

**THE NATIONAL CENTER FOR
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**THE RULES OF EVIDENCE IN
CAMPUS JUDICIAL HEARINGS**

BY:

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**Before acting on any of the ideas, opinions or suggestions in this Program, readers should always
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INTRODUCTION

It is incumbent on public colleges to provide participants in judicial hearings with rudimentary rights of due process, as guaranteed by the United States Constitution and the myriad cases interpreting the 14th Amendment, from which the due process rights derive. Often, many of the rights conveyed to students under the Constitution at public colleges are guaranteed to students at private colleges by contract, state constitutions and state and federal legislation. The Constitution mandates that private college judicial proceedings be fundamentally fair.

But if fundamental fairness and due process are guiding precepts for the campus judicial process, we must realize that these concepts are fluid, loosely defined, situational, and in some cases, jurisdictionally malleable. Some courts create rights where others see no rights. So, what is required in the campus judicial context? Does it make a difference between public and private institutions? Here are some basic rules common to all colleges and universities, which can serve as a launching pad for our discussion of evidentiary rules:

- A campus judicial decision must be based on a fundamentally fair rule or policy;
- The decision must be made in good faith (without malice, ill-will, or bias);
- It must have a rational relationship (be substantially based upon, and a reasonable conclusion from) to the evidence introduced in the hearing;
- It therefore cannot be arbitrary or capricious;
- Sanctions must be reasonable and constitutionally permissible.¹

Several assumptions are implicit in these rules. One is that even though private institutions are not required to provide hearings, it is a best practice to do so, and most do. Thus, we can add to this list that the following hearing-related rights attach:

- Respondents are entitled to written notice of the charges against them, including details of which rules are alleged to have been violated, basic facts of the alleged incident including time, date, place, identity of witnesses (or role of witnesses, if identity of a witness needs to be protected, and

¹ Wood, N.L., & Wood, R.A., *Due Process in Student Discipline: A Primer*, J. of Coll. & Univ. Stud. Housing, Vol. 26, No. 1, 11-12, ACUHO-I, 1997, citing Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967), and Winnick v. Manning, *supra*.

is not essential to the determination of the case²), and a general description of the alleged violative behavior of the respondent³;

- Respondents are entitled to notice of the time, date, and place of the hearing, which should be given sufficiently in advance for the respondent to adequately prepare a defense (2 to 10 days is sufficient unless the case is of unusual complexity)⁴;
- Respondents are entitled to advance notice of the type and character of the evidence to be presented against them, in the form of a fact summary of expected evidence and witness testimony, or by direct inspection of statements, records, investigatory materials, and any other evidence that will be presented at the hearing⁵;
- Respondents are entitled to notice of the range of possible sanctions if found responsible for a violation;⁶
- Accused students have the right not be suspended or expelled without a hearing unless it can be shown that respondent poses a substantial threat to life or property (and then they can be temporarily suspended for no more than two weeks, pending the outcome of a hearing);⁷
- The respondent has the right to have college judicial procedures followed without material deviations (those that interfere with fundamental fairness), where public and private colleges have established such procedures;⁸
- The respondent has a right to a fundamentally fair hearing on the charges. A fundamentally fair hearing has more elements to it than are immediately obvious:
 - ◇ For example, while colleges are not required to furnish students with stenographic transcripts of hearings, because of the cost, when a significant loss of liberty or property is threatened, students should be permitted to access the college's transcript/recording; or to make their

² Where such information is essential, and a respondent insists on knowing the identity of witnesses, that information must be given, if the witness agrees to the release of his/her identity. If the witness refuses permission, they are not permitted to testify, and the hearing must take place in their absence. Where the witness is the key to the resolution of the case, it may not be possible to proceed with charges.

³ Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); Winnick v. Manning, 460 F.2d 545 (2nd Cir. 1972).

⁴ Kaplin, W.A., & Lee, B.A. *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decisionmaking*, 3rd Ed., San Francisco, Jossey-Bass, Inc., 1995.

⁵ Where names of witnesses will be given in written form, obtain FERPA waivers from the witnesses for this release.

⁶ Wood, N.L., & Wood, R.A., *Due Process in Student Discipline: A Primer*, J. of Coll. & Univ. Stud. Housing, Vol. 26, No. 1, ACUHO-I, 1997.

⁷ Goss v. Lopez, 419 U.S. 565 (1975); Picozzi v. Sandalow, 623 F.Supp. 1571 (D.C. Mich. 1986).

⁸ Tuof v. Kibbee, 527 F.Supp. 880 (1981).

own recording or transcripts of the hearing; or the college should provide a recording or transcript at the student's expense, if students are not permitted to make their own.⁹

- ◇ A fundamentally fair hearing should provide the respondent and complainant with similar rights. For example, a college need not afford the participants the right to compel the attendance of witnesses at the hearing, but if that right is afforded to one party, it must be afforded to both.
- ◇ Fundamental fairness is not affected by whether the hearing is open or closed to the public, unless the opening of the hearing allows outside influences that somehow bias or materially disrupt the proceedings and affect the outcome. Open hearings should not be held without the express written permission of the complainant and respondent¹⁰, unless hearings are routinely open under state law, as in Georgia.
- ◇ Fundamental fairness also requires impartiality on the part of judicial decisionmakers.¹¹
- ◇ Fundamental fairness would also include ensuring the right of the respondent to present evidence and confront evidence against her/him.¹² Courts have yet to recognized the right of a respondent to question witnesses adverse to him/her, but such a right could be recognized as an element of fundamental fairness, where an inability to question key witness causes less than full revelation of relevant facts and results in a hearing that is lacking in fundamental fairness.

Many private colleges even go further, assuring their students the same due process rights as adhere to public college students. These include:

- The right to consult with and obtain the advice of an attorney (but not be represented by one) in a hearing in which the college charges are presented by an attorney (or perhaps, if the college presides through an attorney), or during which there are also criminal charges pending against the respondent arising out of the same incident, or where complex policies and procedures and sophisticated rules of evidence are in place. No court has ever found a need to permit attorneys to actively represent clients in judicial proceedings. However, it is conceivable that in the most

⁹ Esteban v. Central Missouri State College, 415 F.2d 1077 (1969); Gorman v. University of Rhode Island, 646 F.Supp. 799 (D.R.I. 1986).

¹⁰ A FERPA mandate.

¹¹ Henderson State Univ. v. Spadoni, 848 S.W.2d 951 (Ark. App. Ct. 1993).

complex of cases, where expulsion is threatened, criminal prosecution has been commenced, and the college proceeds through its attorney, full adversarial representation might be appropriate;¹³

- If a right to remain silent is voluntarily granted, due process requires that no negative inferences be drawn from an invocation of that right by a witness or respondent.
- Note: Due process does not include, as some mistakenly believe, any right to be considered innocent until proven guilty. Yet, presuming guilt would violate fundamental fairness, so perhaps no presumptions ought to be made at all.

After reading this list, one might ask, “Where’s the part about following rules of evidence?” It’s not there. You didn’t miss it. It’s one of those malleable, fluid, hard to define aspects of fundamental fairness. We know that a decision that is biased, arbitrary or capricious will not meet the test of fundamental fairness. We know that procedures and decisions must be reasonable. What is left unsaid is that there will be instances in which the admission and consideration of irrelevant evidence, hearsay evidence, illegally obtained evidence or evidence lacking in credibility will violate fundamental fairness. But, admitting irrelevant evidence doesn’t necessarily violate fundamental fairness. When evidentiary issues are severe enough taint a judicial process, fundamental fairness has been jeopardized by the extreme prejudicial potential of the evidence to produce a result that is no longer fair and reasonable. The question this monograph will try to answer is when evidence has the potential to prejudice the fairness of campus judicial proceedings.

To do that, basic familiarity with the rules of evidence is necessary. But, this monograph has not taken as its goal the teaching of legal rules of evidence to non-attorney student affairs and judicial affairs practitioners. Instead, this monograph develops a unique set of rules, adapted from criminal and civil evidentiary rules, but modified to suit the character of campus judicial proceedings, which will meet the demands of fundamental fairness and due process without turning campus hearings into mini-courtrooms. You will find no talk here of “Best Evidence” or the “Excited Utterance,” which is but one of twenty-one exceptions to the federal hearsay rule. Instead, the rules offered below, in plain non-legalistic language, are not hard to understand. But, their simplicity is deceptive, because although the rules seem straightforward, applying them is not. To help familiarize and train the reader, each explanatory section

¹² Goldberg v. Regents of the Univ. of Cal., 248 Cal.App. 2d 867, 57 Cal. Rptr. 463 (1967).

¹³ Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); Richmond, D.R., *A Student's Right to Counsel in University Disciplinary Proceedings*, J. Coll. & Univ. L., 15(3), 289-297, 1989.

offers a series of application exercises to challenge, confound, and ultimately enlighten. Intuitive understanding of these rules cannot be relied on. They must be drilled on and experienced in context to understand how they apply and sometimes, interrelate.

TESTIMONIAL EVIDENCE RULES

Campus judicial hearings are not trials, in the sense of the criminal and civil legal systems. However, there are some concepts from these venues that are beneficial to the campus hearing, because of the truth-finding and right-assuring nature of the concepts. Therefore, campus hearings should borrow and adapt these concepts for their own benefit, and in some cases, at public colleges, are required to do so. There are two basic rules of evidence that should be observed in the campus hearing. They are the rule of relevance and the rule credibility of witnesses/testimony (the legal term for which is hearsay). (Quick note: many of the following examples center on sexual misconduct cases because it is in these cases that evidentiary challenges to fundamental fairness are most often raised).

Relevance

Judicial decisionmakers should only deliberate upon evidence that is relevant to the issue being tried in the hearing. Otherwise, the hearing could degenerate into a confusing barrage of unrelated facts and character assassination. Controlling evidence has three stages: Excluding testimony and evidence before the hearing; declaring testimony inadmissible at the hearing; and limiting or excluding evidence admitted at the hearing in the later deliberation stage. Relevance must be controlled by the presiding judicial decisionmakers or the chair of the judicial body. Unlike a trial, though, judicial decisionmakers should not wait for objections to be raised by participants. It is the duty of the judicial body to inform those testifying that the information they are providing is irrelevant and inadmissible, if there is a need to make that clear in the hearing to avoid prejudicing the process. Often, it is possible to anticipate such testimony, and cut it off so that it is not revealed at the hearing. Sometimes, judicial decisionmakers will not recognize that testimony is irrelevant until after it is given. When this happens, the judicial body must strive to disregard the testimony in its deliberations, and refuse to allow it to color its decision. Although this is difficult, it is a foundation for fairness in the hearing that all judicial bodies should endeavor to accord to the participants.

Relevance is a discipline that is not controlled tightly enough in most judicial hearings, mostly because of a lack of familiarity with the concept, and how to apply it. So, how do you recognize irrelevance when you hear it? Testing for relevance is actually not complex. To test for relevance, ask yourself: Is the fact or information that is being offered likely to prove/disprove an issue in the hearing? If it is likely to lead to proof/disproof, even indirectly, it is relevant. If it is not likely to do so, it should be inadmissible. Test your familiarity with this concept on the following examples. In each case, ask yourself, what is the matter in issue that this fact speaks to? Then ask whether considering that fact would tend to prove or disprove the issue. If it would, it is relevant. If it would not, it is not.

Relevance Exercises

- Is the fact that a boyfriend failed to heed a campus no-contact order relevant in a later hearing in which he is charged by his girlfriend (who requested the order) with a violent attack? *Yes. It tends to prove that he had violent inclinations toward her.* Would it be relevant in a hearing in which the boyfriend was charged with an attack by an unrelated third person? *Probably not.*
- The complainant in a sexual misconduct case wants to testify that on the night of the assault, she observed stacks of pornographic magazines, centerfold posters on the walls, and pornographic videotapes on the bookshelf of respondent's dorm room. Is this relevant? *The existence of pornography does not make it more or less likely that there was or was not consensual sex. Further, such testimony casts aspersions on respondent's character as a libertine or sex addict, which is not in issue in the case.*

Variation: What if the complainant wants to testify that after the assault, respondent went to the bathroom to take a shower. At that time, she observed stacks of pornographic magazines, centerfold posters on the walls, and pornographic videotapes on the bookshelf and around the VCR in respondent's dorm room. While respondent was in the bathroom, complainant played the tape that was in the VCR. Complainant wants to testify further that the way respondent raped her is identical to a rape depicted on that tape. May she? *Yes. At this point, the pornography becomes relevant. If respondent re-enacted a scene he had seen on a film, it might help to establish that respondent planned the assault, which is indirectly, but clearly related to the issue of consent. While intent may not prove or disprove respondent's actual actions (someone may commit rape without intent to, and someone with intent to commit rape may not commit it), this information could certainly contribute to the*

decision of a judicial body that a preponderance of the evidence, or clear and convincing evidence exists.

- In the same case, the roommate of the complainant wants to testify that since the assault, complainant has suffered from terrible nocturnal nightmares, often waking up screaming and that complainant never acted this way before the incident in question. May she? *The matter at issue in the case is whether the complainant is suffering from rape trauma syndrome. This testimony does not directly prove consent, if that is the matter in issue, but it may help to contribute evidence to that determination. This information is relevant to whether or not complainant is suffering from rape trauma syndrome. If she is, this testimony is evidence that complainant is suffering from a trauma that may have been triggered by an assault. Testimony from a treating counselor or psychologist might confirm this.*
- A stereo is taken from Bill's dorm room. Bill thinks he has seen the missing stereo in Jay's room, and tells his RA. College officials search Jay's room, find the missing stereo, and charge Jay with stealing it. Bill is later asked by Jay to testify as to how he knew the stereo was in Jay's room. Bill objects to the admission of this testimony, questioning its relevance (he went into the room when Jay wasn't there, based on a tip from a hallmate). Is it relevant? If not, can it be admitted? If it is admitted, should it be deliberated upon? If it is not relevant, but it is still admitted, is it prejudicial? Not if it was not deliberated upon, and you can prove that it wasn't.

Medical evidence

Medical evidence is a special case of the relevance question. Generally, relevant medical testimony or evidence can be admitted in a campus hearing. How it is admitted is often the issue, because that involves credibility. Should a victim of an aggravated assault be able to testify to what the doctor told him about his condition in the emergency room, or is it better to get a copy of the medical records, or bring the doctor in to testify? Generally, assertions about medical conditions that can be accompanied by medical records, doctor's letters or affidavits should come with some verification. Actual testimony from a doctor is not necessary, but it can help to bolster some cases, if that can be arranged. Medical assertions from complainants, respondents and witnesses can be accepted as evidence, but testing for credibility is

important. If the victim of the assault testifies that he had a contusion as a result of the beating, it would be a good practice to ask: How do you know you had a contusion? What is a contusion (if you need to know)? Was this the doctor's diagnosis, or a comment from another medical provider? Was this part of the medical report?

Police testimony

Police testimony is often important in campus judicial cases. Police officers from local and campus police departments will be called on to give testimony, produce reports, and discuss or share evidence. Generally, police officers are trained and experienced in giving testimony, and will discuss evidence, investigations, and key issues competently. Make sure that they establish their own jurisdiction and authority on the record. A key issue judicial officers need to be wary of is possible biases in testimony, and of opinion testimony. Any time a police officer testifies to something the factual basis of which is unclear, question it and allow the officer to establish the fact. If they utter an opinion of any kind, question it and allow the officer to substantiate the basis for the opinion. If the officer appears to be favoring one person's version of events over another's, this should be the basis for questioning and explanation.

If a police officer introduces some type of physical evidence, they will need to testify as to the type of evidence, its characteristics, its significance, how it came to be in the possession of the police, and that its condition is substantially the same as it was when it was first obtained by the police, and in whose custody the evidence has been placed since it was obtained. They will discuss any tests (fingerprinting, DNA, toxicology, etc.) performed on it, and the results of those tests. If written results of tests are available, they should be introduced as evidence at the hearing. If any of these elements are not established by the officer, questions should attempt to elicit these details. If any of these questions are not answered to the satisfaction of the judicial body, that evidence can be discredited as lacking credibility.

Bias is not an automatic disqualifier for a police officer. In fact, it is a frequent occurrence. Any conclusions reached by an officer should be tested for factual basis. If the officer is convinced by the evidence that the respondent is guilty, this type of bias is permissible. It is baseless biases (opinions without foundation) that raise the potential of jeopardizing fundamental fairness.

Counselor testimony

Counselor testimony is infrequent in campus hearings, related to one party or another. It is more frequently offered in the form of expert testimony, related to post-traumatic stress, rape trauma, or other generally informational presentations to the triers of fact. This is usually relevant if the counselor has an adequate background for the knowledge, which they can establish in their introduction. Be cautious and inquire upon any signs of bias that may surface. Sometimes, counselors are called as witnesses by their clients, to testify to information exchanged in the context of the counselor-patient relationship. This has to be handled very carefully. The patient has the ability to consent to confidential information about them being disclosed, but they are in control of how much they allow the counselor to volunteer. Once the counselor testifies, he or she can be subjected to reasonable cross-examination by the other party. The judicial process will be fair if you ensure that the cross-examination sticks to questions about information that came up during the direct questioning only, and does not expand beyond that to other parts of the counselor-patient relationship that the counselor is not authorized to address. If it was relevant in the direct testimony, it will be relevant as a topic for cross-examination.

Lie detectors

For some reason, this topic has come up on campuses often lately. I think that the use of polygraphy and other lie detection techniques can complicate and formalize the campus judicial process unnecessarily. These tests are so unreliable that courts won't accept them. Why should we accept an unreliable scientific device on campus? It can jeopardize fundamental fairness, so why take the risk. If, for some reason, you do use them, lay a solid foundation for the technology, how it was administered, and how the results were introduced into evidence, and good luck.

Rape Shield/ Past Sexual History

Every state uses a Past Sexual History rule as part of its rules of evidence, as do the federal courts. Past sexual history is essentially a rule of relevance. While the formulation of past sexual history rules varies from state to state, part of the basic concept is to protect the complainant from the admission of irrelevant sexually-related evidence which will cast aspersions on the character of the complainant, but not

relate directly to the matter in issue in the hearing. It can also be used together with relevance rules to exclude evidence that may not relate to the complainant's sexual past per se, but to other potentially prejudicial information regarding the complainant's sexual behavior.

The key to using past sexual history rules is to make sure that all participants understand the rule and its application *before* the hearing. Avoiding the revelation of certain evidence at the hearing is preferable to having to decide on the rule's application to facts that are introduced in front of those who will be making a final determination of the outcome of the case. When a past sexual history or potentially biasing issue arises at the hearing, the admissibility determination should never be made in front of the full judicial body (for those colleges that use more than a small panel of 1-3 people), whether the evidence regards the complainant or respondent. The presiding officer or officers should hear arguments on past sexual history relevance in private or at sidebar, so that the full judicial body is not colored by hearing the arguments on admissibility.

For example, what color underwear the victim was wearing is not relevant to the issue of whether on not "she wanted it" or if she consented. Contrary to antiquated notions of propriety and licentiousness, the wearing of certain types of "sexy" lingerie or none at all is not indicative of the promiscuity or sexual disposition of the wearer. Such information should be kept from the judicial body because of its propensity to allow such improper inferences. Who else (and how many others) the complainant has had sex in the past with is not relevant to the issue of whether the accused had her consent on the date of the incident in question. Promiscuity is not an invitation to rape. Whether the victim has ever consensually slept with the accused before may not even be relevant to whether there was consent on the date of the incident in question, depending on patterns of communication and behavior that may be issues in the case. Judicial body members are *obligated* to prevent such information from being admitted, and should not consider it in deliberations if it is somehow introduced.

These are the four different kinds of past sexual history rules in effect throughout the country:

- 1) Some states bar admission of any past sexual experience, even with the accused;
- 2) Some states allow evidence of past sexual experience with the accused, but nothing else;
- 3) Some states allow evidence of past sexual experience with the accused to the extent it is relevant;

- 4) Some states allow general evidence of past sexual experience, but require a very high threshold for determining relevance in advance of revelation of the information.

If your college uses a relevance threshold, relevance must be shown directly. A procedure for establishing relevance and admissibility before the hearing should be established, with 48-hour notice to all parties of what evidence will and will not be admitted. Stern warnings should be given to avoid topics that have been pre-determined as off-limits. Try these examples to test your grasp of the Past Sexual History rule:

- The complainant maintains that although she brought the respondent back to her room, and engaged in heavy petting, she never thought that he would expect her to have intercourse with him. When she stated this, a male faculty member of the hearing panel interrupted and asked, “Do you expect us to believe that you asked a guy to your room, fooled around, and really had no idea that he would expect to sleep with you?” She answered, “Yes.” In response, the faculty member then asked, “Are you so sexually inexperienced that this would never cross your mind?” As chair of the hearing panel, what should you do? This demonstrates the need for the presence of an alternate judicial board member, doesn’t it?
- The complainant wants to testify that she was sexually abused as a child. She wants to use this testimony to show why she did not resist the sexual advances of the respondent—she just froze up. May she testify to this fact? *Yes. Past sexual history of the complainant is always admissible by the complainant (when it is relevant, if your college uses a relevance threshold). Here, is it relevant because it explains why the complainant acted the way she did during the incident in question. Even if resistance is not purely an issue, the complainant’s state of mind during the incident is surely something of which judicial decisionmakers should be aware.*

It is important to be aware that past sexual history functions transactionally. Suppose your college follows past sexual history rule variation three, above.

- The respondent wants to testify that the complainant gave him oral sex before they had intercourse. May he? *This information is relevant, and is not barred by the past sexual history rule. The event of*

the oral sex is part of the same transactional occurrence in which the rape is alleged. It is therefore relevant, though it may not be in the least probative of anything more than that the complainant consented to oral sex, but not to intercourse. Rape shield would bar, however, testimony that the complainant gave the respondent oral sex on the night before the night in question.

Credibility and relevance intersect on some occasions, though credibility is discussed more in the next section. When they intersect, they can complicate the application of this rule.

- Suppose that the complainant has testified that he was a virgin when the respondent assaulted him. The respondent wants to call three witnesses to testify that they had sex with the complainant previous to the incident in question. Can these witnesses be called to give that testimony? *This information is normally not relevant under past sexual history rules, and should be inadmissible. Yet it is admissible, though not to prove that because the complainant consented on previous occasions, he consented to the respondent. It is admissible only as it bears on the credibility of the complainant's testimony. If the testimony shows the complainant's veracity to be in doubt, it is admissible for that limited purpose, and to cause the judicial body to question whether the complainant has been truthful with other parts of his testimony. But, the judicial body must not consider the testimony to be probative on the issue of consent with the respondent, only on the issue of his virginity and his truthful testimony thereto.*

Rape shield is not a two-way street precisely because it is a relevance issue. The past sexual behavior of the respondent may well be relevant, though this is an often-misunderstood exception. Most college hearings will not allow the admission of such testimony, but it is perfectly proper to consider certain types of past instances in relation to "guilt" and in the sanction stage of the process. It would seem parallel logic that if a complainant's consent on one occasion does not equate to consent on other occasions, it is also true that a respondent's sexual transgression on a previous occasion or occasions does not mean that he transgressed on the occasion in question. There is, on the contrary, something to the argument that a criminal propensity should be taken into account. The federal rules of evidence provide that in both criminal and civil trials, evidence of past instances of sexual assault and child abuse are relevant and admissible character evidence.¹⁴

¹⁴ F.R.E. 413-415.

These two topics are the only exceptions to the rule that bars evidence of prior bad acts generally because of the incredibly high likelihood that one who commits these acts will commit them repeatedly. For sexual assault, there is a 74% likelihood that someone who has committed assault before will commit it again. That makes previous instances relevant in a college hearing, but only if they are prior criminal convictions or college policy violations. If you are going to admit such evidence, fundamental fairness and due process will be assured by giving the accused notice prior to the hearing that it will be admitted (if possible). Past sexual history of the respondent should not be admitted unless previous accusations have resulted in criminal convictions or responsible findings on campus. This exception does not mean, however, that a respondent's past sexual history can be admitted to cast doubt on character, generally. For example, it is not relevant that the respondent sleeps around.

Credibility

This rule of evidence requires the judicial body to consider only evidence that is credible, and from credible sources. Necessarily, each individual judicial decisionmaker will assess and make a subjective determination on the credibility of the witnesses who provide testimony. Believability of the witness is only one facet of credibility. The truth of the testimony offered is also central. Evidence that a judicial body considers must be reliable and founded in fact. Included under the rubric of "credible evidence" is the interrelation of credibility with evidence that contains rumor, conjecture, and hearsay. Best practices suggest that such evidence should not be considered by the judicial body, because it can prejudice the fairness of the process, in some cases. Rumors should not be admissible because by definition they lack a factual basis. Conjecture involves guesswork by the witness, and the offering of an opinion that the speaker may not be qualified to make. Hearsay is, for the purposes of a campus hearing, testimony of suspect origin because it is not firsthand, or because the speaker lacks personal knowledge of the circumstances of the statement. A judicial body will recognize rumor, conjecture and hearsay when a witness uses words like, "I heard that..." "It's my opinion that..." "I guess that..." "It seems that..." and other phrases to similar effect. Rumor, conjecture and hearsay may all run together, and may not in practice be distinguishable. The key principle is that each is inadmissible because it is suspect. It raises suspicion because it is not sufficiently credible. Judicial bodies must make every effort to exclude such evidence, or not consider it in deliberations if it is voiced during the hearing. If evidence is introduced that appears to

have credibility issues, a line of questioning should be initiated to see if a factual or credible foundation for that information can be formed by that witness, or by other means. Here are some exercises to test understanding of credibility rules:

- Complainant wants to testify that she has heard that respondent has raped other women. May she? *No. This is hearsay/rumor, and has no basis for credibility. It casts doubt on the character of the respondent without sufficient evidence to support it.*
- Respondent's fraternity brother wants to testify that he has heard around that complainant is "an easy lay." May he? *No. This is also based on hearsay/rumor, and there has been no corroborative evidence admitted which would help to prove the veracity of this statement. Even if there were, this evidence would be inadmissible because it is irrelevant (Past Sexual History).*
- Respondent has denied entirely that she had sex with the complainant. Complainant wants to testify that respondent has an "identifying mark" that would only be known to someone who had seen respondent naked. May he? *It depends. The information is relevant to the issue of whether or not intercourse took place, and therefore whether or not the definition of the offense was met. However, allowing the complainant to testify to this fact does not make it relevant, unless the fact is established as true. So, the key issue here is the credibility of the fact asserted. If the respondent admits the existence of the "identifying mark," there is no difficulty. However, what if she will not. You may need to consult medical records, or request that respondent submit to a medical exam. If the existence of the mark cannot be determined, you will have to assess the value of the evidence on the basis of complainant's testimony alone. You will have to consider the credibility of his assertion, his ability to view the mark, his recollection of the details of the mark, and other such information, to determine if the testimony is credible enough to be considered.*
- Respondent wants to testify that he heard that complainant is only pressing charges against him because her parents are upset that she is not a virgin anymore. May he? *No. His testimony is based on hearsay and rumor. There is nothing to convince us of the credibility of this information. Secondhand information should not be considered unless other evidence and circumstances lend credence to the hearsay evidence that persuades you that there is good reason to believe the rumor*

(for example, if the complainant's roommate told this to the accused, the roommate should be called to testify directly on this point). Too many times, evidence of this nature finds its way into campus hearings, and colors the decisionmaking process. Judicial decisionmakers must strive to minimize this type of collateral dubious evidence.

- Complainant wants to have a friend testify that two weeks before the assault, the friend saw (at a distance) the respondent slap the complainant. May she? *As a witness to the event, the friend's testimony is admissible if credible. She must have been in a place where she could see the slap, could identify who was slapping, and who was being slapped, etc. If so, her testimony is admissible, since it is also relevant. Physical violence and sexual violence often occur together, though it is important to realize that establishing the fact of the slap does not establish the fact of sexual misconduct, though it may help decisionmakers to build up to a preponderance of the evidence or clear and convincing evidence, especially if there is more than one instance of prior abuse.*

Character evidence

Some colleges allow testimony by character witnesses. While I don't see a need for this type of testimony (the respondent is not going to call a witness who says bad things about him), it is permissible if you choose to allow it, within reason. It should be limited to one or two witnesses, on both sides, and anything they state can be further explored for veracity and/or credibility on cross-examination. In deliberations, realize that the probative value of such evidence is extremely limited. Nice people can do bad things. If nothing else, perhaps such testimony would be better used to influence sanctioning decisions, rather than the decision on whether or not the code of conduct has been violated.

Rape trauma syndrome

An additional facet to consider with regard to the credibility of the complainant has to do with rape trauma syndrome (RTS). RTS is the emotional, physiological and psychological response to rape, much as anyone would react to a traumatic event. Judicial bodies must be well informed about RTS, just as a criminal or civil jury would receive such information via expert witnesses. Because it is not a certainty that

such expert testimony will be offered at each hearing, offering information on RTS should be an integral part of judicial training.

For the purposes of the campus judicial inquiry, RTS has three main stages. Every victim experiences each stage, though to a greater or lesser extent depending on the person. The first stage is shock/denial. Denial may last for a few hours, or a lifetime. Commonly it lasts for a few days or months. During that period, the events of the assault are simply too traumatic for the psyche of the victim to be able to deal with. They literally operate as if it did not happen, and will deny what is too painful to admit. Frequently, denial is partial. They may be able to deal with and assess some parts of the assault, but not others. Denial functions as a full or partial unconscious, unintentional loss of memory.

Denial is significant to the judicial process because victim reports are frequently marked by inconsistency. This leads us to tend to doubt the report, even though the FBI tells us that only about two percent of reports are fabricated annually. Usually, the inconsistencies manifest as changes in the victim's description of the event, often with more detail offered over time, so that the "story" seems to improve the victim's chances of winning the case. Such "recovered memories" are especially suspect because the facts that are omitted are often significant. Our natural inclination is to doubt the victim when this happens.

Ultimately, you will have to make your own assessments of the credibility of the victim. It will be helpful to bear in mind that as unlikely as it may seem, the denial stage of RTS can explain these inconsistencies. Victims by and large are not making things up. Rather, they are reporting their memories as they recover them. This accounts for the frequent differences between reports taken just after the incident, and later reports or hearing testimony. The psychological mechanics work something like this. The intensity of the pain of the incident is at its highest at the time of the incident, and decreases gradually thereafter. At first, the unconscious "protects" the victim by denying her conscious access to some or all of the painful memories. As the acuity of the incident decreases with the passage of time, and with the resolution of interrelated issues, the victim becomes better able to cope with the pain and reality of the incident. For some reason, the unconscious slowly begins to allow details of the incident to seep back into the victim's consciousness, sometimes in a rush, but mostly in drips and drabs. As these memories come to light for the victim, she reports them. This is what produces the appearance of falsity.

If you still doubt how this works, imagine that you are driving in a car with your family. As you enter the busy intersection, you apprehend another car headed through the red light toward you. Maybe everything seems to be in slow motion. Inevitably, the car hits your car. Some people will emerge from the wreck, tend immediately to their family, check on the other driver, clear the wreck from the intersection, call the police, call an ambulance, call the insurance company, and get the other driver's information. Most people do not have such collected responses. Most people will emerge from the wreck in a state of dizzy disorientation. That is why many victims do not immediately notice their own injuries, or recall the accident. Most people in this situation don't have the presence of mind to think of all the "smart" things to do. They are suffering from a post-traumatic stress response. They shut down because of the shock, and do not become fully alert until they are able to handle the trauma.

Going through an assault is no different than going through an accident, except that the trauma response is often heightened and elongated. Victims do not do afterward what a normally conscientious person would. That is why you cannot consider a failure to immediately report the incident as evidence that it did not happen. In fact, the vast majority of victims do not report the incident immediately. That is why we have statutes of limitation in this country. If all reports were immediate, we would not need them.

In summary, it is very common that you will encounter contrasting facts from the victim's testimony. Judge these facts through the lens of RTS. Be aware that there is a much greater likelihood that shock has caused the inconsistencies, than that the victim is fabricating anything. Also, when asked a question at a hearing, it is possible that the victim will respond that she cannot remember. When this happens, it may not be evidence that the fact questioned does not exist, or did not happen, but that the denial stage of RTS is operating to cause the memory loss, however temporary or permanent. Most victims whose cases come before the judicial body soon after their assaults will still be in this stage.

The second stage of RTS is the Stress Response/Disruptive stage. During this stage, the victim has consciousness of the incident, though maybe not full consciousness. On both conscious and unconscious levels, she begins to react to the victimization. The trauma begins to interfere with and cause serious changes in her life. The most common responses that characterize this stage include nightmares, flashbacks, and behavioral disorders associated with sleep, eating habits, exercise, social habits, promiscuity, paranoia, and substance abuse. If a victim is likely to attempt suicide, it will be during this

second stage. Commonly, victims will not want to sleep where the assault took place, and will either sleep to excess to avoid painful waking thoughts, or sleep little, because of the loss of control one experiences when one sleeps. They may also avoid sleep to avoid nightmares. Victims often change eating habits. Consciously, they may need to assert control over an aspect of their lives they can control, like food intake, as a response to the loss of control experienced in the assault. Unconsciously, they may gain or lose weight so that they appear emaciated or obese, and no longer conform to male beauty ideals. If they are less attractive, they think, perhaps they are less likely to be victimized again. Similar changes to other behaviors, such as exercise and partying, are also associated with the control issue. Many victims withdraw from all social interactions, out of fear. Some victims become what some would consider promiscuous. These victims believe that if they always consent, they can never be raped again. Or, they take control and try to erase the violation with repeated controlling, consensual sex. An introverted person may become quite extroverted, and vice-versa. The key to understanding stage two is to realize that testimony regarding these behavior changes is probative, it tends to show or prove that the victim has been through a traumatic event. A woman does not generally wake up in the middle of the night in a cold sweat, screaming, unless she has in fact been raped. Testimony regarding typical stage two behaviors should color your deliberations.

The third stage of RTS is the Reorganization and Reintegration stage. During this stage, the victim begins to deal constructively with the assault, and destructive behaviors wane. Victims begin to figure out how the assault fits into their lives, and how they have been changed by it. Over time, they learn how to go on. It permanently changes them. They never fully get over it. Hopefully, it loses prominence as an everyday thought, but will always remain a transformative life event.

DELIBERATION

Commonly, colleges have established a defensive posture as policy with regard to records of hearings and deliberations. It is becoming clear that this defensive posture is backfiring. It is standard procedure at a majority of colleges and universities, as a matter of policy, not to keep a verbatim record of campus hearings. It is a nearly uniform practice among colleges not to keep verbatim records of campus judicial deliberations. This has enabled the defensive posture. For example, suppose a student sues his or her institution, alleging that the campus hearing in which they were charged was highly irregular and in

violation of the fundamental fairness owed them. As a legal matter, the complaining student has the burden to prove to the court that the hearing proceedings were irregular and fundamentally unfair. Without access to a complete record of the transactions of the hearing, it will be very difficult for the complaining student to prove that the college did wrong, because the hearing was in some way flawed.

In recent years, a large number of college administrators have come to understand that this defensive posture has worked against them in cases where they could have vindicated their actions if they had a complete transcript or tape recording of the hearing. Therefore, many colleges have adopted a policy of allowing verbatim notes or recordings to be made of the hearing, but almost all colleges have not permitted the record to continue to be made during deliberations, again so that records of any errors made by adjudicators could never be used against the college in later legal proceedings.

Suppose a hypothetical sexual misconduct case wherein the plaintiff (who was the respondent) student alleged that during the hearing, evidence was admitted against him that prejudiced the fairness of the process. He alleges that two statements were prejudicial. One witness, a police officer, testified that when the complainant came to the police station to file a report, she “looked like a rape victim.” The statement was unsupported by any foundational testimony from the police officer. It was opinion testimony, lacking in credibility. The plaintiff also complained that the complainant’s best friend was called as a witness, and stated, “He is a rotten SOB who is well known on this campus for mistreating women.” The respondent objected to this evidence at the hearing, but the student chair of the judicial panel decided to allow its admissibility, and questioned the best friend as to how she knew this, and if she had ever had any dealings with the respondent, which she had not.

After the close of all the evidence, the judicial panel met in closed session to deliberate. No record was kept. During the deliberations, the panel made a decision to ignore the testimony of the police officer, because it was of questionable foundation. Then, the chair of the judicial panel instructed the panelists to disregard the testimony of the best friend, that the respondent was an SOB known for mistreating women, because this was testimony from a witness who proved her bias by her statements, and could not factually support the hearsay/opinion she presented. The panel then deliberated on all the other evidence, and found the respondent in violation. Reasons for the decision were not given.

When the plaintiff sued, he challenged the fairness of a judicial process that allowed evidence that was inflammatory conjecture without credibility and relevance, and should not have been admitted. The college defended its actions by arguing that it probably wrong to admit the evidence, but harmless error because the evidence did not in fact prejudice the proceeding because this evidence was not part of the deliberations.

Yet, the only record of the case shows that this testimony was admitted. The college now has to show that when the case was decided in closed session, those inflammatory facts and opinions were disregarded by the adjudicators, and were in no way part of the foundation of their decision against him. This college is going to have a tough time proving that its deliberations were fundamentally fair without some record of the deliberative session.

Colleges and universities need to adopt updated recording and retention policies to counter cases like this one. I recommend developing a deliberation report, summarizing the evidence presented, clarifying any evidence discounted in deliberations, and demonstrating the detailed basis for the conclusion reached.

DELIBERATION AND CONSENSUS BUILDING

Deliberation and consensus-building skills are extremely important. Deliberation is the process of assessing and reviewing the facts to determine if a policy violation has occurred. Whether your judicial body must decide unanimously or by majority, there is likely to be some disagreement among judicial body members. It will be up to judicial decisionmakers to sway other members when a clear majority or unanimity is not achieved immediately upon the facts of the case. Building a consensus is necessary to determining an outcome. Certain members of the judicial body will emerge as leaders on certain cases. Their views will be stronger than those of others, who may be undecided. It will be the responsibility of those who possess strong views to offer those views to the rest of the judicial body, and to try to persuade the others of the strength of those arguments. Judicial decisionmakers may on occasion encounter opinions of other judicial body members that are based on emotional grounds, preconceived notions about sexual behavior, race, sexual orientation or other biases, or evidence that was not properly before the judicial body. It will be up to judicial body members to police themselves and to remind each other that the

deliberations properly rest upon a review and analysis of the facts offered into evidence in the hearing, and not on personal feelings. Judicial body members are required to apply the technical letter of the policy, even in the face of strong feelings of disagreement with the policy, or strong feeling that the facts suggest mitigating circumstances. Mitigating circumstances are properly considered not at the deliberation stage, but in the sanction stage of the process.

Deliberations may become contentious. Try to maintain restraint. Endeavour to keep an emotional distance from the case, though it is frequently hard to do so. Use deliberative strategies. Commit significant facts and evidence to paper, so that it may be examined in concrete form. Thoughts often will gel by seeing pro and con lists, or by analogizing the case at hand to other cases, or other types of cases or experiences. Discuss and assess each key fact on which the case hinges. Reach consensus by finding the areas of commonality, and build outward until dissent is raised. Fully discuss and shed light on each conflict. It may be helpful to take straw polls on individual key facts, to gauge where the judicial body stands on the issues. Breaking the issues up into manageable pieces will help to reduce the often overwhelming effect of taking on the entirety of the matter at once.

IMPACT STATEMENTS

Many colleges offer the participants in a sexual assault judicial hearing the chance to provide impact statements. An impact statement is an opportunity for the participants to give the judicial decisionmakers some insight into how the incident in question has effected their lives. Much of the evidence at the hearing will concern the event at issue, rather than giving a more global account of how the participants have been changed by the incident. Making an impact statement allows the participants to address these issues, which might not otherwise be strictly relevant. Impact statements are not evidence per se, but can serve to weigh on the judicial decisionmaker's determination of the credibility of the testimony, and can weigh heavily on the sanctioning process. Many colleges only allow the complainant to make an impact statement. A more evenhanded approach would allow both the complainant and the respondent to make impact statements. They should be informed in advance if they will be able to make impact statements, so that they can prepare their thoughts or statement. Much of a victim's impact statement may reiterate testimony already given regarding rape trauma syndrome. However, the impact statement may in some cases afford the judicial body its first opportunity to assess the complainant's

testimony and credibility in the sociological and psychological context offered by the body of knowledge that comprises rape trauma syndrome, and to assess its evidentiary value to the case.

It may be advantageous to limit the impact statements to a reasonable amount of time, or to a written statement. If given orally, they should not be read until a conclusion is reached, but before a sanction is determined. Before the hearing commences, select who will give their impact statement first by a coin toss or other neutral method, and so inform the participants. Do not allow participants to bring inadmissible evidence to the attention of the judicial body through the vehicle of the impact statement. You may need to warn a student or cut off a statement in order to prevent the abuse of this privilege. While you may expand the rule of relevance to allow the participants to address how this incident has impacted their lives, that expansion should not be at the expense of any of the other evidentiary rules governing the hearing.

ADDITIONAL EXERCISES

1. Leah accuses Hassan of sexually assaulting her after a party, on campus. She claims to have consumed so much alcohol that she blacked out, and has no recollection of having had sex with Hassan. Leah testifies that she only found out that they had sex when Hassan called her the next day and told her they did. Hassan argues that Leah may have had some drinks, but had capacity to consent to him, and in fact did so, even if she for some reason says now that she can't remember it. Hassan wants to prove that Leah was not incapacitated by testifying to the subject matter of a detailed conversation they had immediately following the sex. Leah does not recall the conversation, or many other details of the incident.
 - Can Leah testify to what Hassan told her on the phone? Why or why not? *She can. Though this is hearsay, any court would admit it (as an exception to the hearsay rule for admissions), and admitting it in a campus hearing will not prejudice the fairness of the process.*
 - Can Hassan testify to the contents of the after-sex conversation? Why or why not? What if the contents of the conversation are highly incendiary? How would you handle the decision on admissibility prior to Hassan giving the details? *Generally he can, but it depends on the contents of the conversation. This is hearsay, but if it is a harmless conversation, then it will not prejudice the process. Perhaps the issue is relevance? So what if she had a conversation after the sex,*

does that prove she had capacity before the sex, when the consent needed to be given? This should probably be admitted so that hearing officers can decide its value when they deliberate.

2. You allow an attorney to accompany the respondent in a hearing as an advisor only. You make it clear that the attorney cannot have a speaking role. Halfway through the hearing, the attorney jumps to her feet and asserts that you are violating her client's rights by proceeding with the giving of testimony out of the order prescribed in the handbook. In fact, you (as the hearing officer) have proceeded to ask questions of a witness prior to the respondent being able to cross-examine, which is a reversal of the order stated in your judicial procedures. How do you respond? What do you do? *I would tell the attorney that no more outbursts will be tolerated, all objections must be made by the participants. Then, I would revert immediately to the proper questioning order, and state into the record this was a minor procedural irregularity and will have no impact on the outcome of the hearing.*

3. Marybeth accuses Seth of sexually assaulting her. In the course of the investigation, the campus police unearth four other women who claim to have been sexually assaulted by Seth. They agree to come forward to give witness testimony. This university is private.
 - Can the college, as complainant, call these four women as witnesses to testify regarding Seth's prior actions against them? *Since this involves admitting his past sexual history, for which he has not been charged or convicted, I think there is a strong possibility of prejudice here that favors excluding these unsubstantiated charges.*
 - Is there a hearsay problem that might prejudice this proceeding? *The credibility of these women can certainly be questioned, and should be weighed by the adjudicators, but there is no real hearsay issue here.*
 - Is Seth entitled, before the hearing, to notice that these women will testify at the hearing? *Entitled, no. But, it would be a good practice to give notice, so that he can prepare a defense.*
 - Is he entitled to know, in advance, the substance of their testimony? *I think this would enhance the fairness of the process and allow him to prepare a defense, but he is not entitled.*
 - Does he have a right to cross-examine them? *No. He has a right to respond to their testimony, but no right to cross-examine. As a best practice, he should be allowed to.*
 - Does he have a right to know their identities, either in advance or at the hearing? *No. Their identities may be kept secret if there is sufficient cause to fear for their safety or for retaliation*

against them. However, if the accused will not be able to respond to their allegations without their identities, they need be told in advance of the hearing that their names will not be able to be kept confidential.

- *What if this college is public? Does anything change? If this were a public college, I would argue that he should be told in advance that witnesses will be called who will make accusations that he sexually assaulted them. He should be given summaries or copies of their written statements in advance, though the issue of the names of the witnesses should be handled delicately with assistance of college counsel.*
- *If the university wants to call these women as testifiants regarding their experiences with Seth, what is the least prejudicial procedural way to do so? I think the best practice would be to get these women to file charges against Seth, conduct appropriate investigations, and allow all five women to act as complainants in one hearing against Seth on five counts, so that all the evidence can be offered by the women as co-complainants.*

4. The respondent wants to testify that the complainant wore red panties on the night she was raped. May he? *Absent other facts, this information is not relevant and is inadmissible.*

Suppose the complainant and respondent had been dating for a while. Further suppose that the complainant had made a routine of demonstrating her interest in intimate relations by putting on her red panties for the respondent, on many occasions. Further suppose that the complainant has corroborated this fact, introduced by the respondent. Should this evidence be admissible? *At this point, the color of the complainant's panties on the night in question is relevant, indeed. While this example may seem a bit contrived, it is meant to demonstrate that the admission of such information must clear a very tall threshold before it can be considered relevant.*

5. Harry brings a hate act complaint against Chris. Harry is black, Chris is white. Harry alleged that Chris was plotting an attack on him with several other members of the campus white supremacist group. Harry's chief witness, Mel, is a member of the campus gay, lesbian and bisexual alliance who infiltrated the white supremacist group by posing as a member. In the course of her testimony, Mel states, "Everyone on campus knows that Chris is a racist SOB who has no use for black people."

- Is this admissible testimony? Why or why not? *There is obviously an issue here, based on relevance and hearsay/credibility. While admission of the evidence might prejudice the process, it might also lead to evidence that might help to determine the outcome. I don't think it can be ruled inadmissible as a threshold issue without further development of the line of questioning. I think it should be admitted, to determine if a basis for the assertion could be made. If not, it should not be deliberated upon. It may be most successful for the chair of the hearing board to hear further evidence from this witness at sidebar, outside the hearing of other panelists, to determine if a factual foundation can be laid for Mel's opinion statement.*
- If inadmissible, what is the appropriate way to exclude the testimony? *This testimony can be stopped, if it is clear the witness is headed in a wrong direction, it can be declared inadmissible, and the panel can be directed to disregard it. Or, if admitted, once it is clear that it may have a prejudicial effect, it can be declared that it will not be used either during the hearing or during the deliberations.*
- If Harry wanted to make sure this testimony was admissible, how would he do so? *He would review the statement with the chair or judicial administrator before the hearing, and find out that the statement alone, is inappropriate, but if Mel can prove concrete examples, facts, and reasons for the conclusion, the judicial body will weigh the basis for the assertion. Supporting witness can be called to bolster Mel's conclusion, offering details, incidents or prior behavior by the respondent that would support the allegation of race-based hate activities. He should also instruct his witness Mel to avoid inflammatory terms such as SOB, if at all possible.*
- What if Mel had given a statement before the hearing, stating substantially the same as the above. How would you, as the hearing officer, handle this piece of evidence, knowing that it would be a part of Mel's oral and written testimony? *I would caution Mel that if she does not find a factual way to support her contention, you will not allow her to testify to it, and if she tries to, you will take her off the witness list.*
- How, if at all, is this different from the testimony of the witness who is alleged to have testified in the Brandeis sexual misconduct case that the respondent was a no-good SOB who treated women poorly? *There really isn't any difference. A statement like this, on its own, is prejudicial and should not be allowed. However, if there is a way to establish that there is a factual or experiential basis to the testimony, it can be admitted.*

6. The respondent wants to testify that previous to the hearing on his aggravated assault charge, while meeting with the Dean of Students, the Dean told him that he should go through with the hearing, because he had a good case, and very little chance of losing. May he so testify? *No.*
- If not, on what basis would you exclude the evidence? *Relevance and hearsay. The Dean's feelings really have nothing to do with whether or not the respondent violated the policy, which is the matter in issue. Moreover, this is hearsay, because we have no idea if the Dean actually made this statement.*
 - If you excluded it on the basis of hearsay, could the respondent call the Dean (who is not involved in the hearing process) as a witness to testify to his own statements to this effect? Would this testimony be admissible from the Dean? On what basis would you include/exclude it? *Having the Dean present cures the hearsay/credibility issue, but this testimony, even in person, would be highly prejudicial to the fairness of the process. What the Dean thinks is not relevant, and could bias the adjudicators, who work for the Dean. I would exclude it as irrelevant and prejudicial.*
7. Jim, a sophomore, accused Jenny, a junior, of stalking him. To prove his case, Jim's sole testimony is that after one date, Jenny sent him over a dozen e-mails containing veiled threats. May he offer this oral testimony? If he can, will this prove his case? *This is hearsay, which is of questionable value because we don't know if she really sent him any e-mails. So, he can offer it, but I would not admit it or consider it to be of value at the deliberations, because it is an unproven assertion.*
- What is the best way to admit this evidence, if it is admissible? *Jim should offer the e-mails themselves, or a summary of their contents, or something to show us they existed, were inappropriate, or exhibited any threat of staking, obsession or dangerous behavior. If he can do this, they become of probative value to determining if Jenny simply obsessed over Jim electronically, or if she was a stalker.*
8. Professor Tweed is accused of sexual harassment by a female student, April. To bolster her claim, April wants to testify that she has observed Professor Tweed behaving in the same way toward other students. May she? Under what circumstances? *If April makes assertions about the Professor's behavior, they must be evaluated carefully. If he has never been accused before, this is evidence of questionable value, because it is being offered by the complainant, without proof, to further her own claim. But, if her descriptions of Tweed's behavior are convincing, perhaps he should be questioned*

about these other events. Is the fact that he has potentially harassed other students relevant to whether he harassed April? It might be. Harassers often have a repetitive pattern, and I would consider this relevant, though weakly probative, if the other incidents described bore a strong resemblance to April's and if I felt she was a credible witness. This testimony would have stronger probative value if the other students would come forward to describe how Tweed behaved toward them. There is no real hearsay concern here, because although the testimony involved out of "court" statements by someone other than April, they could be considered admissions by the respondent, Professor Tweed.

9. Professor Tweed is accused of sexual harassment by a female student, April. She has accused him of making lewd and suggestive comments about her appearance, and of trying to solicit sex from her. In his defense, Professor Tweed wants to testify that he had also propositioned two male students and made similar comments about them. Is this admissible? *If the professor wants to have this testimony admitted, it can be, as a relevant admission. However, Tweed is not trying to use it as an admission, but as a defense. So, in his own defense, this testimony lacks credibility. It's admissible, but of very little probative weight. However, admitting it is not likely to prejudice the process.*
- In his defense, Professor Tweed wants to call two male students to testify that Professor Tweed had also propositioned them and made similar comments about them. May he? *Yes, this cures the credibility issue. Bonus Question: Is this evidence dispositive of a complaint alleging breach of Title IX? It could be. If Professor Tweed can prove that he is an equal opportunity harasser, the college cannot satisfy the Title IX requirement that there be a gender basis to discriminatory behavior. He's a cad, but he's smart enough to exploit the loopholes in federal law. Hopefully, your college policy is broader than Title IX, and he can be dismissed based on other charges. His testimony at this hearing will be admissible at the next one, and there are no double jeopardy issues. This is not a criminal proceeding, and the charges at the first hearing will be based on a different policy than the charges at the second hearing.*
 - What if one of the male students thinks he is giving testimony to help condemn the professor. At the hearing, he learns that the professor is using him to create a defense. Can he refuse to give the testimony? *He can refuse to give testimony, you don't have the power to compel him to speak, and making him speak would help Tweed subvert the judicial process. What if he tries to discredit himself by testifying that he only appeared to testify because the professor had failed*

him in class, and that he had lied, and had not in fact been harassed by the professor. How would you handle this testimony? *If it was clear that this disgruntled student tried to perjure himself to avoid helping the professor he was harassed by, and then was misled by, as a witness, I would discount his own attempts to discredit his testimony as of dubious merit, though I would not charge him with any honor code infractions for lying.*

10. Mark went to Professor Shade's apartment after class. While eating ice cream, Mark tasted something of strange consistency. He went into the bathroom, and spat the substance onto a notecard. He has vague recollections of the evening, and thinks he may have been drugged and assaulted by the professor. He went to the police two days later. If he charges the professor with sexual harassment, is the substance on the notecard admissible as evidence? *Doubtful, but a remote possibility. Under what circumstances? If the student somehow managed to preserve the evidence on the notecard, got it out of the Professor's apartment, and turned it over to the police immediately, it might have been tested. But, we know two days passed. The student could have tampered with the card. But, if he froze it in a sterile container, and then had it tested by a reputable facility, I would review the medical/toxicological report previous to the hearing and make a determination of the value of the evidence. If there is just too much difficulty ascertaining what the evidence means, or its purity, I would exclude it as being too inconclusive. But, if the tests reveal a drug clearly, I would allow the Professor to be confronted with this evidence (especially if the police had custody of it) and respond to it. If I knew about the card at the time of the investigation, I would also request a search of the Professor's premises to test the ice cream and search for evidence of some sort of stupefying drug, to bolster any drug test results that might come from the evidence on the notecard.*

11. Sergeant Sleuth was the chief investigator on Melissa's rape complaint. In the course of the hearing, the Sergeant was testifying to her encounters with Melissa just after the alleged assault, and later. The Sergeant testified that about one month after the alleged assault, she chanced across Melissa on campus. When asked her impression of Melissa's condition, the Sergeant testified, "she looked like a rape victim." Is this testimony relevant? *It might be...*

- Is it credible? *No. Testimony like this should raise our flags regarding prejudice. It is an unsupported conclusion/opinion, with no indicia of reliability. Don't accept it just because it came from a police officer.*

- Is it admissible? *Not without more support for the officer's conclusion. I might also question the relevance of what someone looked like a month after an alleged incident.*
- Under what circumstances would this testimony be admissible. *A foundation could be laid for this testimony through further questions. But, we have to establish more than that it was just the officer's opinion, For example:*

(Police Officer—PO): "She looked like a rape victim."

(Judicial Officer—JO): "What do you mean."

PO: "Well, you can just tell."

JO: "How."

PO: "In my 11 years of experience on the force, I've dealt with dozens of women who have been raped."

JO: "Any they all have a particular look?"

PO: "No, when I said she looked like a victim, I meant more than her appearance, it was her bearing, her reaction to me, how she behaved."

JO: "Can you describe her appearance, bearing, reaction..."

PO: "I saw her on the Quad, walking toward me. She had closed-off body language, and walked with her head down, making no eye contact. She seemed dazed, or daydreaming. When someone walked too close to her, and bumped her elbow, she started, nearly jumped in the air, and looked like she was out of breath. She sat on a bench, and I watched her try to calm herself down. When she got up, she pulled her jacket tighter around her, like protection. It wasn't cold. Then, she started walking in my direction again. When she was nearly to me, I said hello, and she nearly jumped again, until she realized it was me. I was the investigating officer in her case. I asked her how she was, and I could tell that she did not want to talk to me. Her answers were short, curt, almost frightened."

JO: "And from this you concluded she was raped?"

PO: "No, it was just her whole bearing. Here was a woman who a month before was gay and vivacious and outgoing, and she looked like a frightened cat."

JO: "Just because someone's having an introverted day doesn't mean they've been raped, though, right?"

PO: "She was exhibiting classic rape trauma syndrome. No eye contact. Heightened sense of personal space. Flinching. Scared. Nervous. Detached. She was fidgeting when we spoke. She

felt vulnerable; you could see it in her eyes. Her guard was up, wary. Any police officer who observed her would suspect some type of recent trauma.

JO: "Is that all?"

PO: "In all my years on the force, I have developed a sense for reading people. This is not a flighty opinion. I watched her for 10 minutes, and it is my professional judgment that I was observing someone who had recently been violated. No question.

JO: "Had she seen you? Could she have been acting for your benefit."

PO: "I don't think so. Her eyes were down, and she would have to be an incredible actor to pull that off. She looked like a textbook victim, and I stand by my previous statement."

12. Peter called his roommate, Chase, to testify regarding the complaint against Peter for sexual assault, by Kelly. Chase testified that Kelly told him she was only charging Peter because her parents were upset she was no longer a virgin. When he gave his testimony, he read off a notecard, stating that he wanted to make sure of Kelly's exact words. When Kelly cross-examined him, she asked Chase to repeat the substance of her words, and it was clear that Chase could not do so without the resorting to the notecard. *What do you do with his testimony? I would ask him why he had to look at the notecard. Then, I would tell him I suspected he was lying about what Kelly told him. I would ask him where they were when she told him that? What he was doing? What she was doing? Why she would tell him that if she knew he was Peter's best friend? I would ask him what else was discussed in the conversation? I would remind him that he was under oath and that there were penalties for perjuring himself. I would ask him if there was any clarification of his testimony he would like to make, and all the while, I would be watching his non-verbal cues. I would ask him, "would you lie to protect your best friend." Did he look at me, look away? Did he talk calmly, even when I questioned his veracity, or get excited? What did he do with his hands? Where did his eyes dart? Were there any classic telltale signs of lying? I would ask him if he would be willing to take a lie detector to prove the truth of his testimony, and judge his reaction. If I were satisfied, I might believe him. But, if not, I would discount his testimony, and maybe charge him with an honor code violation.*

13. Archer accused his Big Brother, Stan, of hazing him so badly that Archer quit the fraternity. In the hearing, Archer alleged that Stan had repeatedly demeaned him by calling him a "pussy pledge." Stan called his minister to testify that, having known Stan for 17 years, it was his god-sworn testimony that

he was sure Stan would never have used such profane language, or been abusive to anyone. May he? *Sure, if you allow character evidence, but this is not strongly probative. Good people do bad things, but this may help to tip the scales on a close case. Ministers tend to be credible witnesses, so I would allow it as non-prejudicial.*

- Can Stan testify that he thinks that Archer has accused him because Stan blackballed Archer from the fraternity after Stan discovered Archer in bed with another man? *Tough one. This is about Archer's past sexual history here. If you bar such testimony completely, it is inadmissible. However, if you allow past sexual history to the extent it is relevant, I would admit this testimony. Yes, it is scandalous, and yes it is used to assassinate Archer's character, but Stan is trying to create doubt here, and is trying to reveal what may be Archer's true motives for filing the hazing charge. Stan should be able to raise this defense to the extent that he can convince the triers of fact that he is being targeted by Archer out of revenge.*

14. Justin was accused of a serious drug possession offense. When the campus security officer attempted to introduce the evidence, Justin objected to the admission of the evidence on the grounds that the evidence was obtained from his room in a search that violated his 4th amendment rights, and that the evidence should not be admitted under the exclusionary rule. How should you respond? *The evidence is admissible. There is no exclusionary rule on campus. If the college violated his rights, he should sue them for it. But, the evidence is still admissible, in most jurisdictions. Before ruling on this, I would call my college counsel, to be sure.*

15. Respondent in a sexual misconduct hearing wants to call the Sheriff of the complainant's hometown as a witness, to testify to the fact that the complainant, in high school, made an allegation of sexual misconduct against a male student that she later withdrew. May he? *This is a tough call. I would either exclude the testimony outright as being too potentially prejudicial, or perhaps a better approach would be to call the complainant, respondent and Sheriff to sidebar to ask her why she had withdrawn the complaint. If there were legitimate reasons, I would disallow the questioning, but if there was something I thought the panel should decide, I would let the Sheriff testify.*

- What if the Sheriff was going to testify that the complainant had made an allegation in high school that was proved false through investigation? What about the relevance of that testimony? *I'd allow it. If she did this before, she needs to be questioned about why, and if she is doing it again.*

But, be careful not to assume that just because she has done it before, that is enough evidence to convince that she is doing it in this case.

16. Marcy claims to have been sexually assaulted by another student, Bruce. Bruce is a friend with Marcy's roommate, Jill. Bruce thinks that Marcy is only charging him with the violation because her parents are putting pressure on her. He thinks Jill can corroborate this. How, if at all, can he introduce this information? *He could call Jill as a witness to any statements Marcy has made to that effect, or anything else she might know that would provide relevant, credible evidence of Marcy's motives for charging Bruce.*

- In the same case, there was a gap of three months between the time Marcy claims to have been assaulted, and the time she reported the incident. If Bruce fails to raise this issue, should the judicial officers do so? May they? Must they? *They are not required to, but they may, and I think they should as a way of ensuring a thorough inquiry into the truth.*
- Jill thinks Marcy may have once made an accusation against a guy in high school for sexual assault. Analyze the admissibility of this information. *This is hearsay that is lacking in credibility and should not be admitted without further supporting facts.*

17. Two football players were charged with raping a student, off-campus. The incident came to light when a videotape of the rape, taken by the football players, came to light. It is now in possession of the local police, who are willing to share it with the college for use in the hearing. The college has a rule that permits students to refuse to answer incriminating questions, and to have no negative inference drawn from that refusal. The football players discover before the hearing that the college intends to admit the tape into evidence. The player's attorney files a motion in limine with the dean before the hearing, asking that the tape be ruled inadmissible, as a statement by the respondents against their own interests. He asks the college to extend its 5th amendment protections to avoid the self-incrimination issue posed by the tape.

- Do the players have a right not to have this tape used against them? *No. Any right not to answer questions applies in the hearing, not to admissions or other evidence used outside the hearing. To disallow it would be equivalent to disallowing a mea culpa made by the respondents to a police officer, which would never be done.*
- Can/should the college use the tape? *It can and it should.*

- How should it be introduced into evidence, if at all? *The local police should be used to lay a foundation for ascertaining who made the tape, where it was found, how it came into police possession, and if it has been tampered with in any way. Then, the police officer should testify to the relevant contents of the tape. There is no reason that the tape should be shown to anyone at the trial, unless there is a question as to whether the videotape depicts a sexual assault.*
- Should the victim be consulted? *Yes and forewarned.*
- What if the players state that even if the tape is admissible, it is so prejudicial that it should not be admitted, because the videocamera was not in a position during the incident to capture the victim's statements and actions, and so the tape presents an incriminatingly false perspective on what really happened. What should you do? *With the victim's permission, this tape should be reviewed by the judicial officers to allow them to form a judgment about what the tape accurately depicts, and how it will be used. If she refused permission, I would shift the format to a single female administrator hearing, and have only that administrator view the tape and reach a conclusion.*

18. The College has a rule absolutely barring any testimony about a victim's past sexual history. At the hearing, Mike testifies that Ann is lying about being raped by Daniel. He bases this on the fact that Ann testified that she was a virgin before Daniel raped her. But, Mike knows this is untrue because he slept with Ann the previous week, and he so testifies. When he does, the chair of the judicial board objects to the testimony. All the members of the panel heard Mike's testimony. What is the best way to proceed?

- Allow the testimony, as relevant.
- Disallow the testimony and instruct Mike not to refer to it again.
- Have it stricken from the record, and instruct the judicial officers to disregard it. *Second best choice.*
- Dissolve the panel and reconvene the hearing with a new set of adjudicators. *Best choice.*

19. The victim in a sexual misconduct hearing is not proving her case. She knows it, and asks the chair of the hearing panel for a sidebar. At the sidebar, she reveals that there is a witness who could prove her case, but she is reluctant to call this witness because it would prove incredibly difficult for the witness

emotionally to give testimony at the hearing. After discussing the ramifications with the chair, the alleged victim decides not to call the witness.

- At the deliberation stage, can/should/must the chair reveal the substance of this sidebar to the hearing panel members? *No, I think the victim made her decision, and needs to live with the ramifications. It could unfairly influence the panel to let them know about the secret witness, because they have no idea what the witness could say or prove.*

20. Complainant in a sexual misconduct hearing wants to testify that at the time of the assault, she was a virgin. May she? *Taken alone, the evidence of virginity does not establish consent or non-consent. However, when considered in light of other testimony, it is probably going to be relevant. For example, if complainant testifies that she is no longer a virgin, and offers medical evidence of this, her previous virginity can establish the fact that intercourse took place, which may be an issue in the case. Or, if there is testimony that complainant was waiting until marriage for sex, the testimony is relevant to the issue of consent, and why she did not give it. But, if it is just being used to draw sympathy for the complainant, without a factual tie in to the consent issue, it could be unfairly prejudicial to the respondent, and should not be deliberated upon if admitted.*

21. Throughout a sexual misconduct hearing, the victim's mom is present as a supporter. At the close of the evidence, the mom asks to be called as a witness for her daughter. How should this event be handled? *The mom should not be allowed to testify unless the respondent consents. He had no notice, and this is no place for surprise witnesses. Or, if the mom's testimony could be dispositive, she should reveal the information to the chair at sidebar, who could then suspend the hearing, pending notice to the respondent and an advance statement of the mom's testimony, so that he can prepare in advance to defend against her evidence. Then, the hearing could reconvene a few days later.*

22. During the investigation of an abuse case, information implicating a staff member comes to light, but is not revealed to the complainant or respondent. At the hearing, it becomes clear to the hearing officers that this information would be the only thing that the victim could use to prove her case. What obligation does the college have to disclose this information? The judicial procedures clearly state that decisions will be made solely on the basis of evidence presented at the hearing, and that the complainant has the burden of proof in the case. You are the hearing officer, what do you do? *A moral*

dilemma, rather than an evidentiary issue. While the complainant has the burden of proof, you have an overriding obligation to prove a fundamentally fair hearing and process. Can it be fundamentally fair if you withhold the key piece of evidence that she needs to prove her case? You don't owe fundamental fairness to the victim, just to the respondent. However, is it unfair to the respondent not to disclose this information? I would disclose this fact, because if you don't, it will come back to haunt you, and it will be worse later. Can you imagine how this will play out in the media, "COLLEGE KNOWINGLY COVERS UP CAMPUS ABUSE CASE—ENDANGERS STUDENTS TO PROTECT REPUTATION"

23. Prior to a sexual harassment hearing, the alleged victim requests copies of the statements of witnesses, their names, and all other statements that will be used in the hearing. Is he entitled to get them? *No, but it is a best practice to give the complainant and respondent the same information in advance to prepare for the hearing. What if she is the respondent, does your answer change at all? No, this is not a right widely conveyed by courts. If you are a public college, I would provide as much in advance as you can, to avoid becoming a due process test case, but you can limit the amount of information you share in advance, as long as the respondent has a fair and reasonable opportunity to respond to the allegations against her.*
24. In the middle of a hearing for a sexual orientation-based hate crime, the alleged victim charges you, the hearing officer, with being biased against him, based on the type and nature of questions you have asked. How should this be handled? *There are a few options. You could recuse yourself, which is the path of least resistance. Or, you could consult your college attorney, and act upon his/her advice. Or, if you thought the charge was baseless, you could meet with the panel in closed session, and let them vote to see if you will stay or go. The best approach is to find a simple and non-controversial way to back out, which is much easier than litigating the bias issue later. But, you may also have to consider a new hearing, because of the possibility that the bias of one hearing officer has tainted the whole panel.*
25. Respondent wants to testify in a sexual misconduct hearing that the complainant, on the night in question in the course of a conversation, told him that she was on "the pill," as evidence of her consent to sex. Is this relevant? *First, figure out what the matter in issue is here. The issue is not whether the complainant was on the pill. The issue is whether or not the complainant gave consent. Assuming that this testimony is true, and no other facts are available, does it tend to prove or disprove consent, which*

is the matter in issue? No, it doesn't. Use or presence of birth control does not alone prove consent. This is true on the flip side as well. The complainant may not testify that the respondent's carrying of a condom in his wallet is evidence that he planned to rape her. But, the assessment of this evidence must also be contextual. If, for example, the respondent testified that he asked the complainant, "Do you wanna have sex?" and the complainant responded, "Well, I'm on the pill," this testimony is relevant. In that context, the use of information about birth control might have been used by the complainant to convey her consent to sexual intercourse, and it speaks directly to the ultimate issue in the case. Allowing it otherwise might tarnish the fairness of the process.

26. Gamma Upsilon Pi (the Guppy House) and Pi Upsilon Phi (the Puppy House) are rival campus fraternities. In a campus hearing, the Guppies are accused by the Puppies of stealing the fraternity mascot, a pug dog. Both houses are on the verge of war, and this is escalating to a serious incident, rather than a harmless prank, because the beloved pug is still missing. Four Guppy brothers are called as respondents, accused by three Puppy brothers. The Puppies testify as follows:

- One brother testifies that before the Derby Days contest, Joe Pisco, a Guppy, threatened to take the Puppy mascot. May he? *Depends on how the brother came to know of Joe's threat. If he heard it directly, he can testify to it, but otherwise, the judicial officers will have to assess the credibility of how the brother came to know.*
- Another Puppy brother testifies that he saw four men sneaking out of the Puppy house the night the pug disappeared, during a rowdy party. He recognized them as Guppies. May he? *Yes, but unless they had the Pug with them, this is rather circumstantial.*
- Another Puppy brother testifies that he overheard a table of Guppies at dinner, the night before the dognapping, talking about pulling a stunt on the Puppy House. May he? *There are relevance issues and hearsay issues that make this sort of statement one that I would avoid admitting, as lacking greatly in probative value.*
- The Guppies want to testify that last fall, the Puppies stole their Coat of Arms from their house. May they? *Yes, but question the relevance. Are they trying to show a revenge motive for the pugnapping? Or, just trying to disparage the character of the Puppies.*
- A Guppy wants to testify that a friend told him the Puppies are hiding their own mascot away and trying to get the Guppies in trouble for taking it. May he? *Yes, but there is a question of credibility*

that needs to be further expanded upon before the evidentiary value of this information is ascertained.

TEST CASE: Okay, now test your evidence instincts without my answers:

Jennifer Junior has brought a complaint of “disrespect of persons” against her former boyfriend, Steve Senior. It is revealed at the hearing by the complainant that during the course of their relationship, she engaged in sexual relations (in the biblical sense, not the Washington, DC sense) with the respondent. During a routine physical examination, she discovered that she had contracted herpes. Upon searching her boyfriend’s medical closet, she came upon a prescription for antibiotics. When she questioned Steve, he told her that he knew he had herpes, but was embarrassed about it, so he didn’t tell her. Is he responsible for disrespecting Jennifer by failing to tell her of his venereal disease and by passing it along to her?

- What are the questions you need to ask?

Relevant information/questions:

1) Does Steve have herpes? How is this established?

▶ He could be asked at the hearing. Is it permissible to so ask?

▶ His medical records could be examined. Is it permissible to examine them? How might they be obtained?

▶ Assume for purposes of this exercise that Steve admits it at the hearing.

2) Does Jennifer have herpes? How is this established?

▶ Assume for purposes of this exercise that Jennifer testifies at the hearing that her doctor told her she had it.

3) Did Steve give Jennifer the herpes she has, if in fact she has it? How is this established?

Steve is asked if he thinks he gave her the STD, and he says he doesn’t know.

▶ What is the information you need to form a conclusion?

▶ Assume for purposes of this exercise that if it were more likely than not that he knew he had an STD and failed to disclose this fact to his sexual partner, this would constitute a policy violation.

▶ Jennifer wants to introduce evidence she asked Steve to wear a condom on a number of occasions, but he made excuses. Can she?

- ▶ Steve wants to have another student, Chuck, testify that he knows that Jennifer slept with some other guys during and just before her relationship with Steve, and may have gotten herpes from someone else. Can he testify to this? If so, under what circumstances?
 - ▶ Jennifer wants to call her roommate, Tai, to testify that she told Tai that she was experiencing terrible vaginal burning shortly after her first intercourse with Steve. Can she?
 - ▶ Jennifer wants to testify that she never had symptoms after sex previous to her sex with Steve. May she? May she testify that every time she had sex previously, her partner wore a condom?
 - ▶ Suppose for purposes of this exercise that both parties submit to physical examination by the college doctor, who testifies that they both have the same type of herpes, one that is frequently transmitted through unprotected sex.
- 4) If he transmitted herpes to her, did he do so knowingly?
- ▶ Did Steve know he had it?
 - ▶ Did he conceal, or fail to disclose it?
 - ▶ Did he think it could be communicated through unprotected sex?
 - ▶ Suppose when asked, Steve asserts his 5th amendment right not to answer this question.
 - ▶ Suppose further that this school is a private with no procedural provision regarding a right to remain silent. Can he answer the question? Must he? What conclusions may you draw from his willingness/unwillingness to do so?

Do this exercise again, and this time, base your conclusions on the following exchange that took place at the hearing:

Jennifer testified that Steve gave her herpes. She was asked what type of herpes. She responded, Simplex II. She was then asked how she knew she had herpes. She responded that her doctor discovered it during a physical. She was then asked if she had copies of the doctor's diagnosis of this condition. She did.

- Is this information admissible? Why or why not?
- Does it change the outcome of this complaint for you?
- What if she wants to call the doctor as a witness? May she?
- What if Steve requests an examination of Jennifer by his own doctor? Should (can?) this be allowed?

Try this variation:

The college policy clearly states that no right to refuse to answer questions is recognized. Suppose further than in a pre-hearing meeting with the Associate Dean, Steve is told that he may refuse to answer questions. At the hearing, Steve refuses to answer question #4. The hearing officer demands an answer, but Steve says he was told he could refuse.

- What should be done?