



CALIFORNIA CASE LAW WEBINAR

BRETT A. SOKOLOW, J.D.



Brett Sokolow, J.D.

President, ATIXA

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



FACTS:

- John Doe and Jane Roe – both students at UCSD. While laying in Roe’s bed, Doe touched Roe’s vagina and attempted to digitally penetrate her.
- Roe reported the conduct and UCSD initiated an investigation.
- Roe stated she was not opposed to sexual activity with Doe, but did not find the interaction pleasurable at that time. Roe also stated “that she physically wanted to have sex with [Doe] but mentally wouldn’t.”
- UCSD’s investigators interviewed the parties (no other witnesses or evidence) and prepared a report, recommending a finding of responsibility.
- At the live hearing, UCSD allowed both parties to question each other through the Panel Chair. A university representative also questioned both parties. Panel found Doe responsible.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



- Hearing Panel initially suspended Doe for one quarter and mandated internal sexual misconduct training and a counseling assessment.
- Doe appealed finding to the Dean, who affirmed decision. The Dean increased the sanction to one year (forcing Doe to reapply), placed Doe on non-academic probation, and mandated additional ethics training.
- Doe appealed again, to the Council of Provosts, who also affirmed the finding. The Council increased the sanction to suspension for one year and one quarter.
- Doe challenged the outcome in state court in CA.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



HOLDING:

- The court held that Doe was denied a fair hearing and the finding was not supported by substantial evidence. The court ordered UCSD's findings and sanctions to be set aside.
 - Procedural deficiencies with UCSD's hearing and appeal
 - Hearing did not afford Doe a meaningful opportunity to confront Roe.
 - Of 32 submitted questions, the Panel Chair asked Roe nine. The chair allowed Roe to give insubstantial/unresponsive answers to at least two of the questions with no opportunity for Doe to follow-up.
- Court observed that Doe was unable to confront **ALL** the evidence against him.
 - Investigation report was not included as part of hearing, but Panel clearly relied on the investigation report, per administrative record.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



- Court found several other features of UCSD's hearing and appeal process problematic:
 - Investigation report provided substantial evidence and testimony, but Doe was unable to confront this evidence, partially because the investigator did not attend the hearing.
 - Investigation report included a responsibility determination, despite the fact that it was the hearing panel's job to make a determination of responsibility.
 - Doe invoked his right against self-incrimination, which appeared to inappropriately damage his credibility with the panel.
 - Doe's sanction was increased at each appeal without any rationale.
 - Appearance that Doe was being retaliated against for appealing.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



TAKEAWAYS:

- Cross-examination is important; err on side of permitting relevant questions; provide rationale for any rejected questions.
- Hearing chairs must be *well trained* to ensure all parties have a meaningful opportunity to confront all the evidence and testimony upon which a determination will rely.
- The panel, and particularly the chair, must understand what evidence is permissible for consideration and what should be excluded.
- Investigators are still the star witnesses. They and their reports must be available at a hearing for questioning by the hearing panel and the parties.
- Determinations and sanctions, including at the appeal level, must be supported by substantial evidence and clearly articulated.
- Investigators should not usurp decisions-maker's independent role.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



FACTS:

- Regents of UCSD appealed the Superior Court's 2015 decision (see preceding slides) granting John Doe's petition to reverse and remove UCSD's finding that Doe was responsible for sexual misconduct.
- UCSD's appeal emphasized three points:
 1. UCSD's decision to find Doe responsible was based on substantial evidence.
 2. The hearing did not deny Doe any due process.
 3. The sanctioning process was not an abuse of discretion.
- The Appeals Court agreed with UCSD's appeal and reversed the Superior Court's decision, reinstating the finding and sanctions against Doe.
- The California Supreme Court declined to review the Appeals Court's decision.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



HOLDING:

- The court found that UCSD's decision was based on substantial evidence.
 - “[The administrative agency’s] findings come before us ‘with a strong presumption as to their correctness and regularity.’ We do not substitute our own judgment if the [agency’s] decision ‘is one which could have been made by reasonable people.’”
 - Jane Roe’s statements and the findings in the investigation report constituted substantial evidence that the policy was violated.
- The court found that UCSD did not abuse its discretion in sanctioning.
 - Lower Court incorrectly assumed hearing panel’s recommended sanctions were actual sanctions Doe received. Hearing merely made recommendation. Dean who sanctioned Doe followed sanctioning guidelines recommended for the infraction.
 - Record does not indicate that slight increase in sanction during the appeal was an abuse of discretion.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



- The court found that limiting Doe's attorney's participation or Doe's ability to cross-examine Roe did not deprive him of due process.
 - Although Doe's counsel could not participate in the hearing, he meaningfully participated in every other part of the investigation, including outside communication with the investigator and other administrators.
- Doe had opportunity to question Roe through submission of written questions and when asked at hearing if he had further questions for Roe.
 - The chair's decision to rephrase or decline certain questions submitted by Doe was based on reasonable rationale.
- The court found that UCSD did not withhold evidence from Doe.
 - Doe had opportunity to call investigator as witness but chose not to.
 - Because hearing panel's decision relied on information in investigation report, not the notes from the investigator's interviews, Doe was not entitled to those notes.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



- The court found that UCSD appropriately considered Doe's 5th amendment invocation.
 - Doe did not remain silent in the hearing. He denied allegation.
 - When asked follow-up questions, he didn't answer, citing 5th amdt.
- When asked about consent in the context of his relationship with Roe, he declined to answer.
- Fifth Amendment protection does not apply because Doe offered some testimony and refused to answer follow-up questions or provide supporting evidence upon request.
- "The [hearing] panel properly could consider his refusal to provide more information as bearing on John's credibility."

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



TAKEAWAYS:

- Although it ruled in favor of UCSD...
 - The court was concerned about the limited cross-examination available to Doe given the reliance on credibility, indicating – yet again - the importance of a meaningful opportunity to question the other party.
 - The court was concerned that Doe did not have access to the investigator's complete interview notes with Jane. When providing information to the parties, make sure to provide all relevant information so that the parties can have a meaningful opportunity to review and respond to the evidence obtained.
- The court felt the increased sanction after the appeal was appropriate due to Doe's "lack of compunction" and the way he berated Jane in a post-hearing document; remorse/lack thereof may be considered for sanctioning purposes.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



FACTS:

- John Doe was accused of sexual misconduct and conduct code violations stemming from two sexual encounters in the same evening with Jane Roe, the reporting party, and Students 1 & 2, Doe's high school friends.
- Doe and Student 1 engaged in a consensual sexual encounter with Roe. Doe and Roe engaged in a separate consensual sexual activity shortly thereafter. Students 1 & 2 were also in the room during this encounter and roughly penetrated Roe with their fingers and penises while she was engaged in consensual sexual activity with Doe.
- One Student slapped Roe hard on the buttocks. Several seconds later she was again slapped hard on the buttocks. Roe began to cry, and the men disengaged from sexual activity and quickly left the room.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



- USC found that Doe violated nine sections of the student conduct code. A USC Appeals Panel overturned all but two of the violations:
 - he “encouraged or permitted” others to slap Roe on the buttocks during sexual activity, and he endangered Roe by leaving her alone in the bedroom.
- Superior Court affirmed that there was sufficient evidence that Doe encouraged or permitted non-consensual behavior, but determined there was insufficient evidence that Doe endangered Roe.
- Doe appealed, claiming he was denied a fair hearing by USC and that there was insufficient evidence to support the Appeals Panel’s finding that Doe encouraged or permitted non-consensual behavior.
- USC cross-appealed that there was sufficient evidence to support the Appeals Panel’s finding that Doe endangered Roe.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



HOLDING:

- Appeals Court held that USC did **not** afford a fair hearing to Doe.
 - The two violations did not align with investigative theory communicated by USC. The investigation focused on non-consensual sexual acts, but John was found responsible for conduct code violations for which he did not prepare.
- Court ruled USC's procedures were insufficient despite fact that initial notice of charges included violations of the conduct code which John was eventually found to have violated.
 - The court reasoned that simply listing the charge was not sufficient to provide notice and a fair opportunity to defend.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



TAKEAWAYS:

- The responding party must be informed of the **factual basis** for the specific charges. “If notice is to be meaningful, it must include information about the basis of the accusation.”
- Access to and opportunity to review information must be provided equitably. The responding party did not have meaningful access to the evidence upon which USC intended to rely – Roe was provided copies of investigators’ “notes relating to every witness....” Doe, however, “did not receive any information regarding the other witnesses’ testimony.”
- Policy language matters: USC’s policy mandates that students “confront and prevent the misconduct, notify an appropriate university official..., or remove [themselves] from the situation.” The “or” negated Doe’s obligation to report the misconduct and, in the court’s opinion, absolved him of any violation of this section because he left the room during the sexual activity.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



FACTS:

- John Doe, a student at Pomona College, and Jane Roe met up at a “day party.” Roe claimed that after the party, Doe told her he needed to use the restroom but instead “tricked” her into accompanying him to his room.
- According to Roe, once in his room, she panicked. Despite her reported resistance and lack of consent, Doe digitally penetrated her vagina.
- According to Doe, Roe removed her shirt voluntarily and moved Doe’s hand to her vaginal area, which Doe interpreted as consent for sexual touching and digital penetration.
- After Roe left Doe’s room, she met Friend A and Friend B at the college’s dining area and reported to them that she “felt pressured” by Doe and he had “fingered her” without her consent.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



- During Pomona's investigation, Roe produced a text message exchange with Friend A from around the time of the interaction with Doe, in which Friend A wrote, "Are you sure you want to do this with him?" and Roe replied, "Yea I'll be fine but let's meet at the coup at 5:45" to which Friend A responded, "Hahaaha [cry-laughing emoticon] Fuck that boy."
- Although Roe did not attend the hearing, Pomona found Doe responsible for sexual misconduct and implemented a two-semester suspension. Despite Doe's appeal, the sanction was upheld.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



HOLDING:

- The Superior Court assessed Doe's assertion that the external adjudicator demonstrated bias by "incorporating the investigation report by reference and reaching illogical conclusions about who removed Roe's clothing."
- Doe also stated that the proceedings were unfair because verbatim witness statements were not created by the investigator, which resulted in unreliable evidence.
- The court was unmoved by both of these contentions, stating that "bias [is] never implied and must be established by clear averments." Doe's disagreement with the conclusions reached does not establish bias.
- Lack of verbatim witness interviews also did not prove problematic, as the investigator maintained notes from witness interviews, which were provided to both parties in advance of the hearing.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



- However, Judge Strobel did ultimately order Pomona College to dismiss the finding of responsibility as well as Doe's two-semester suspension.
- Citing *Doe v. UCSD* (5 Cal.App.5th 1055 (2016)), Judge Strobel determined that the disciplinary process unlawfully denied Doe a fair hearing and pointed to Pomona's failure to allow Doe the opportunity to question Roe, either directly or indirectly, at the hearing.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



TAKEAWAYS:

- When a situation turns on credibility, which many do, make sure that the parties have a meaningful opportunity to ask questions of the other, either directly or indirectly.
 - Failure to provide such an opportunity significantly disadvantages the party unable to pose questions and, depending on your jurisdiction, may constitute an unfair hearing.
- When one party does not attend the hearing, make every effort possible to ensure that the other party is able to pose questions through some means, even if through video conference.
- Issues of cross examination are, for now, quite jurisdiction-specific, but cross-examination and hearing rights are clearly now applicable to CA suspension/expulsion cases for public AND private institutions.

DOE V. USCB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



FACTS:

- Jane Roe attended a party at John Doe's apartment, which he shared with his girlfriend (Witness 1) and roommate (Witness 2). Roe had been drinking and wasn't feeling well. Witness 1 directed her to lay down on a mattress close to the couch she and Witness 2 were sitting on.
- Doe arrived home from another party, where he had been drinking. Doe lay down, fully clothed, on the same mattress.
- Roe reported to UCSB that Doe roughly touched and sucked her breasts and digitally penetrated her vaginally and anally. At first, Roe was unable to say anything and felt paralyzed. She eventually said, "whoever's behind me is hurting me badly."
- Roe reported that Witness 1 said Roe must be having a bad dream but when she saw Roe's buttocks were half-bare, she screamed and told everyone to get out of the apartment.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- Roe was medically examined by the Santa Barbara County Sexual Assault Response Team (SART). The report indicated that Roe had bruising and a laceration in her anal area. The report also indicated that Roe was on a prescription antidepressant.
- Three months later, Doe was placed on interim suspension.
- Eight months later, Doe was notified by UCSB that a hearing would take place in 12 days. The hearing was subsequently delayed for a month to allow the committee time to consult with counsel.
- Doe's objection to the delay was denied. For the hearing, Roe submitted a list of witnesses and two pages from the SART report – a cover page and a page that listed her current medications.
- The committee found Doe responsible for sexual assault and suspended him for eight semesters.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



HOLDING:

- The court found Doe was denied a fair opportunity to cross-examine witnesses.
 - Doe was denied access to the full SART report. A detective testified about one line in the report but failed to answer Doe’s further questions about the remaining content of the report.
- The court cited the best evidence rule (now “secondary evidence” rule in CA) which precludes oral testimony to prove the content of a writing.
- The court also cited the rule of completeness, which should have allowed Doe to see the entire SART report.
 - Without the opportunity to inspect the report, Doe was unable to determine whether valuable information was not disclosed.
 - Doe was unable to properly cross-examine and properly prepare his defense.
 - The court found the Committee relied on the report to corroborate Roe’s testimony that she was penetrated with fingers and/or a penis.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- The court also found the Committee inconsistently applied policies and procedures and selectively applied formal rules of evidence.
 - Doe was unable to secure an expert to testify about the side effects of mixing antidepressants with alcohol because he was only provided the name of the medication Roe was taking the night before the hearing.
 - Doe's mother attempted to testify about the side effects but her testimony was excluded.
 - The Committee allowed the detective's testimony about the SART report, which indicated that the physical injuries were consistent with the allegations, even though she was not an expert, did not conduct the examination, and did not write the SART report.
 - The Committee also allowed UCSB's general counsel to actively participate in the hearing and make formal evidentiary objections but denied Doe's counsel the opportunity to actively participate in the hearing.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



TAKEAWAYS:

- Inequities in access to evidence, cross-examination, and ability to introduce counterevidence corrupt the hearing and its outcomes.
- California courts are increasingly citing formal rules of evidence and expecting decision-makers to apply these rules equally.
- When documented evidence exists, decision-makers should rely on that evidence, rather than relevant testimony about that evidence.
- An entire document should be produced if and where any portion of that document is relied upon in the hearing.
- Parties are entitled to sufficient time to access an expert or allow non-expert testimony where the testimony relates to a viable theory.
- General counsels should not actively participate in a hearing where parties' counsel is denied the opportunity to actively participate.

JOHN DOE V. CLAREMONT MCKENNA COLLEGE

CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



FACTS:

- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Roe, a student from Scripps College.
- He was suspended for one year.
- The decision was made as a result of an “Investigation Findings and Review” committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee “meeting” did not allow for questioning by the Committee or the parties.
- Jane Roe did not attend the Committee meeting.
- The Investigator also did not ask Roe the questions Doe requested the investigator ask.

JOHN DOE V. CLAREMONT MCKENNA COLLEGE

CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



- Doe petitioned in state court for a writ of administrative mandate to set aside the decision.
- Trial court denied the petition. Appellate court reversed.
- Court approvingly cited 6th Circuit's Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
 - *“We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself. ”*

JOHN DOE V. CLAREMONT MCKENNA COLLEGE

CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



HOLDING:

- Court recognized: a college is not a court, cannot compel people to appear at hearing, the burden of added procedures on the college, and the possibility of intimidating/retraumatizing the reporting party.
 - *“In light of these concerns we emphasize...that the school’s obligation in a case turning on the complaining witness’s credibility is to “provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.”*
 - *“While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in Regents, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant.”*

JOHN DOE V. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



TAKEAWAYS:

- Different courts have approached the issue of cross examination differently. The judge's reference to a 6th Circuit Court of Appeal ruling involving a public school is notable because that ruling is not binding on California state courts and CMC is a private institution.
- While live, in-person cross-examination is not required by this decision, this ruling continues the pattern of judges who have underlined the importance of ensuring a) the ability of one party to question the other party and b) the ability of the decisionmaker to assess the parties' credibility.
- This ruling is just one example of why it's so important to keep up to date on the current state of caselaw in your particular jurisdiction.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



FACTS:

- Jane Roe and John Doe attended a “paint” party, which involved throwing paint at each other. After the party, Doe accompanied Roe back to her apartment. According to Roe, Doe then engaged in nonconsensual vaginal and anal assault. The next day, Roe visited a rape treatment center and also spoke with LAPD officers.
- After Roe reported the interaction to USC on April 30, 2014, Dr. Kegan Allee, who was both the investigator and adjudicator in the matter, began investigating. In May, an outside attorney replaced Dr. Allee as the investigator. Although the attorney interviewed several critical witnesses, when the matter was transferred back to Dr. Allee on June 5, Dr. Allee did not re-interview these individuals.
- In August, Dr. Allee determined that Doe knew or should have known that Roe was too drunk to consent to the sexual interaction. Dr. Allee noted that although Roe could not remember much of the evening, Roe had reconstructed the events after speaking with three witnesses.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



- All 3 witnesses had been interviewed by the outside attorney, but not by Dr. Allee.
- In her determination, Dr. Allee assessed the credibility of other witnesses and determined they were not “sufficiently reliable.”
- Doe was expelled from USC. Although he appealed on several bases, the university denied his appeal.
- Doe petitioned for a writ of mandamus to set aside his expulsion, asserting procedural and substantive challenges. Doe asserted that USC’s findings were not supported by substantial evidence and the investigation was unfair. Doe stated that USC did not provide him with a fair hearing or an independent adjudicator.
- He pointed primarily to the facts that he was unable to cross-examine witnesses, had to rely on Dr. Allee, and Dr. Allee did not interview the three central witnesses, but instead relied on interview summaries by the outside investigator.
- The trial court denied his petition.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



HOLDING:

- The court of appeals reversed the trial court's decision.
- Because Dr. Allee's investigative report and adjudication turned on witness credibility, Dr. Allee should have interviewed all critical witnesses either in person or by videoconference to let her to observe the interviewees. This was especially important here where there were significant inconsistencies and a dispute over whether the substances observed in Roe's apartment after the sexual encounter were blood or paint from the party.
- Additionally, USC did not comply with its own procedures to conduct a fair and thorough investigation by failing to request that Jane provide her clothes from the incident and her consent to release her medical records from the rape treatment center.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



TAKEAWAYS:

- When there are investigations that turn on credibility (as many do), the finder of fact needs to be able to observe the witnesses' demeanor to appropriately render determinations of credibility. Relying on another individual's report(s) is simply insufficient, according to the court.
- When you are aware that evidence exists or may exist, ask for it! The court made it quite clear that even though Roe may have refused consent to disclose her medical records from the rape treatment center, the university was still obligated to request it.
- While there is no obligation for a party to provide it, your institution may come under significant scrutiny for failing to follow up on potentially probative evidence.
- Asking for all relevant evidence (such as clothes or medical reports that have been discussed during the interviews) is vital to ensuring that you are conducting a thorough investigation.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



FACTS:

- John Doe, a USC student-athlete, was accused of non-consensual sexual acts stemming from an incident with Jane Roe, a senior athletic trainer.
- Roe had been drinking in anticipation of attending a party. After Doe and Roe texted about his plans, she went to his apartment to smoke marijuana. When she arrived, they went out to get some food. Roe reported that when they returned to Doe's apartment, Doe pushed himself on her, held her hand down, pulled her hair, put his hand over her mouth, and engaged in intercourse. Doe reported it was consensual and cited her moans and facial expressions as evidence that that she was actively participating and enjoying the interaction.
- In an investigative interview, Doe described a previous sexual encounter with Roe during which Doe "fingered" Roe. Roe did not initially remember the encounter and became visibly upset when a Title IX investigator shared that Doe reported digitally penetrating her.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



- USC began an investigation into Roe's original allegations, and Doe was subsequently notified that the additional encounter he mentioned during the interview was added to the investigation.
- Doe suggested that Roe fabricated the allegation so she wouldn't be fired as an athletic trainer.
 - The investigator did not pursue this theory. The investigator also disregarded testimony that Roe had been disciplined for having sex with a football player and had signed an agreement not to do so in the future.
 - The investigator did not inquire about the athletics consensual relationships policy, nor determine if Roe had previously signed an agreement.
- Doe was found responsible for non-consensual sexual acts stemming from the initial reported incident, and was found not responsible for the additional incident disclosed during interviews. His expulsion was upheld by an internal appeal.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



HOLDING:

- The superior court upheld USC's action and Doe filed an appeal. While the appeal was pending, Doe was expelled from USC for unrelated conduct code violations.
- The appeals court vacated USC's findings against Doe on several grounds:
 - If credibility is a central issue and potential sanctions are severe, fundamental fairness requires a hearing, with cross-examination, before a neutral adjudicator with power to independently judge credibility and find facts.
 - Fundamental fairness dictates the factfinder cannot be a single individual with divided and inconsistent roles.
 - The investigator should fully explore theories that may shine light on credibility of a witness and not solely rely on the parties' lists to identify witnesses.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



TAKEAWAYS:

- USC's system placed a "single individual in the overlapping and inconsistent roles of investigator, prosecutor, fact-finder, and sentence." The investigator here had "unfettered discretion" to determine what evidence to consider, which witnesses to interview, and what determination and sanction to impose.
- Consider the levels of checks and balances present in your process and make sure there is a decision-maker who is at least one step removed from the investigator.
- Do not solely rely on the parties for witnesses. A thorough investigation will likely result in additional witnesses which should be interviewed to ensure a complete review of all available evidence.
- The investigator should fully explore all theories that may shine light on the credibility of the parties.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



FACTS:

- John Doe, a student at USC, reportedly engaged in sexual intercourse with Jane Roe while she was incapacitated by alcohol.
- USC investigated, gathering information from over a dozen witnesses, text messages, and video footage taken over the course of the evening.
- Roe consumed the equivalent of four shots of vodka, a cup of wine, and additional alcohol. Six witnesses described Roe as “obviously intoxicated,” “really drunk” and “swaying,” “stumbling and slurring her words” as the evening wore on. Seven other witnesses, however, reported that she did not seem visibly impaired, at least no more so than many of the other attendees.
- Doe stated that during the evening, Roe suggested they go to a nearby bedroom, where they had sex. Doe described her as “functional, coherent [and] aware the whole time.”

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



- According to Doe, Roe stood on her knees on the bed to remove her skinny jeans, agreed to Doe's suggestion to get a condom, and was an "active participant."
- Various witnesses saw Doe and Roe in the bedroom.
 - One friend asked if Roe was okay - Roe replied yes.
 - Another expressed concern to Doe about Roe's intoxication but did not attempt to intervene in or stop the sexual activity.
- Afterward, a friend told Roe they should leave. Doe and the friend had different accounts of how easily Roe was able to dress herself.
- Surveillance video of Roe and a friend leaving the apartment showed that it took the women almost nine minutes (as opposed to the expected one minute) to reach the elevator. Roe was swaying and stumbling in the hallway and at one point she fell and lay motionless for about a minute.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



- Doe was provided with a written notice pursuant to USC policy. The investigator concluded that Roe lacked the capacity to consent, that Doe knew or should have known of her incapacity, and under a preponderance of evidence standard, engaged in unwelcome sexual conduct that ranged from fondling to vaginal penetration.
- The investigator recommended that Doe be expelled. Doe appealed on several grounds. The Appeals Panel could not conduct a *de novo* review or make new findings of fact, and policy required that it must defer to the findings if there was substantial evidence to support them.
- The sanction may be altered only if it was unsupported by the findings or was grossly disproportionate. The Appeals Panel recommended that the sanction be changed to a three-year suspension and no-contact order.
- The Vice Provost of Student Affairs ultimately upheld the expulsion.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



HOLDING:

- The court held that USC's process has fundamental flaws and denied Doe's right to a fundamentally fair hearing. USC's single investigator model improperly permitted a single investigator to act in overlapping and conflicting capacities as both prosecutor and decision-maker in imposing discipline.
- The limited authority of the Appeals Panel's review exacerbated the harm to fundamental fairness, because the panel could not independently make credibility determinations or new factual findings. The panel could essentially never set aside an investigator's findings without a procedural error.
- The court held that Doe was entitled to cross-examine Roe and all witnesses before a neutral adjudicator (who was not the investigator) with the authority to make findings of credibility and fact.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



TAKEAWAYS:

- California institutions, both private and public, need to abandon the single-investigator-adjudicator model.
- The responding party has a right to cross-examine the reporting party and witnesses, either directly or through an indirect mechanism.
- The credibility determination and findings of fact must be made by a neutral decisionmaker who is not the investigator.
- Doe also made arguments of insufficient evidence and gender bias, but the court declined to reach those arguments because of its holding on due process. It remains to be seen, therefore, whether those arguments could ultimately succeed on a different set of procedural facts.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



FACTS:

- John Doe was a student at Cal Poly. His roommate was alleged to have sexually assaulted Jane Roe in their on-campus apartment while she was incapacitated by alcohol.
- Doe served as a witness in the investigation. When Doe described a telephone conversation that he had with Roe's friend, the investigator heard Doe say, "I assume she found out about me and my roommate having sex with her."
- Doe explained that it was a misstatement and that he was "very tired." Doe denied having sex with Roe.
- Doe became a responding party, and the final investigation report including a finding that Doe was responsible for sexual misconduct.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



- The investigator referenced Doe's inculpatory statement in the first interview as "most compelling," and that his statement of being "tired" was not credible.
- Doe appealed, arguing that the investigation findings were not supported by the evidence and that his ADHD should have been considered.
- Initially, Doe received disciplinary probation with a suspension held in abeyance. Both Doe and Roe appealed. The appeals officer denied Doe's appeal, granted Roe's appeal, and expelled Doe from all CSU campuses.
- While Doe's petition to California Superior Court was pending, the California Court of Appeals decided *Doe v. Allee*.
- After *Allee*, CSU vacated the findings and discipline and ordered a new investigation consistent with the guidance from *Allee*.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



HOLDING:

- The court reviewed the merits of Doe's due process arguments. Applying the procedural requirements set forth in *Doe v. Regents, Claremont McKenna*, and *Allee*, the court concluded that the process provided to Doe should have included an opportunity for the decision-maker to assess Roe's credibility by an in-person appearance or via technology.
- Under *Allee*, the investigator of the original allegations could not serve as the neutral adjudicator in Doe's process, because that individual needed to serve as a witness to Doe's verbal statements in the first interview.
- A fair adjudication of the allegations against Doe inherently turned on the credibility determinations of Roe, Doe, Doe's roommate, and the original investigator.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



TAKEAWAYS:

- The investigator in this case was in the fairly unique position of being the primary witness to Doe's alleged confession. Even so, adherence to the essential elements of a civil rights investigation would have cured many of CSU's procedural errors. Careful attention to impartiality and conflict is imperative.
- A recorded interview or more than one investigator may have helped definitively establish whether Doe did, in fact, make the inculpatory statement.
- When *new* allegations emerge during an interview, the investigator must immediately confer with the TIXC regarding the investigator's role in the current investigation and the potential new charge(s) and investigation.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



FACTS:

- An individual reported that John Doe, a CSUF student, was drugging womens' drinks at parties and having sex with them. Two women, Roe 1 and Roe 2, moved forward with the formal process. Roe 2 was not an enrolled student.
- The interim TIXC commenced an investigation and concluded in her report, which she did not provide to Doe, that he engaged in non-consensual sexual intercourse with both Roes. Both women were determined to have been incapacitated (Roe 1 due to her age).
- The original NOI included reference to sexual assault and sexual harassment involving the two female students on the pertinent dates. A Notice of Investigation Outcome (NOIO) was written, informing him that the allegations were substantiated; however, the NOIO was inadvertently never sent.
- Doe was found responsible for sexual misconduct violations and notified that the sanctions under consideration were suspension or expulsion. The notification made no mention of appeal rights.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



- At the sanctions hearing, Doe was told that because he did not appeal findings, they were not up for review. He then appealed findings, but the appeal was untimely.
- Doe was notified that he would be expelled. His appeal of the sanction based on prejudicial errors and new evidence was denied.
- Chancellor's office discovered that the NOIO had not been sent and directed CSUF to issue a new NOIO, provide a copy of the report, the names of all complainants and witnesses, and instructed that Doe's "untimely" appeal be "reopened."
- CSUF reopened the investigation of Roe 2's report. The appeal re: Roe 1's matter was denied - Doe had acknowledged in appeal hearing that Roe 1 was a minor at the time of intercourse.
- The original investigator completed an amended investigation report, which affirmed the original findings for both incidents. Doe received an NOIO, including information that he could appeal. He appealed the amended findings and was denied. He was expelled again after a sanction hearing; he did not appeal the sanction.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



HOLDING:

- The court observed that CSUF's sexual misconduct policy did not articulate appropriate jurisdiction to adjudicate Roe 2's report because an "unenrolled student" is not a "student" pursuant to the policy.
- CSUF failed to notify Doe that the report pertaining to Roe 1 found incapacitation due to her age. The original allegation related to incapacitation due to intoxication. The investigator found Doe responsible based on Roe's age. Doe did not receive notice of the allegation relating to Roe's age until after the initial sanctions decision.
- Applying *Doe v. Allee*, CSUF must provide an opportunity for cross-examination and a neutral decision-maker to assess the credibility of the reporting party and witnesses. *Allee* dictates that the investigator cannot also serve as the fact-finder.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



TAKEAWAYS:

- The court advanced the same proposition as OCR's proposed TIX regulations: the notice of allegations and investigation must include enough facts and details to properly put the responding party on notice prior to an interview. The notice in this matter should have referenced the possibility of incapacity due to age and intoxication.
- The TIXC must ensure major steps (including required notices) are successfully completed.
- Policy must contemplate and define the parameters of jurisdiction. Ensure policy is drafted so that your institution may take discretionary jurisdiction whenever the institution's interests would be best served.
- Current investigatory models which allow the TIXC to serve as an investigator, or which allow a single investigator to render determinations must be significantly overhauled.

QUESTIONS?



CONTACT INFORMATION

RYAN J. MCDAVIS, M.P.A., M.S.L.

Executive Director, ATIXA

ryan.mcdavis@atixa.org