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

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### ABOUT YOUR PRESENTER:

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- 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

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- 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.ncher.org](http://www.ncher.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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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](http://www.ncherm.org); click *Publications*
- Feel free to email questions and consulting inquiries to Michelle Issadore, NCHERM Director of Educational Programs;  
[Michelle@ncherm.org](mailto:Michelle@ncherm.org)

## Luther College Hearing Board & Appeals Board

2020 Fall training  
September 1, 2020

prewatch:	Determining if Sexual Assault has Occurred (video)
10:00-10:45	Introductions, Conduct Basics (Corey Landstrom)
10:45-12:00	Title IX (Kasey Nikkel)
12:00-12:30	Lunch Break
12:30-1:15	Implicit Bias Training (Lisa Scott)
1:15-2:10	Questioning, Analysis, and Deliberation (video); concepts (Nan Hibbs)
2:15-2:30	Trauma Informed Response (Mariah Smith)
2:30-2:50	Sobriety/Field Tests (Bob Harri)
2:50-3:30	Conduct Basics/Alcohol & Drug Policy (Corey Landstrom)

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## Introductions

- “College attendance, whether it be a right or a privilege, very definitely entails responsibility.” - *Harry Blackmun*
- “We judge ourselves by what we feel capable of doing, while others judge us by what we have already done.”  
- *Henry Wadsworth Longfellow*
- “It takes less time to do a thing right, than it does to explain why you did it wrong.” - *Henry Wadsworth Longfellow*

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## Tenets of the LCHB

- To regard each student as an individual, deserving individual attention, consideration, and respect.
- To consider the facts fully and carefully before resolving any case.
- To speak candidly and honestly to each student.
- To hold each student to a high standard of behavior, both to protect the campus community, and to promote student moral development.
- To recognize the reality of human fallibility, as well as the stresses associated with collegiate life, and to demonstrate compassion, understanding, and a sense of humor.
- To contribute to the educational mission of the College by interpreting policies, rendering decisions, and recommending sanctions that contribute to the intellectual and moral development of the entire student body.

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## Key Competencies - LCHB

- Effective communication skills
  - Including active listening, articulation of thoughts
- Attention to detail
  - Including questioning and any paperwork
- Understanding of campus culture
- Care for the campus community
- Care for the individual student
  - Including compassion and empathy
- Comprehension of campus policies and procedures
  - Including consistency and proper application
- Strong sense of self-awareness
  - Including being aware of personal biases, how others perceive you, and being able to be “real” in a hearing

Source: Inabinet, J. (December 2008). Continuing Development of Effective Conduct Board Training. Power Point Presentation.

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## 10 Principles

1. Disciplinary systems should reflect the diversity of campus cultures.
2. Common values can be identified and affirmed.
3. Cases should be heard before they are decided.
4. Educational aims and progressive discipline should guide the imposition of sanctions.
5. Progressive discipline should encompass the interests of people seen and unseen.
6. “Perfection” of human nature isn’t the aim.
7. Hearing board members are role models.
8. Hearing board members are learners.
9. Privacy rights must be respected.
10. The disciplinary process should promote ethical dialogue and critical thinking.

Source: Inabinet, J. (December 2008). Continuing Development of Effective Conduct Board Training. Power Point Presentation.

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## Expectations

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## Bias/Prejudice

- Knowledge of case/personal interest
- Impartiality
- Just because you know someone doesn't mean you can't hear the case
  - "In a University setting, prior contact among the faculty and students is likely; that fact alone does not indicate bias or partiality."
    - Holert v Univ. of Chicago
- Complainant and respondent awareness – care for our students
- Outside/internal influence on possible findings
  
- **Balanced process is the goal** – our own personal values, beliefs and life experiences are present...

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## Confidentiality

- The Family Educational Rights and Privacy Act of 1974 (FERPA)
  - Generally, universities are not allowed to disclose any student educational records to third parties without the student's prior written and dated consent. There are, however, a few exceptions to this rule.
- Respect for students
- Required by law and our process
- Decisions publicly supported
  
- You may be approached regarding the outcome of a case – you can not provide any information.

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## Decisions

- More likely than not
  - "Preponderance of evidence"
  - 50% plus just a little bit (50.01%) = responsible
  - 49.99% = not enough to find responsible
  - "Are you persuaded by all of the *relevant* evidence that a violation occurred?"
    - If yes, preponderance of evidence exists.
- Only information before the board to be considered

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## Respect

- Dignity of all persons
  - Students before the board and board members themselves
  - Recognize, understand and appreciate the impact of difference and it's role in the process.
- Tact in questioning
  - Don't dig into unnecessary personal information
  - If the facts have become clear, don't "pile on"

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## Due Process?

- Procedural
  - There must be procedures and methods that are consistently used
- Substantive
  - There must be a basic fairness, an absence of arbitrary or capricious action
- Legal relationships
  - Public = constitutional
  - Private = contractual
- Simply - "state exactly what process is provided without using such platitudes" as due process or fundamental fairness. (Stoner and Lowery)

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## Code of Student Conduct

Luther College is a community of scholars whose members include its students, faculty and staff. As a community, we share a dedication to creating an environment that supports trust, respect, honesty, civility, diversity, free inquiry, creativity, and an open exchange of ideas. We also recognize the need to establish a Code of Conduct that *sets forth expectations for student behavior*, promotes growth and development, guides student action, and defines procedures and sanctions for *behavior that is inconsistent with the aims and objectives of a community of scholars*. For the benefit of the community, the Code of Conduct limits certain behaviors and activities. It also attempts to *protect the academic integrity, health, welfare, safety, rights, and property of the college community*.

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## Code of Student Conduct

- Luther College strives to strike a balance between freedom and the policies necessary to promote its basic purposes of teaching and learning. Since enrollment at Luther is a voluntary act, *students voluntarily assume the obligations of behavior* reasonably imposed by the college as it carries out its mission. *These obligations are generally much higher than those imposed on all citizens in society.* Luther College expects students to *maintain standards of personal integrity* that are in harmony with the educational goals of the college; *assume responsibility for their actions*; and *respect the rights, privileges and property of others.*

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## Code of Student Conduct

- The Code of Conduct also reinforces the concept that students have rights: the *right to be treated as individuals within the disciplinary process*; the right to be *protected from arbitrary, capricious, or malicious acts on the part of other members of the community*; and the *right to study, learn, live, and work in an environment free from behavior that could disrupt the college's functions, cause injury to persons, or cause damage to or loss of property.*

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## What IS our code of conduct?

- Civil document by which the college community:
  - Defines what the living learning environment will be like and
  - Sets forth conditions governing a student's eligibility to remain part of the community.
- Purpose: Educative. Designed to support a quality living learning environment for ALL students.

Source: Stoner, E. (2008). Getting Academy Training Institute. Salt Lake City, UT.

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## Policies that are relevant

- Luther College Code of Conduct
- Alcohol & Other Drug Policies and Procedures
- Policy on Student Sexual Misconduct and Interpersonal Offenses
- Discriminatory and Harassing Conduct
- Hazing Policy
- Acceptable Use Policy (telecommunication and computing equipment)
- Greek and Other Campus Organizations
- Policy on Student Presence While Away from Campus (Academic Dismissal, Disciplinary Suspension, Medical Leave of Absence)

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## Policies that are relevant

- What about off-campus matters?
  - "Obviously, a college has vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body." - Kusnir v Leach

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## Disciplinary System

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## Administrative Hearings

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- Residence Life Staff
- Director of Student Rights & Responsibilities
- Other designees
  
- Types of cases heard:
  - Alcohol and other drug violations, disorderly conduct, fire safety violations, vandalism, fake IDs, failure to comply, etc.
  - Case that are minor in nature and when a student does not have an extensive disciplinary history.

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## Luther College Hearing Board

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- Cases involving violations of the Code of Student Conduct that could result in the sanction of suspension or expulsion.
- Cases in which the student involved does not accept responsibility for the violation with the understanding that the full range of sanctions are available should the student be found responsible.
- Violations of a more serious nature, including but not limited to cases of sexual misconduct or assault, organizational misconduct, violations by students with significant disciplinary records, or consideration of sanctions for students who have received 10 or more points (Alcohol and Other Drugs Policy).

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## Hearings

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## Case posture

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- Report
- Complaint (victim or college)
- Investigation (fact gathering)
- Review (no surprises)

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## Notification of charges

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- 7 days prior to hearing
- Description of violation
- Time and location of hearing
- Right to assistance of advisor – advisor of choice
- "[A] student charged in a disciplinary process has no right to call or cross-examine witness(es) as long as the student has a full opportunity to defend herself or explain her position." - Grier & Stoner

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## Quorum = 5\* (new last year)

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- At least:
  - 1 student
  - 1 faculty
  - Director of Student Rights and Responsibilities or staff representative serving as chairperson
- Students cannot be the majority of representatives

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## Process

- Only persons directly involved as witnesses
- Only information pertinent to possible violation can be considered
  - Persons with expertise and an ability to explain
- Confidential
- Recorded
- Review script
- Respond, Explain and Defend
- Is not "Judicial"
- Educational, not adversarial

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## Clarifications

- Different Systems, Different Goals
  - Criminal Law:
    - Punishment, Retribution
  - Civil Law:
    - Compensation for victims
  - Campus Goal:
    - Create a good living/learning environment for ALL members of our academic community.

Source: Stoez, E. (2008). Gehring Academy Training Institute, Salt Lake City, UT.

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## Questioning

- Purposes
  - to determine the facts of the case in order that decisions can be made regarding the nature and seriousness of the violation.
  - to decide if an individual is responsible or not.
  - to assess the student's awareness and understanding of the violation.
  - to assess the student's acceptance of responsibility and the sense of respect for others' rights.
  - to teach; to provoke thought about a particular perspective or issue.
  - to determine what type of sanctions are appropriate for the violation.

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## Questioning

- Types and style
  - Investigatory v Adversarial
  - Use open-ended questions
  - Don't ask hypothetical questions - hypothetical results
  - Consider pacing and silence
  - Pay attention to other board members
  - Ask yourself - **Do I have enough information?**
  - Keep asking questions until you understand the facts.

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## Questioning

- Avoid
  - References to religious background
  - Asking irrelevant personal questions
  - Sounding as though you've already reached a decision
  - Bringing up your own personal experiences
  - Diagnosing
  - Any questions regarding past disciplinary actions
    - If a student introduces information during a hearing regarding past incidents, then you may pursue the information if it is relevant to the issue at hand.

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## Questioning

- Consider opening statement
  - Does it answer questions
  - Does it clarify situation
- Review of materials provided
  - Technical rules of evidence in civil and criminal cases do not apply
  - *Acceptance of Responsibility*: If the student charged accepts responsibility there is no need to ask numerous questions about the facts unless the Board needs clarification. Instead, questions regarding the student's perception of the seriousness of the violations, etc. can be addressed.

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## Information

- Evidence
  - Any kind of information presented with the intent to prove what actually took place.
- Proof
  - The effect of evidence.
  - Evidence can prove something or not at all.
- Types of Evidence
  - Direct or Testimonial
  - Circumstantial
  - Documentary
  - Real and Demonstrative
  - Hearsay
  - Character (sanction phase)
  - Past record (sanction phase)

Source: Sokolow, B.A., et al. (2004). The 2001 Judicial Training Videoseminar Training Manual

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## Reading Participants

- Comfort
  - No one is necessarily comfortable during a hearing process. You may be uncomfortable with the information you review and hear during a hearing. You may have to ask questions that are uncomfortable. The outcome may significantly impact someone's future, which may present discomfort. These are all **your** discomfort. What about their's?
- What we should do:
  - Establish a baseline – get them relaxed as possible
  - Maintain solid eye contact (do not stare or glare)
  - Listen to their response (do not write if possible)
  - Listen to their response (do not think of your next question)
  - Nod affirmatively to keep them talking
  - Use your hands to encourage them
  - Do not: fidget
  - Do not: shake your head “no”
  - Do not: look shocked, stunned or accusingly at what they just said.

Source: Sokolow, B.A., et al. (2004). The 2001 Judicial Training Videoseminar Training Manual

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## Reading Participants

- What to look for in their testimony
  - Their baseline – how relaxed are they? The baseline may change during the hearing.
  - What are they doing with their eyes?
  - What are they doing with their arms/hands?
  - What are they doing with their heard?
  - What are they doing with their legs and feet?
  - What words are they using?
- Conclusion
  - “When people are uncomfortable, it does not necessarily mean they are lying – it may just mean they are uncomfortable. What are YOU doing to make them more comfortable, and thus, more likely to tell the truth (or at least talk to you)?”

Source: Sokolow, B.A., et al. (2004). The 2001 Judicial Training Videoseminar Training Manual

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## Decisions

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## Determination of responsibility

- Deliberate in closed session (sanctioning phase follows)
- “Is it more likely than not that the student violated the Code of Student Conduct?”
  - and associated policy/policies
  - Important to review policy language
- Once determined, past disciplinary records are considered in advance of sanctioning decision

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## Chair responsibilities

- facilitating a discussion;
- ensuring that the opinion of each panel member is heard and considered;
- assisting with the finding of facts;
- assisting the members with applying the preponderance of evidence standard to the findings of fact;
- polling the members to verify their answers;
- sharing the final determination with the accused student and complaining party

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## Board member responsibilities

- Thoroughly reviewing case materials in advance of scheduled hearings provides for board members the opportunity to develop effective questions
- openly and candidly engaging in all discussions;
- conducting a review of information collected to determine which information is of value;
- applying the preponderance of evidence standard; and
- determining the finding(s) of fact;
- sharing individual determination(s) about the facts of the case within the closed session.

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## Sanctioning

- Majority vote
  - Seek consensus
  - Chair votes in case of tie
- Sanctions
  - 1. Warning
  - 2. Probation
  - 3. Fines, Restitution
  - 4. Discretionary Sanctions (work assignments, essays, evaluation, etc.)
  - 5. Residence Hall Suspension or Expulsion
  - 6. Luther College Suspension or Expulsion
  - 7. Revocation or Admission or Degree
  - 8. Withholding Degree

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## Sanctioning

### Questions to Consider Prior to Imposing a Sanction:

- How will you maintain your goal of an educational and developmental sanction?
- How can you make the sanction appropriate for the violation(s)?
- How will you make it clear to the student that her/his choices are always expected to reflect the Colgate Code of Student Conduct - or more precisely the moral, ethical, and legal "high road"?
- How will you balance your concern for the individual with the welfare of the entire academic community?
- How will "non-issues" cloud your decision-making?

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## Sanctioning

### Sanctioning Factors:

- The Nature of the Violation(s)
- Institutional Precedent for the Violations(s)
- Previous Disciplinary History of the Student
- Other Mitigating or Aggravating Factors
- Balancing Active and Inactive Sanctions
  
- College Risk/Policy Adherence v other factors

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## Appeals

- 1. 7 days to Director of Student Rights and Responsibilities after notification of decision
- 2. Appeals may be based only on:
  - a. Procedural error
  - b. Decision reached on substantial information
  - c. New information that was not available at time of hearing
  - d. Sanction is too severe/insufficient
- 3. After receiving the appeal, the Appeals Board may
  - a. Deny the appeal
  - b. Accept the appeal and take appropriate action which may include asking the hearing body to reconvene
- 4. What is the role of the board in an appeal?

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## Criminal Process

- Two completely separate processes
- College process
  - Quick, limited ability to compel evidence, low standard of proof, limited sanctions
- Criminal process
  - Slow, broad ability to compel evidence, high standard of proof, serious sentences
  - Evidence gathered in college process may be admissible in criminal case

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## Advice from a past board members

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- A conduct board considers what is best for the individual.
- A conduct board considers what is best for the institution.
- A conduct board understands there are individual and cultural differences in how students will behave when under stress and/or are feeling threatened, emotional, wronged, etc.
- Substance abuse is not an excuse. (nor is mental health, previous trauma, others?)
- Not knowing is not an excuse.
- Almost all of the innocent will say they did not do it. Some significant fraction of the responsible will say they did not do it..

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