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DETERMINING IF SEXUAL MISCONDUCT OCCURRED: ASSESSING FORCE, INCAPACITY & CONSENT

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ABOUT YOUR PRESENTER:

- Brett Sokolow is the Managing Partner of the National Center for Higher Education Risk Management (NCHERM), a national multidisciplinary risk management consulting firm. Through NCHERM, Sokolow has consulted with over 2,200 colleges, universities, schools and military institutions in the US and Canada. He has also provided strategic prevention programs to students at more than 2,000 college and university campuses.
- Sokolow is an expert in preventive law and risk management. He has 14 years of experience helping clients to enhance the safety and security of their communities by strategically addressing high-risk health and safety issues.
- Sokolow is a risk management consultant, author, editor and higher education attorney admitted to the Pennsylvania and New Jersey bars. He holds a Bachelor of Arts degree in East Asian Studies from the College of William and Mary (1993), and a Juris Doctorate from the Villanova University School of Law (1997).

Overview

- Without training, our assessment of complaints of sexual misconduct can be clouded by our sexual politics, values and biases.
- We owe the parties an unbiased decision.
- If consideration of a complaint veers into victim-blaming or reputations, we are not being objective about the evidence (e.g., she drank, so she is responsible, too).
- The only question we have is whether it is more likely than not that our policy was violated.

Evaluating the Policy

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- Well-constructed sexual misconduct policies typically have common elements.
- The *2005 NCHERM Typology of Campus Sexual Misconduct Complaints* Whitepaper details the rubric for analyzing these cases (www.ncherm.org).
- Three questions will get you to a solid analysis of 99% of all campus sexual misconduct complaints.

Overview of the Three Questions

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1. Was force used by the accused student to obtain sexual access?
2. Did the accused student know, or should s/he have known that the alleged victim was incapacitated (alcohol, other drugs, asleep, etc.)?
3. What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?

Force

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- Was force used by the accused student to obtain sexual access?
- There are four types of force to consider:
 - Physical violence -- hitting, restraint, pushing, kicking, etc.
 - Threats -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
 - Intimidation -- an implied threat that menaces and/or causes reasonable fear
 - Coercion -- the application of an unreasonable amount of pressure for sexual access.
 - Consider:
 - Frequency
 - Intensity
 - Isolation
 - Duration
- Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force.

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Force

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- If force, in any of the four forms (or other forms as defined in your policy), was used, stop here. You are done.
- The policy has been violated. Consent and incapacity are irrelevant at this point.
- Sanction appropriately to:
 - Bring an end to the discrimination
 - Prevent its future recurrence
 - Remedy the effects on the victim

Incapacity

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- Did the accused student know, or should s/he have known that the alleged victim was incapacitated (alcohol, other drugs, asleep, etc.)?
- Address this question second, because it can be ruled out quickly and efficiently if alcohol, drugs or other incapacity are not in issue. If not, move on to the 3rd and final question about consent.
- If incapacity could be involved, there is a two-step analysis:

Incapacity

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- First, was the alleged victim incapacitated at the time of sex?
 - Could s/he make rational, reasonable decisions?
 - Could s/he appreciate the situation and address it consciously such that any consent was informed
 - knowing who, what, when, where, why and how
- Second, did the accused student know of the incapacity (fact)?
- Or, should the accused student have known from all the circumstances (reasonable person)?

Incapacity

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- What was the form of incapacity?
 - Alcohol or Other Drugs
 - Not impaired, not under the influence, not drunk, but incapacitated
 - Administered voluntarily or without victim's knowledge
 - Rape drugs
 - Mental/cognitive impairment
 - Injury
 - Sleep

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Incapacity

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- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact dependent
- Blackouts are frequent issues
 - Blackout = incapacitation
 - Blackout = no working (form of short term) memory, thus unable to understand who, what, when, where, why or how
 - Partial blackout must be assessed as well
- What if the accused student was drunk too?

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Incapacity

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- If the alleged victim was not incapacitated, move on to the 3rd question.
- If the alleged victim was incapacitated, but:
 - The accused student did not know it = policy not violated.
 - The accused student should not have known it = policy not violated. Move on to 3rd question.
- If the alleged victim was incapacitated, and:
 - The accused student knew it = policy violation. Sanction.
 - The accused student should have known it = policy violation. You are done. Sanction accordingly.

CONSENT

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- The NCHERM model uses a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (force, resistance, against someone’s will, someone unable to consent, etc.)
- Question 3 is the Consent question: What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?

CONSENT IS...

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- Informed (knowing)
- Voluntary (freely given)
- Active (not passive)
- Clear words or actions
- Indicating permission to engage in mutually agreed upon (sexual) activity

Sexual Sovereignty (Autonomy)

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At the heart of the idea of consent is the idea that every person, man or woman, has a right to personal sovereignty (autonomy); a right not to be acted upon by someone else in a sexual manner unless he or she gives clear permission to do so.

You Have a Right to Define Boundaries

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With this idea comes the understanding that consent can be broad or narrow, and can be limited, such as in cases where someone is willing to engage in some forms of sexual activity, but not in others (is sex like baseball?)

Does Consent Have to Be Verbal?

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- In this model, consent may be given verbally or nonverbally, but must be communicated clearly in whatever form.
- Silence and/or passivity is not consent.
- Must be a verbal or non-verbal "Yes"

Warning Signs of Non-Consent

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- Consent is in doubt when a party to a sexual interaction is making assumptions about what their partner does or does not want.
- Absence of clear signals means no consent, not try it and see if s/he likes it or objects (traffic signal example).

Conceptualizing Consent

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- Consent means two (or more) people deciding together to do the same thing, at the same time, in the same way, with one another.

Consent vis-à-vis Force, Resistance

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- The idea of pure, autonomous consent completely rules out any requirement to show the use of force, or any type of resistance.
- Yet, the use of force or the showing of resistance would demonstrate non-consent.

Who Must Consent?

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- All parties to a sexual interaction (but we hear one complaint at a time)
- Consent requires that the person initiating the sexual activity get permission to do so, and that permission does not exist in the absence of resistance.
- Passively allowing someone to touch you in a sexual manner is not consent.

Consent Not Always Valid

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- There are circumstances where even when consent is given, it is not valid.
- Consent would be invalid when:
 - forced, threatened, intimidated, coerced,
 - when given by a mentally or physically incapacitated person,
 - or when given by a minor.

More on Consent...

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- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.
- You can place any conditions you want on your willingness to consent.

More on Consent...

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- Making someone touch you is as inappropriate as touching someone else, where no consent is given.
- If someone won't touch you, and you have to physically manipulate them to get them to touch you sexually, you automatically have a consent problem.
- Unless they freely give consent, you can't take it.

The Last of the 3 Questions

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- What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?
- If the accused student can answer this question with evidence of sufficient words or actions, you are done. There is no policy violation.
- But, if the accused student cannot answer this question, answers it with insufficient evidence of consent, or assumptions, you are done. The policy has been violated. Sanction accordingly.

Use the Resources of NCHERM

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- Tons of free articles, whitepapers, books, protocols and other resources related to best practices for addressing campus sexual assault
- www.ncherm.org; click *Publications*
- Feel free to email questions and consulting inquiries to Michelle Issadore, NCHERM Director of Educational Programs;
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