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COLLEGE *of*
CHARLESTON

Adjudicating Alleged
Sexual Misconduct under
the Student Sexual
Misconduct Policy

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Introduction

Sexual and interpersonal violence are some of the most egregious violations of our policies and adjudicating these matters requires great care and deliberation. This training, along with the other training you have completed, will give you the tools you need to act as adjudicators on these issues.



Conflict of Interest or Bias

Adjudicators must be:

- ✓ Fair
- ✓ Thorough
- ✓ Detail Oriented
- ✓ Impartial

Adjudicators must not have a conflict of interest or bias:

- X For or against complainants or respondents generally
- X For or an individual complainant or respondent

— Are you the Right Adjudicator?

Potential bias

Adjudicators are expected to recuse themselves from any case where they may have a bias or the appearance of bias. Examples of bias can include, but are not limited to:

- A relationship with the parties (or their advisors)
- Academic, voluntary, or professional work expressing views that could impact the hearing
- Personal beliefs that could impact your judgement

— Confidentiality

As adjudicators in a case, you will have access to extremely sensitive information. As such, you are expected to safeguard the privacy of information shared in our conduct process and keep it confidential. Under no circumstances should you:

- Discuss the case with those without a legitimate need to know
- Leave copies of the Investigative Report unattended
- Share the Investigative Report or other evidence





Policy, Policy, Policy

The most crucial element of any conduct hearing is understanding our policy and applying it consistently, accurately, and fairly.

Each investigative report will start with the provisions of the policy that were potentially violated. Read these provisions carefully. Each element of a specific policy violation must be met to make a finding of responsibility. The report will also include the entire policy as an appendix.

Applicable Policy

As you may have heard, in the summer of 2020 the College adopted the *Interim Title IX Sexual Harassment Policy and Grievance Procedure* in response to new federal regulations. This policy differs from the Student Sexual Misconduct Policy in several key ways including:

- Narrowing jurisdiction;
- Differing definitions of hostile environment sexual harassment; and
- Significant additionally procedural requirements for the conduct process and hearing

This policy will be covered in greater depth in the Title IX Adjudicator training.

The applicable policy that controls in a conduct process is ALWAYS included in the Report and you must ensure you apply the correct policy

— **The Standard Of Proof**



Under our policy, the College's standard of proof is preponderance of the evidence. Note that this is different from the standard of proof in the criminal context. Here, you are looking to see if it is "more likely than not" that the Respondent violated the policy.

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Presumption of Innocence

Under our policy, the Respondent is presumed innocent unless, and until, it is established by a preponderance of evidence that the policy has been violated.

Moreover, the Complainant and Respondent have the right to not participate in our process or provide information. You may not make any negative inferences from their silence such as "an innocent person would refute these allegations."

The Hearing File

Adjudicators will be provided with a hearing file that contains:

- The Complaint and Statement (in the Investigative Report)
- The Investigative Report
- The Charge Letter
- Any additional documents that parties have asked you consider





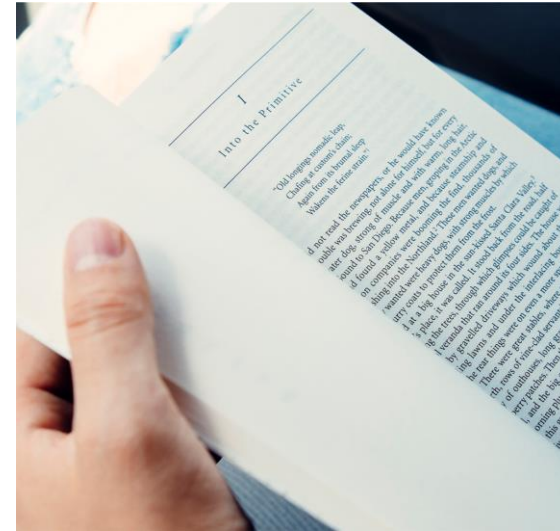
The Complaint and Statement

The Complaint will contain the name of the Complainant and Respondent and the kind of misconduct alleged to have occurred. The Complainant may also name witnesses on this form. You are not restricted to those witnesses and may call others during the hearing you believe have relevant information. You may also choose NOT to call witnesses named on the Complaint under some circumstances.

The Statement will contain, in the Complainant's own words, a narrative of the Complainant's account about what occurred.

The Investigative Report

The Investigative Report acts as a summary of the investigation and is comprised of several sections. The report will detail the parties involved, their relationship to each other, applicable policy provisions, names of witnesses contacted and interviewed, and a summary of the information gathered.



The Investigative Report

The Investigative Report sections include:

Background information

Summary of investigation

Information on interim measures

Requested remedy from the Complainant

Interview summaries with annotations from the parties

Appendices including applicable policy, witness list, and exhibit list

Witness interview summaries



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How to Read the Investigative Report

The Investigative Report is organized to be easy to read and interpret and help you understand the policy, issues and information received from parties as well as witnesses. When reading the Investigative Report, keep the following questions in mind:

Is there sufficient evidence to meet the standard for **EACH** element of the alleged policy violation?

What are the disputed issues between the parties?

What questions do you have for the parties or witnesses?

Does any party or witness seem less credible?

— Assessing Credibility

Assessing the credibility of parties and witnesses is crucial. The Investigative Report will note where parties may have contradicted themselves, offer information about possible motives to be untruthful, and other relevant information as to credibility.

When assessing credibility ask yourself:

- Does this account of events make sense?
- Can this account be corroborated by the evidence?
- Do they have a motive to lie?
- Does anyone's account change in critical ways between their interviews with the Office of Equal Opportunity Programs (EOP) and the hearing?

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Demeanor and Assessing Credibility

The Investigative Report and EOP's interview summaries can include descriptions of demeanor. You can also assess party's demeanor if they appear in person for the hearing. However, avoid the temptation to make judgments based on someone's demeanor alone. The investigation and adjudication process can often be very stressful and emotional for both the Complainant and Respondent, and everyone has a different stress response. Some parties may be tearful, others stoic and reserved. Assess credibility based upon facts not solely upon how you feel a person "should" act in similar circumstances.



– Calling Witnesses

You can call any witness that you think has **relevant** information. If the witness has already been interviewed by EOP, ask yourself if they can provide any new information. Often witnesses meet with EOP closer in time to the events in question and may have better recall when speaking with EOP. If you do call a witness who has met with EOP, know their interview summary well and note if there are any inconsistencies with their testimony during the hearing. If there are, ask them to explain that inconsistency.





— Appropriate Questioning

Keep in mind, by the time an issue has gone to the hearing stage, the parties have given thorough accounts to investigators and often find recounting the incident stressful or traumatic. Therefore, you should try to avoid asking questions already answered by the Investigative Report or asking parties to repeat accounts. (i.e. Let's start from the beginning. Tell me about what happened.).

Only ask questions relevant to the charges that go to the heart of the alleged policy violation. You may ask difficult questions provided they are relevant.

— Questions Submitted by the Parties

The Complainant and Respondent may submit questions for each other and for witnesses through the hearing panel. You may decline to ask questions if you deem them irrelevant. Irrelevant questions are those that are not designed to elicit information that tends to make a consequential fact at issue more or less probable.

Also be aware of abusive questions, those are usually not relevant and should not be allowed. For example, "isn't it true you're a liar who can't be trusted?" Is unlikely to elicit a useful response. You may re-frame a question, if possible, to get to the heart of the question while removing any potentially abusive language. For example, "are you being truthful today? Have you been truthful throughout the investigation" or something similar.

Tips for Questioning

Open

Open-ended questions typically elicit more information than close-ended questions

Avoid

Avoid leading questions

Avoid

Avoid accusatory questions, for example "why didn't you" instead of "can you tell me why you did that?"

Use

Use medical terms for clarification, this is particularly the case if a party is using slang terms for acts or body parts. Ask them to clarify exactly what they mean.

Use

Use similar respectful language for all parties, if you call the Complainant "Ms." or "Mr." extend that same courtesy to the Respondent and vice versa.

– Questioning and Prior Sexual History

The Complainant and Respondent's unrelated sexual history is not on trial, and you should avoid questions on this point. *However*, it is an appropriate line of questioning in situations in which their sexual history is relevant. For example: if the Respondent states that the assault never occurred and the allegation is an attempt by the Complainant to disguise a consensual affair they've been having from the Complainant's boyfriend/girlfriend, then whether they had a prior sexual relationship is relevant. Note the Complainant's and Respondent's sexual history with one another is likely relevant information.

In contrast, asking questions, or allowing questions, about someone's sexual history to support an argument that, for example, that a sexually promiscuous person is more likely to have consented or assault someone, is not permissible.

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– Three Questions

In sexual assault cases, apply a 3-question rubric:

1. Force (or threats)
2. Incapacitation
3. Consent

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Force and Threats

If you find there is sufficient evidence the sexual contact or intercourse was the result of force, or threats, then the analysis is over and there is a policy violation.

Student Sexual Misconduct Policy 2.8

"Consent obtained through fraud or force, whether that force is physical or through threats, intimidation, or coercion, is not regarded as effective consent.

– **Physical Force**

Our policy defines force as, no matter how slight, "any intentional physical impact upon another, use of physical restraint, or the presence of a weapon."

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Sexually Based Threats

Our policy defines threats as "an expression of intention to inflict injury, harm, or damage."
Examples of sexually based threats can include:

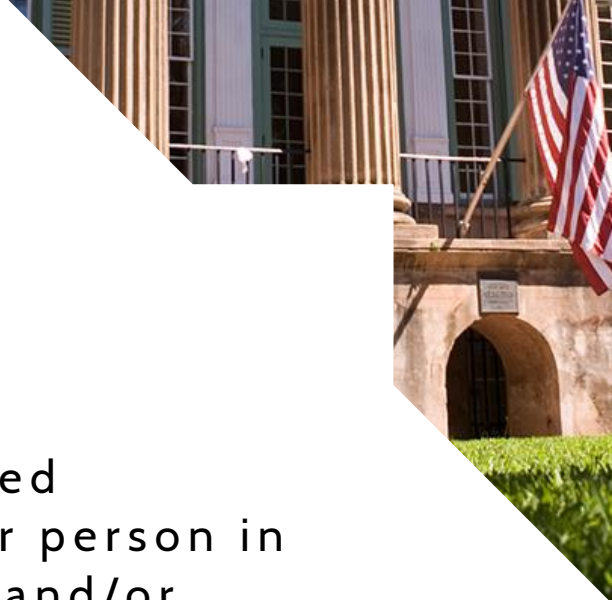
"If you don't have sex with me, I will harm someone close to you,"

"If you don't have sex with me, I will tell people you raped me,"

"If you don't have sex with me I will fail you."

– **Sexually Based Intimidation**

Our policy defines sexually based intimidation as "placing another person in reasonable fear of bodily harm and/or emotional distress through the use of threatening words, repeated and/or severe aggressive behavior, or other conduct (without displaying a weapon or subjecting another person to physical attack).



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Coercion

Our policy defines coercion as "the use of explicit or implicit force, threats, unusual pressure, or intimidation to make somebody do something against their will." Ex. "I'll kill myself if you don't..."

Factors to consider when evaluation coercion include: power differentials; was the Complainant making choices under duress?; did the Respondent place undue pressure or cajole the Complainant into acquiescing?

Incapacitation

Is there evidence sufficient to find that the Complainant was incapacitated AND that a reasonable person in the Respondent's shoes should have known? If so, don't dwell on a consent-based inquiry. Even if the Complainant verbally consented, she/he cannot validly consent if she/he is incapacitated.

Student Sexual Misconduct Policy 2.10

"Incapacitation-shall mean a state where someone cannot make informed, rational judgments and decisions 'because they lack the capacity to give knowing consent (e.g., to understand the "who, what, when, where, why or how of their sexual interaction")'"



— **Two-Part Test for Incapacitation**

Remember for incapacitation you are examining two elements, and **BOTH** must be shown by a preponderance of the evidence:

1. The Complainant was incapacitated; AND
2. The Respondent either knew OR "reasonably should have known"

Incapacitation and Alcohol

According to our policy, "where alcohol is involved, incapacitation is defined with respect to how the alcohol consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make fully informed judgments. Indicators of incapacitation include, but are not limited to, the following: a person who is passed out, experiencing blackouts, disoriented to their surroundings, or asleep or in and out of sleep."





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The Other "I" Words and Alcohol

Incapacitation should not be confused with under the influence, impairment, intoxication, or inebriation. For example, one becomes under the influence as soon as alcohol is consumed.

Incapacitation is a state beyond mere drunkenness or intoxication. Incapacitation is defined by how the person's decision-making capacity, awareness of consequences, and ability to make fully formed judgments has been impacted by alcohol.

Factors Influencing Alcohol's Effects

Body weight,
height, and size

Tolerance for
alcohol and other
drugs

Amount, pace, and
type of alcohol or
other drugs
consumed

Amount of food
intake prior to
consumption

Propensity for
blacking-out

Genetics

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Incapacitation not Involving Substances

Most of our cases involving incapacitation arguments involve substances. However, incapacitation can also be due to:

- Being asleep
- Disability
- Injury

— Consent

If you find no credible evidence of force, threats, or incapacitation that the Respondent was, or should have been aware of, move to asking if was there consent.

What specific words (or actions) by the Complainant reasonably indicated to the Respondent that he/she had consent for EACH of the specific sexual acts that took place. Remember that under our policy, it is the responsibility of the party initiating sexual activity to ensure they have consent. If there is evidence of words or actions that are reasonable indicators of consent, there is no violation.



— Consent Defined

The Student Sexual Misconduct Policy and Interim Title IX Policy define consent as "the presence of explicit voluntary and knowing verbal consent or overt action clearly expressing consent. Such signals of consent must be mutual and ongoing. Silence, in and of itself, does not convey consent."

Recall also, that under our policies, consent "can be given by words or actions, as long as those words or actions create mutually understandable clear permission regarding willingness to engaging in (and the conditions of) sexual activity." Please also be aware that, in South Carolina, those under the age of 16 cannot consent.

Evaluate consent in the full context of the interaction. For example, if the Complainant touched the Respondent's genitals and the Respondent reciprocated that touch. Even absent the Complainant verbally stating "you may touch my genitals" does the totality of the circumstances indicate consent?

— Sexual Harassment

Sexual harassment can be verbal or non-verbal. Examples of verbal sexual harassment include unwelcome sexual advances or requests for sexual favors, sexual innuendo, suggestive comments, jokes of a sexual nature, sexual propositions or threats, slurs, and repeated unwelcome requests for social engagement among other behaviors.

Non-verbal harassment can include displaying suggestive objects or pictures, leering, whistling, obscene gestures, written or graphic material (including digital communications).



— Sexual Harassment

Under our policy, the test for a violation is unwelcome conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's access or an educational benefit or an individual's employment at the College;
2. Submission to or rejection of such conduct by an individual is used as the basis for academic decisions or decisions concerning educational benefits or employment decisions affecting such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or other educational benefit or creating an intimidating, hostile, or offensive working, learning or living environment."

— **Stalking**

Our policy defines stalking as "engaging in a course of conduct directed at a specific person that would cause a reasonable person to i. fear for their safety or the safety of others; or ii. suffer substantial emotional distress."



— Sexual Exploitation



Our policy defines sexual exploitation as "taking sexual advantage of another for one's own benefit or to the benefit or advantage of anyone other than the person being exploited." Some examples of sexual exploitation include:

- A student runs a blog/Tumblr/Instagram account of "upskirt" photos of other students taken without consent
- "Revenge porn"
- Prostituting another person
- Voyeurism
- Intentionally exposing a partner to an STI/STD without their knowledge
- Non-consensual taping of sexual activities
- Sharing "nudes" without consent

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Dating/Relationship Violence

A violation of our policy will be found where there has been violence committed by a person:

"i. Who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and

ii. Where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons's involved in the relationship."

— **Domestic Violence**

Domestic violence is substantially similar to dating/relationship violence but the distinction chiefly lies in the relationship of the parties. Our policy defines domestic violence as

"felony or misdemeanor crimes of violence committed by a current or former spouse of the complainant, by a person with whom the complainant shares a child in common, by a person who is cohabiting with or has cohabited with the complainant as a spouse, by a person similarly situated to a spouse of the complainant..."

— Interpersonal Violence

Regardless of whether the issue at hand is an instance of dating/relationship or domestic violence, there are key things to keep in mind when adjudicating these cases:

- Men and women can be the aggressors
- Interpersonal violence occurs in heterosexual and homosexual relationships
- Many victims of interpersonal violence leave and reconcile with their abusers many times before leaving for good. A pattern of returning to the Respondent does not, in and of itself, constitute proof that there was no abuse.



— **Day of the Hearing**

- The parties will be tense and holding emotions in
- Their advisors are often nervous
- Friends and families may be near by
- The parties will likely read from prepared statements
- Have your Investigative Report and consider tabbing relevant sections
- The Student Handbook and/or Relevant Policies will be available



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Hearing Structure

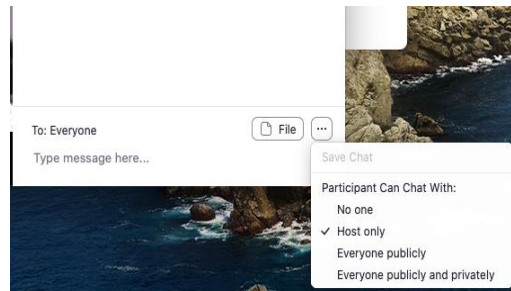
- Introductions
- Pre-hearing remarks
- Warning of Contempt/Confidentiality
- Challenge of Impartiality
- Statement of Charges
- Opening Statements
- Case Presentations
- Summations



Technology

Parties and witnesses may join the hearing using Zoom. Therefore, its important you are knowledgeable about the platform

- Sign into Zoom and ensure all system updates have been done and that both video and audio are working prior to starting the hearing
- To begin a meeting, sign in and open the home screen. Then select "new meeting" or "join" and enter the meeting ID
- Once the host has started the meeting, you can see who has arrived from the "participants" tab, you can also invite attendees to join from this tab
- You can end the meeting by selecting "end"
- Please mute the microphones of those not actively speaking
- The host should also lock the meeting room from the "security" tab once everyone has joined
- Consider restricting parties from chatting privately with one another if you will have multiple parties and/or witnesses in one meeting. You can do so through the chat tab in the meeting like so:



Technology Tips



If a party or witness is participating via Zoom, discuss with them how they should rejoin the meeting, and who they should contact, if they lose their connection



Make sure parties are invited to a meeting and you have the meeting ID numbers and passwords available for easy reference if someone is having trouble logging into the meeting



Consider having IT on standby to address any technology issues that may arise



For more information on Zoom, you can access the platform's training portal at <https://learning.zoom.us/learn>

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Findings and Sanctioning

If you have found a policy violation you must also determine the appropriate sanction for the Respondent. In cases of sexual misconduct, you are required to consider suspension or expulsion, but you are not required impose these sanctions. You must make a finding as to each charge.

The sanctions you impose should be fair and proportional to the violation(s) and the circumstances. Matters you may consider when imposing sanctions include:

- Respondent's record of past violations;
- Respondent's acknowledgement of wrongdoing and a commitment to conform future behavior to our policies;
- Whether alcohol or controlled substances were involved;
- Whether violence was involved; and
- If the Respondent poses a continuing risk to the Complainant and/or the College community



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Thank You

If you have any questions, or want more information, please don't hesitate to contact:

The Office of Equal Opportunity Programs
843-953-5754
Eop@cofc.edu

