



LIVE @ DISTANCE: Restorative Justice in Higher Education

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I Am Paige. I Am Scott. We Are Lawyers!



Training Goals

Understand	Understand what restorative justice is and its application in Title IX informal resolution
Understand	Understand the components of a restorative conference and the elements of a resolution agreement
Apply	Apply restorative justice process in a hypothetical case study
Assess	Assess and explore best practices for setting up and staffing RJ programs

misnomer

(mĭs-nō' mĕr) *NOUN*
A WRONG NAME.



informal

 [in-fawr-muhl] [SHOW IPA](#)  

See synonyms for: [informal](#) / [informally](#) on [Thesaurus.com](#)

adjective

- 1 without formality or ceremony; casual:
an informal visit.
- 2 not according to the prescribed, official, or customary way or manner; irregular;
unofficial:
informal proceedings.

<https://wordinfo.info/results/misnomer>

Perspective

- Investigation/adjudication is a system designed by lawyers (to serve lawyers?)
- Deep, universal dissatisfaction with the investigation/adjudication model
- No appetite for return to mishmash of informal practices
- Is there an alternative to the investigation/adjudication model which is **rigorous** and **educational** role of colleges and universities?
- Much discussion about restorative justice but little understanding of how to implement a thoughtful program

What are your reasons for your interest in exploring RJ?



What is Restorative Justice?

“Restorative justice is profoundly relational and emphasizes bringing together everyone affected by wrong doing to address needs and responsibilities and to heal the harm to relationships and community, to the degree possible.”

-Fania Davis

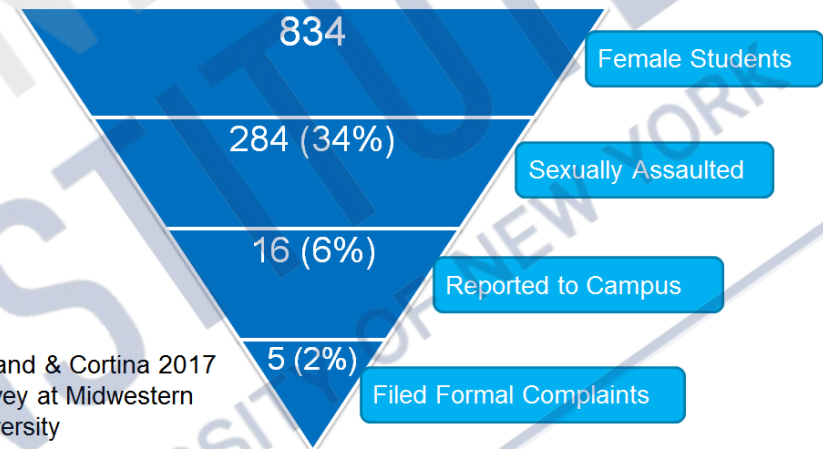
- Five “Rs” of Restorative Justice: Relationships, Respect, Responsibility, Repair, and Reintegration



Title IX: The Need For More Options

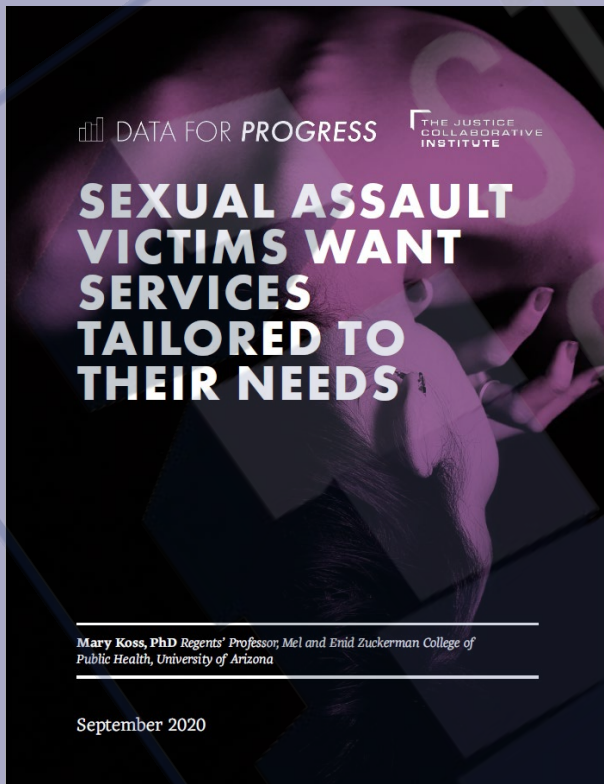
Traditional investigative/adjudicative processes can often be incompatible with needs of victims/survivors:

- Long and intrusive investigation and decision process
- Potential for re-traumatization in a variety of different forms
- Confrontation and Cross-examination
- Reluctance to expose offender to severe disciplinary sanctions
- Concerns about confidentiality, maintaining personal and social relationships, etc.



Holland & Cortina 2017
Survey at Midwestern
University

How Can RJ Minimize/Mitigate Trauma?



- “By offering victim-centered methods of accountability, like restorative justice, communities can both decrease reliance on policing and create a system where victims’ voices are placed center stage, where they can feel comfortable asking for what they need without fear of negative repercussions.”
- “Most victims, if asked, want a process that both prevents future harms and meets their needs, such as retaining control and protecting themselves from more trauma.”

<https://theappeal.org/the-lab/report/sexual-assault-victims-want-services-tailored-to-their-needs/>

How a Radical New Approach to Dealing With Sexual Assaults May Heal Trauma

A philosophy called restorative justice allows survivors to have their pain heard, and is an opportunity for the person who caused the harm to be accountable for their actions.



BY GINNY GRAVES Aug 6, 2021

“When an assailant is charged with a crime, the first thing they’re told is to deny guilt — which is exactly the opposite of what many survivors want,” says Ackerman, a rape survivor herself. “They want acknowledgment that a crime was committed. Many want an apology. They want to tell their own stories and ask questions about why the assault happened. And they want to be reassured that the person who caused the harm understands the suffering they caused — and that they will never commit a sexual assault again.”

Focus: Repairing Harm

Cornerstone of RJ is the recognition of harm—
not the violation of a rule.

Traditional Conduct Process:

What rule was violated?

Is there enough evidence to
support a finding of
responsibility?

How should we punish the
offender?

Did we follow our policy?

Restorative Justice Process:

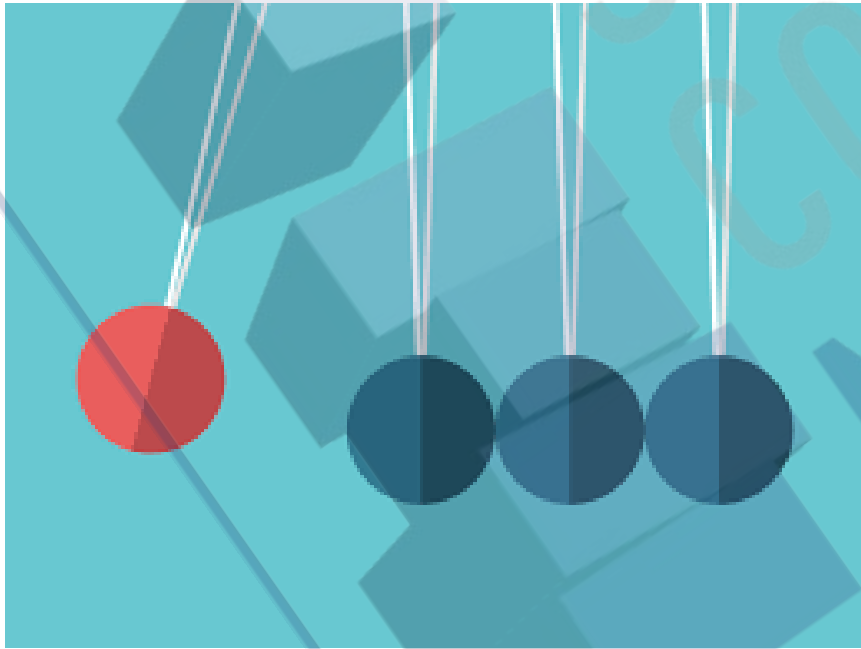
What is the harm?

Who is responsible?

What can they do to repair the
harm?

How can we rebuild trust?

Title IX Compliance Requirements



OCR Guidance: July 2021 Q&A



XIV. Informal Resolution

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.¹⁹² A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.¹⁹³

Compliance: Big Picture

1. “Formal Complaint” (if “SH”)
2. Written notice, including rights and options
3. **Voluntary** and **timely** process
4. No conflict of interest
5. Facilitated by appropriately trained personnel
6. Know limits



Title IX Informal Resolution: Express Limitations

- ✓ May **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**
- ✓ May **not** require **as a condition** of
 - enrollment or continuing enrollment,
 - or employment or continuing employment,
 - or enjoyment of any other right,**waiver** of the right to an investigation and adjudication of formal complaints of sexual harassment
- ✓ May **not** require the parties to participate in an informal resolution process
- ✓ May **not** offer an informal resolution process **unless** a formal **complaint is filed****

Questions?



THE STATE UNIVERSITY OF NEW YORK

Fundamental RJ Process

Pre-Conference

- Referral
- Outreach
- Assessment
- Preparation

- **Voluntary meeting between offender and harmed party**
- **Trained Facilitators**

Conference

- What happened?
- What was the harm?
- How can we repair harm and rebuild trust?

Post-Conference

- Agreement monitoring
- Assessment
- Mentoring



Practical Considerations

1

Facilitator's Role & Qualifications

- Conflict of Interest/Bias
- Soft Skills

2

Prompt Resolutions

3

Documentation

- Written Notice for Title IX Claims
- Notice of Rights & Options
- Consent/Participation Agreements
- Final Resolution Agreement

4

Voluntary Participation

- Red Flags
- Initial Assessment of IR Requests

Big Picture: What is a Facilitator's Role?

- **Intake**
 - Conduct intake in consultation with Title IX official
 - Provide required notices
 - Develop agreed-upon process
- **Pre-Conference**
 - Prepare parties and other participants
 - Identify and mitigate concerns (if possible)
- **Conference**
 - Facilitate storytelling by all participants
 - Identify and list harms
 - Brainstorm solutions
- **Post-Conference**
 - Prepare resolution agreement with input from parties
 - Monitor Compliance

Avoiding Conflict of Interest & Bias

Conflict of Interest:

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

Title IX Requirements

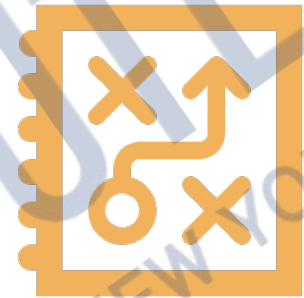
- **Conflict of Interest/Bias:** Facilitator may “not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”
- **Training:** “[T]he definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, . . . informal resolution processes, as applicable, and *how to serve impartially*, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .”

[34 C.F.R. § 106.45(b)(1)(iii)]

Conflict of Interest?

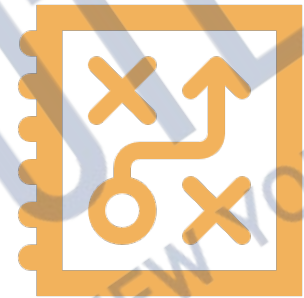
College has a well-regarded Office of Victim Services. Staff Counselor receives complaint and provides support and resources to Complainant. Complainant requests Counselor to facilitate informal resolution between Complainant and Respondent.

- May the Counselor serve as facilitator?



Conflict of Interest?

After assessing internal capacity, College determines that instructors in the School of Social Work have appropriate skills and training to facilitate conflict resolution. One of the instructors has published a paper on the use of trauma-informed practices in resolving sex misconduct complaints, including statistics of incident prevalence which show that male students are the primary perpetrators of sexual violence.



- May the instructor serve as a facilitator for a Title IX informal resolution?

Reflect



What “soft skills” should we look for in RJ Facilitators?

Facilitation Skills & Mindsets

Compiled by Carrie Landrum, University of Michigan, March 2019

Skills to Begin With

Build Rapport – Get to know people first and foremost. Find commonalities.

Build Trust – Clarify confidentiality, be as transparent as possible, be sincere and non-judgmental.

Practice Multipartiality¹ – Be equitably partial to all participants. Respect and care for each person.

Hold Space – Be present with the person's experience. Use silence. Be an affirming presence.

The “OARS” of Motivational Interviewing²

Open-Ended Questions – Ask questions that cannot be answered by a yes or no.

Affirmations – Express appreciation and respect, validate as helpful.

Reflections – Instead of asking a question, reflect back what you heard in a statement.

Summaries – Summarize what you heard, ask if you understood accurately what was shared.

The LARA Method³

Listen – Actively listen to what is said and unsaid. Notice terminology and body language.

Affirm or Acknowledge – Verbally acknowledge what was shared, affirm where possible.

Respond – Respond in an honest, respectful, and helpful manner to what was surfaced.

Add – Add relevant additional information in a respectful and empathic way.

Additional Skills

Use Silence – Practice the use of silence to honor what's shared, and to offer space for reflection.

Offer Choice – Pose options and honor agency whenever possible; ask before adding thoughts.

Convey Empathy – Understand, empathize with, and be sensitive to others' experiences, thoughts.

Practice Mirroring – Use the terms they use and match their energy as helpful, mirror body posture.

Breathe Mindfully – Breathing deeply and mindfully can calm a facilitator as well as participants.



“Reasonably Prompt”

- Title IX Regs require “**reasonably prompt time frames**” for conclusion of the grievance process, including informal resolution processes.
 - Temporary delay or limited extension of time frames for **good cause** with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
 - Timeliness is key for all effective IR, not just sexual harassment
- What is a presumptively appropriate time from start to finish?
- How do we monitor and ensure prompt responses?



How Do We Document Our Process?

Notice to the parties regarding the allegations

Signed, written consent to participate

Final Resolution Agreement (signed by all parties)

Other Documentation as Appropriate (E.g., mutual confidentiality agreements, no contact orders)

How Do We Ensure Voluntary Participation?

- **Educate** the participants about restorative justice options
- Provide **Notice of Rights & Options**, such as:
 - ✓ Whether the process will involve a face-to-face interaction
 - ✓ Whether and when the process can be terminated
 - ✓ Whether information shared can be used in subsequent conduct matters
 - ✓ How IR/RJ differs from formal investigation and adjudication
- Participation contingent on successful completion of preparatory (**pre-conference**) meetings
- Require parties to sign a **Participation Agreement** memorializing initial assessment process
- Frequent check-ins and monitoring

Reflect

- ❖ What kinds of questions might we ask a complainant to assess whether they are participating voluntarily?
- ❖ What kinds of questions might we ask a respondent?
- ❖ What “red flags” might make a case incompatible for restorative justice?



Informal Resolution is Not for All Cases.

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (*e.g.*, use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

Remember: Traditional investigative/adjudicative processes *must* be used when an employee is accused of sexually harassing a student.

How do we assess “Nature of Alleged Offense”?

- Behaviors (what kind of behavior, multiple times, escalating over time, etc.)
- Cognitive and developmental understanding (age, disability, etc.)
- Motivations/Intention (premeditated, “attempt” violation, etc.)
- Tactics (persistence, incapacitation, violence, etc.)

Initial Assessment Hypo 1

Title IX Coordinator receives formal complaint alleging sexual harassment.

Complaint alleges that Respondent Student repeatedly “catcalls” and uses sexually suggestive innuendo in comments to Complainant, repeatedly and publicly comments on Complainant’s body and attractiveness, and sends Complainant unwelcome and inappropriate messages via social media.

- What questions will you ask Complainant in the initial intake meeting to assess appropriateness for IR referral?
- Do you have any concerns re offering IR under these facts?
- How would your assessment change if you have records that this is not the first time Respondent has engaged in the alleged misconduct?

Initial Assessment Hypo 2

Title IX Coordinator receives a report from a third party re concerns of dating violence between Complainant and Respondent.

Title IX Coordinator schedules initial outreach meeting with Complainant to offer support and resources. During the meeting TIXC observes bruising on Complainant's chest and neck and a slight limp.

Complainant states they will not participate in a formal complaint process and requests informal resolution options. Respondent is also willing to participate in informal process.

- Do you have any concerns re offering IR under these facts?
- If you determine IR is inappropriate, how will you proceed?

Initial Assessment Hypo 3

Title IX Coordinator has walk-in appointment with Complainant, who describes alleged conduct constituting sexual assault under the Title IX policy. The alleged incident occurred after a long night of drinking, which rendered Complainant incapacitated. Prior to the incident, Complainant had a close relationship with Respondent, and Complainant expresses disappointment and anger that Respondent “took advantage” of their trusting relationship.

Complainant is seeking support and resources and expresses reluctance to file a formal complaint. Complainant states that they “do not want to ruin” Respondent’s life but wants them to understand what they did was wrong and prevent it from happening again.

- Do you have a blanket policy barring IR in cases of alleged sexual assault? If so, should we reassess?
- Do you have any concerns re offering IR/RJ under these facts?
- Assuming that Complainant is interested in IR/RJ, how will you assess Respondent’s potential for participation?

Questions?



Fundamental RJ Process

Pre-Conference

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- Assessment
- Preparation

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Conference

- What happened?
- What was the harm?
- How can we repair harm and rebuild trust?

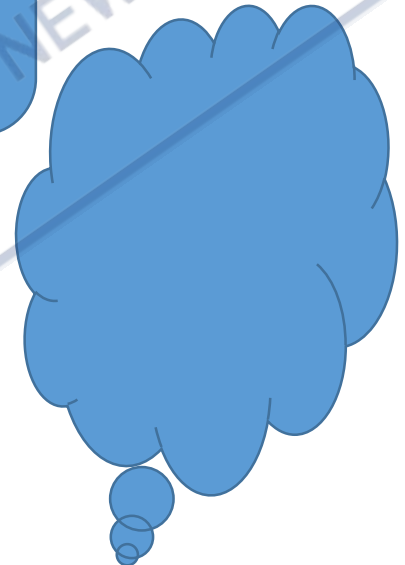
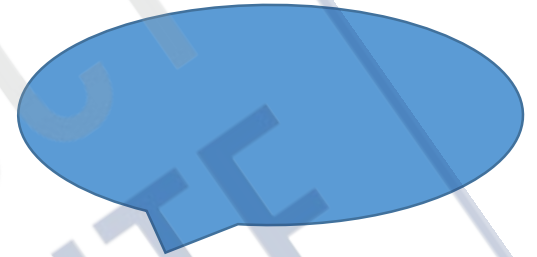
Post-Conference

- Agreement monitoring
- Assessment
- Mentoring

Understanding “Harm”

Discussion Questions:

- How is “harm” different from a policy “violation”?
- What kinds of harms may a victim/survivor describe?
- Are there types of harms that are not typically memorialized in a Code of Conduct/Title IX policy?



Hypothetical

- Complainant and Respondent are sophomores at Great University.
- They meet at a party hosted by Respondent's (on-campus) fraternity house. Over the next several weeks, Complainant and Respondent become good friends.
- Respondent repeatedly asks Complainant to go out "on dates" and says he wants to take the relationship to the next level. Complainant likes Respondent a lot but is not sure whether she is ready for a serious relationship yet.

Hypothetical (cont.)

- Respondent invites Complainant to a Mardi Gras-themed party at his fraternity house.
- Complainant arrives at the party with several friends. Complainant leaves her things (including her keys) in another fraternity member's bedroom, which is locked for safekeeping. Complainant and Respondent eventually meet up and begin talking and dancing.
- Complainant and Respondent each drink several cups of the fraternity's homemade "Hurricane" punch. Later in the evening, Complainant notices that she is beginning to feel tired and dizzy and decides its time to call it a night.
- Complainant looks around but cannot find her friends. She calls and texts her friends and realizes they have already left. Complainant does not know the fraternity member whose room her belongings were left in.

Hypothetical (cont.)

- Respondent observes it is late and invites Complainant to sleep in his room until the morning. Complainant agrees but tells Respondent she is very tired and doesn't want "any funny business."
- Complainant and Respondent get into Respondent's bed. Respondent initially pulls Complainant in to "cuddle," but shortly thereafter begins touching Complainant's breasts and hips. Complainant pushes Respondent's hands away. Respondent then attempts to kiss Complainant's mouth, but she turns away.
- Respondent then grabs Complainant's hand and places it over his groin, moving Complainant's hand in a sexual manner. Respondent then requests Complainant to perform oral sex, which causes Complainant to begin crying.
- Startled, Respondent ceases activity, and the parties are silent. When Respondent wakes up, Complainant is gone.
- Complainant blocks Respondent on her phone and social media and avoids him on campus. Respondent believes the encounter was a "bad hook up," and doesn't think about the encounter until he receives a notice of complaint from the University's Title IX Office 6 weeks later. . . .

Initial Assessment

- Does the alleged conduct fall within Title IX policy jurisdiction? If not, does the alleged conduct fall within a Code of Conduct/Discrimination/Sexual Misconduct Policy?
- What are the potential policy violations?
- What questions will you ask Complainant in initial interview to understand goals and present options?



Pre-Conference: Generally

Preparation of Parties and any other participants

- Support persons/advocates
- Institutional representatives

Rapport/trust building with facilitator

Hear the story

- Allow parties to share with limited interruption, if possible. If necessary, use open-ended questions to encourage sharing.
- Open-ended questions
- Listen for red flags that would make the case inappropriate for conference (denial of responsibility, issues of mental health, willingness to engage)
- Help parties practice responding to what they will be asked during the conference

Engage support person/advocate to gain additional insight of the impact/harm of the misconduct

Pre-Conference: Preparatory Questions for Harmed Party

How would you ordinarily prepare for an initial investigative interview with C?

How should your approach change in a restorative process, where the goal is to identify and address harm?

What's different/missing from this list compared to a traditional investigative interview outline?

What sort of responses would be "red flags" for terminating an IR/RJ process?



What happened?



What impact did this incident have on you?



What was the hardest thing about this?



If the person responsible were here, what would you like to say to them or ask them?



Is there anything that could be done right now that would help meet your needs?



Are there things in this community that permit/encourage incidents like this to happen that you would like to see addressed?



What would you like to see Respondent do to repair the harm they have caused you?



What concerns do you have about participating in this process?

Hypo – Add'l Facts from Initial Meeting with Complainant

- Complainant states that she experiences anxiety and fear whenever she sees Respondent and goes out of her way to avoid him on campus.
- Complainant says she has nightmares about the incident and “just wants to feel safe.”
- Complainant is sad to have lost her friendship with Respondent, which has also made other mutual friendships awkward and distant. Complainant is also angry at Respondent’s behavior and lack of respect.
- Complainant does not want to participate in a hearing or be cross-examined. Complainant also wants Respondent to “learn a lesson,” but is not sure she wants to “be the reason Respondent gets expelled.”

- **Will you offer IR/RJ for this case?**
- **What factors weigh in favor/against?**
- **What facts suggest this case might be appropriate for restorative justice (as opposed to other forms of IR)?**

- Desires of the complainant/harmed party
- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

Pre-Conference: Preparatory Questions for Offending Party

How would you ordinarily prepare for an initial investigative interview with R?

How should your approach change in a restorative process, where the goal is to encourage R to accept responsibility?

What's different/missing from this list compared to a traditional investigative interview outline?

What sort of responses would be "red flags" for terminating an IR/RJ process?

- What happened from your perspective?
- At the time of the incident, what were you thinking about?
- What have you thought about since the incident?
- What impact has this incident had on you?
- Who else has been impacted? How?
- What do you think you could have done differently?
- What can you do to make things right?
- How can we rebuild trust?
- Are there things in this community that permit/encourage incidents like this to happen that you would like to see addressed?
- What concerns do you have about participating in this process?

“I started talking with him, I think about what I wanted and that **I didn't want a formal proceeding**. I didn't want a verdict handed down. I wanted something to come out of it. I wanted it to be discussion and I wanted to decide with Sameer what the results were going to be . . . It was a **powerful feeling** to feel that I was not just crazy. And that he also knew that it had been wrong.”

“I was **terrified** that I assaulted her. I was terrified that I'd hurt her in this way. I was terrified of myself. Because if this was true and I did assault her then what did that make me?

I was terrified of being found out. I was terrified of being sent to jail. I was terrified of all the consequences that come with sexual assault and rape and I didn't have anybody that I was like who I could tell because like . . . how do I say, 'Hi. I think I think I assaulted and raped somebody, but I'm not entirely sure.'”

21 || A SURVIVOR AND HER PERPETRATOR FIND JUSTICE

12/3/2018



<http://www.reckonings.show/episodes/21>

Sameer met Anwen freshman year. He was into her, and they started seeing each other. Then one night, after a fraternity party, Sameer convinced Anwen to come home with him — which is when he coerced her into sexual activity. Their senior year, Anwen invited Sameer into a process of restorative justice.

Pre-Conferencing: Identifying & Preparing Support Persons/Advocates

❖ Contrast:

- Who often serves as an “advisor” in a traditional conduct process/mediation? What does that advisor’s participation look like under regs/policy?
- What characteristics would you want in a support person/advocate role for a restorative justice conference?

❖ Prepare:

- What are the parties’ needs for support in the process?
- Are there components of the story that the support person is well-positioned to tell? (e.g., Impact of the conduct on victim? Observations of remorse/responsibility by offender?)
- Has the support person identified particular needs/obligations for resolution?

❖ Consider: Would an institutional representative be appropriate in the conference? Who might be potential participants in this case?



RJ Conference: Goals

For Complainant:

- Create opportunity to share account and impact in trauma-informed way
- Identify and understand the way the misconduct impacted the Complainant in order to meaningfully redress the harm
- Center and address needs to redress harms, including emotional and communal harms

For Respondent:

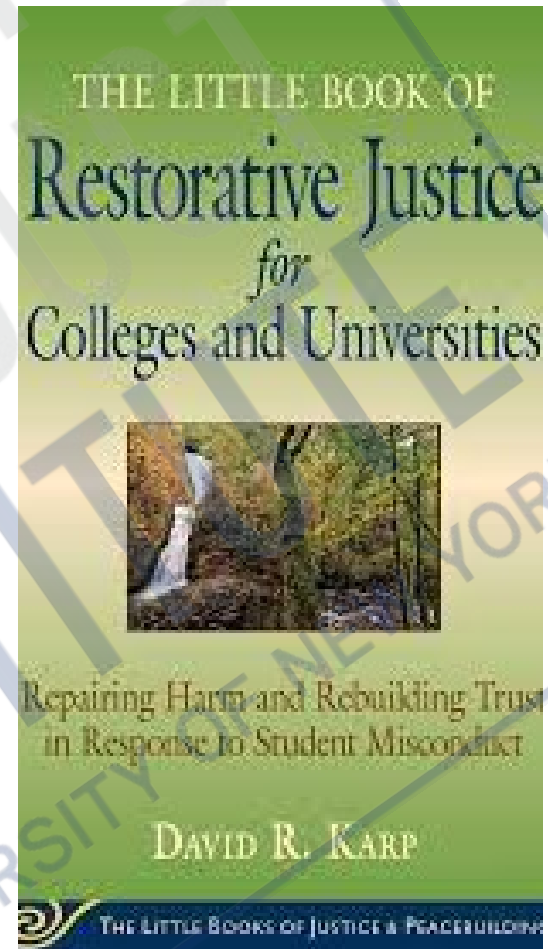
- Create opportunity and incentive for accountability through acceptance of responsibility
- Identify obligations and opportunities to repair harm
- Provide opportunity for understanding, education, and growth

For Institution:

- Ensure Complainant's continued access to EP&A
- Address misconduct in a meaningful way
- Identify opportunities for community/cultural change

Conference: Facilitator's Role

- Facilitate storytelling by all participants (set the stage; consider using a script)
- Monitor and respond to indications that process is unduly traumatic or becomes involuntary (often with assistance of co-facilitator)
- Identify and list harms
- Brainstorm solutions
- Outline resolution agreement with input from parties



Conference: The Significance of “Storytelling”

Back to our Hypo:

- What details do you think **Complainant** will share about the incident that you may not ordinarily capture in a traditional conduct process?
- What details do you think **Respondent** will share about the incident that you may not ordinarily capture in a traditional conduct process?
- What details might a **support person/advocate** share about the incident?



What do we mean by “accepting responsibility”?

- *What was positive/restorative about this statement?*
- *What does accountability look and sound like from Louis C.K.’s perspective?*
- *What was problematic about this statement?*
- *How would you support Louis in reframing his apology?*



How Do we Facilitate “Acceptance of Responsibility”?

“[A]ccountability involves facing up to what one has done. It means encouraging offenders to understand the impact of their behavior—the harms they have done—and urging them to take steps to put things right as much as possible.”

-Howard Zehr

- How does the structure of a RJ conference facilitate accountability versus a traditional I/A?
- What “admissions” or acknowledgements might a Respondent make in the context of a RJ conference that would not come out in a traditional I/A?
- How do we mitigate concerns of admissions?

“Yes, I knew it in my head. Yes. I knew it to myself but admitting it to the person I did it. It's just. Yeah, I mean. I hated myself. I wanted to kill myself. I asked her like hey, like do you want me to kill myself? Do you want me to like turn myself in to the police? Like what do you want? What can I do?

I know I can't fix this but what can I do? I know I can't fix this but what can I do?

And that's when she offered to asked if we could talk more and I said, okay.”

Harms?

- Thoughts?

Needs?

- Thoughts?

Obligations?

- Thoughts?

Complainant

Harmed Party

Disgust/
Disempowerment

Emotional Harm

Acknowledgement/
Engagement

Need

Apology
Writing Exchange
Dialogue

Obligation

Pain/Discomfort
Emotional Trauma

Physical Harm

Understanding/
Treatment

Need

Counseling/
Support Group
Increase awareness of
campus resources

Obligation

Sexual
Objectification

Structural Harm

Education /
Cultural Change

Need

Shared Presentation
Op Ed

Obligation

Targeted Training
Resources/Options for
Safer Experiences at
fraternities

Obligation

Post-Conference: Final Informal Resolution Agreement

Potential elements of final resolution agreement include:

- Procedural Background
- Admission of Responsibility? **
- Sanctions, educational requirements, and other remediation measures
- Confidentiality agreement/limitations
- Consequences for breach

Post-Conference: Monitoring

- Hypo: Respondent becomes non-responsive and does not participate in agreed-to educational activities.
- How do we enforce?



Final Thoughts: RJ Implementation on Your Campus

Preparation/ Adoption

- Decision regarding commitment to adopting and supporting RJ program/practices
- Review current policies, practices, personnel, and resources to determine capacity for integrating RJ
- Develop plan for implementation

Initial Implementation

- Issue revised conduct and other policies
- Provide training for involved personnel and offices, such as Student Affairs, OIE, campus safety, general counsel/compliance
- Implement protocol for screening and referring cases for RJ process for targeted location, conduct, population, etc.
- Assess outcomes, areas for improvement, etc.

Broader Implementation/ Continuous Improvement

- Expand program/practices to address other populations or conduct
- Assess for opportunities to make process more efficient and accessible



Questions?