

I. APPEAL FROM RESPONDENT REGARDING A FINDING OF RESPONSIBILITY FOR NONCONSENSUAL SEXUAL CONTACT

This appeal came about after Doe and Smith, apartment-mates at W&L, brought cross claims of sexual misconduct against one another after a sexual encounter that occurred when both roommates were alone and highly intoxicated. The HSMB found Doe responsible for nonconsensual sexual contact, and Smith not responsible for nonconsensual sexual penetration. The findings were largely based on a credibility assessment of the parties, with Smith being found more credible than Doe, who only had a fragmentary recollection of the events. Doe was suspended for a year.

Doe brought an appeal for procedural error and defect and bias of the investigator and HSMB panel.

a. Background facts of the case:

On the evening of September 7, 2021, Doe and Smith ordered take-out sushi, drank beer and cocktails, and watched a movie during which they both fell asleep on the couch. In the early morning hours of September 8, a disputed incident occurred.

The parties agree that Doe performed oral sex on Smith, though they disagree about who initiated the interaction and whether each man was capable of consenting to it.

Doe alleges that when he was asleep on the couch, he woke up to Smith running his fingers through Doe's hair. Doe opened his eyes to see Smith's exposed, erect penis. Smith lifted Doe's head towards Smith's penis, and Doe performed oral sex on Smith. After an unknown amount of time, Doe became tired, stopped, and fell back asleep on the couch. Doe alleges that he was “blackout drunk” at the time, and thus remembers the incident only in fragments.

Smith, on the other hand, asserts that he woke up to a sensation of “caressing” around his penis. Smith stated that as he was opening his eyes, he saw his underwear was pulled down and saw Doe kneeling between his legs looking up at him. He then saw Doe perform oral sex on him. Smith then jumped up and ran into another room.

¹ The facts from these case samples were taken from published court case opinions and altered for training purposes

The next thing that Doe remembers is Smith waking him up and telling him that he needed to speak with him. Smith told Doe that he was uncomfortable with what had just happened. Doe did not remember what had happened and was unnerved when Smith explained it to him. During the conversation, Doe was still feeling nauseous from the alcohol and vomited multiple times. Doe apologized to Smith, explaining that he did not remember what happened. After Doe sobered up, however, he says that he realized that he had been taken advantage of by Smith, not the other way around.

A couple days after the incident, Doe received a call from his mother, telling him that his aunt was in the hospital. Doe decided to take a leave of absence from W&L to both support his family and seek mental health treatment. Doe did so and returned home to California.

Doe planned to return to school for Fall Term 2022. Because he was concerned that Doe would be in school with him when he returned, Smith filed a Title IX complaint against Doe on April 28, 2022. Doe then received notice of the complaint. The Notice of Investigation described the allegation that Doe “engaged in nonconsensual sexual penetration by having oral intercourse with Smith while he was asleep.”

A week later, Doe filed his own Title IX complaint against Smith, alleging that Smith had engaged in sexual misconduct by initiating oral intercourse with Doe while Doe was incapacitated due to alcohol. The next day, the Title IX Coordinator issued a Notice of Investigation to both men regarding Doe's complaint.

The investigator interviewed Doe three times, Smith twice, and nine other witnesses. She also collected and reviewed documentary evidence including text messages and emails. The investigator shared all evidence collected during the investigation with the parties and the investigation report, to which the parties responded in writing.

The investigator described Smith's account that he was asleep on the couch and felt a sensation as if someone was “caressing” his penis, which he described as feeling similar to a sexual dream. Smith was then in the “process of waking up” and shifted his body and saw that his underwear was pulled down and his erect penis was exposed, with Doe kneeling in front of him. After Smith shifted his body, Doe took Smith's penis with his left hand, put it in his mouth, and began performing oral sex. Smith then ended the encounter by standing up and walking to his bedroom. Overall, the HSMB hearing panel ultimately found Smith's account “credible in its level of detail and specificity.”

As to Smith's incapacitation, the HSMB panel found that Smith “was asleep when the sexual contact began.” In the hearing report form, the HSMB summarized the Sexual

Misconduct Policy, stating that being asleep is a form of incapacitation, and that one cannot consent to sexual contact when they are incapacitated. The HSMB hearing report form stated that the HSMB found “by a preponderance of the evidence standard that Smith was incapacitated and unable to consent to the sexual contact.”

Next, as to whether Smith otherwise consented, the HSMB found insufficient evidence that Smith made any “outward demonstration” indicating that he had “freely chosen to engage in sexual contact.” Specifically, the HSMB found that there was insufficient evidence that Smith had run his hand through Doe's hair—as Doe contended. Moreover, the HSMB determined that even if Smith had done so, that gesture would not have constituted consent.

On the other hand, as to Doe's allegations against Smith, the HSMB found that Smith had not sexually assaulted Doe. Specifically, the HSMB found that Doe demonstrated through his physical actions—specifically grabbing Smith's penis and placing it in his mouth—that Doe initiated the sexual penetration. Though Doe did not dispute that he had performed oral sex on Smith, he argued that he was unable to consent to the act because he was incapacitated due to alcohol. To this, the HSMB found that Doe “may have subjectively experienced an alcohol-induced fragmentary blackout,” but that Doe's actions of initiating and performing the oral sex were inconsistent with him being incapacitated. As to Doe's credibility, the HSMB found that Doe's “inability to provide detail or specificity about the event negatively affected the reliability of the other information he provided.” In sum, the HSMB found that Doe was not unable to consent due to incapacitation.

b. Procedural defect appeal ground:

Doe argues that he received notice that he was being investigated for one violation, but then was found responsible for another. Specifically, Doe received notice in his initial Notice of Investigation letter that he was being investigated for performing oral sex on Smith while Smith was asleep, but then he was found responsible for a different violation: sexual contact of Smith while Smith was asleep. Under the Sexual Misconduct Policy, nonconsensual sexual contact and nonconsensual sexual penetration (which includes oral sex) are separate forms of misconduct. Doe argues that he cannot be found responsible for nonconsensual sexual contact when he did not receive notice of that potential violation.

Doe points out that the policy violation he was on notice of was “having oral intercourse with Smith while he was asleep.” But Doe contends that the HSMB found

that only “caressing” occurred while Smith was asleep, but that the oral sex took place after Smith had woken up.

Doe argues that he “would have changed the emphasis of his defense if he understood the shifting nature of the claim.”

c. Bias:

Doe argues that he was deemed to lack credibility based on his alcohol-induced fragmentary recollection of events. However, Doe alleges that the HSMB considered the evidence that he was “blackout drunk” differently because he is male. Doe alleges that if a female student stated that she had performed nonconsensual oral sex while blackout drunk, the school would not find that her gaps in memory undermined her credibility. He argues that because he is a male alleging incapacitation the panel found him less credible than it has done with female students who could not remember specific details of the alleged assault either at all or at least could not remember details of the alleged events in a linear fashion in similar circumstances. He argues that this shows bias on the part of the HSMB panel members.

As the Appeal Panel—what evidence would you seek (if any) to make your decision? What would be your decision?

II. APPEAL FROM RESPONDENT REGARDING THREE FINDINGS OF RESPONSIBILITY FOR NONCONSENSUAL SEXUAL PENETRATION/CONTACT

During December-February of 2021-2022, John Doe '22 had four formal complaints of sexual misconduct brought against him for misconduct that allegedly occurred between 2018-2021 by four different complainants (referred to in this document as Jane Roe 1 '24, Jane Roe 2 '22, Jane Roe 3 '25, and Jane Roe 4 '22). John Doe brought counterclaims against Jane Roe 1 for nonconsensual sexual penetration and sexual exploitation and Jane Roes 1-4 for harassment and retaliation.

John Doe was found responsible for three of the complaints and not responsible for one. John Doe was dismissed from the University after his first finding of responsibility (Jane Roe 1) with the panel issuing a sanction of dismissal for each case he was found responsible for thereafter. He has appealed the three complaints for which he was

found responsible on the grounds of bias of the hearing panels and investigators and procedural error and defect and new evidence.

John Doe brought counterclaims against Jane Roe 1 for nonconsensual sexual penetration and sexual exploitation and Jane Roes 1-4 for harassment and retaliation. The HSMB found Jane Roes not responsible for all of the counterclaims and John Doe appeals those decisions on the basis of bias on the part of the hearing panels.

a. **Facts of the cases:**

John Doe and Jane Roes 1-4 are all students at W&L. During December-February of John Doe's senior year (2021-2022), each of Jane Roes 1-4 filed formal complaints alleging that John Doe had sexually assaulted them.

i. **Jane Roe 1**

In the early morning hours of December 13, 2021 (Jane Roe was a sophomore and John Doe was a senior), John Doe met Jane Roe 1 at an off-campus fraternity party hosted by his fraternity. They left the party together and returned to Jane Roe's residence in a theme house.

According to John Doe, he was heavily intoxicated when he left the party, and initially did not remember anything until "waking up in someone else's bed without memory of with whom he was in bed, where he was, and that he left and returned to his residence."

Later that morning, Jane Roe 1's roommate sent Jane Roe 1 a text message asking if Jane Roe 1 had "hooked up" with John Doe. Jane Roe 1 responded "yeah but it was so bad lmao." Her roommate asked, "Was he too drunk lol." Jane Roe 1 responded, "No it was just questionably non-consensual at points on my end." Jane Roe 1 texted a different friend about the encounter as well, stating that she "hooked up with this idiot beta man last night. and it turned non-consensual on my end at the end bc it was painful and bad and was going on forever and he didn't use a condom? which i knew but also wtf and i think he finished?" Jane Roe 1 wrote, "i'm okay i'm just mad at myself also for not being more assertive when i was saying stop and i wasn't very loud but i was like literally squirming away."

That day, Jane Roe 1 asked a friend who knew John Doe to find out what John Doe knew about what had happened during their encounter. John Doe told Jane Roe 1's friend that he could only remember having too many drinks and waking up next to a stranger. Jane Roe 1's friend accused John Doe of raping Jane Roe 1, but John Doe

denied the accusation because he said he did not recognize Jane Roe 1's name and did not have any memory of a sexual encounter. The friend returned to Jane Roe 1's dormitory and told her and her friends what John Doe had told him.

On December 27, 2021, Jane Roe 1 brought a formal complaint against John Doe of nonconsensual sexual penetration. She alleged that after meeting John Doe, she had decided to have sex with John Doe and consented to the initial penetration. But she alleged that during the sexual encounter, she had verbally withdrawn her consent, but he had not stopped after she had told him to stop.

Jane Roe 1 recounted that she and John Doe went to her residence on campus together. There, John Doe, Jane Roe 1, and Jane Roe 1's roommate talked in the living room. After Jane Roe 1's roommate left the living room, John Doe kissed Jane Roe 1 and she led John Doe up the stairs to her room. Jane Roe 1 recounted that John Doe then went to take a shower, but she could not recall how long the shower lasted. After the shower, Jane Roe 1 and John Doe proceed to make out, and John Doe performed oral sex on Jane Roe 1 for "a few seconds or maybe a minute." John Doe then had sexual intercourse with Jane Roe, at which point Jane Roe 1 said, "Ow Ow Ow" and asked John Doe to "stop." John Doe acted as if he had not heard her and continued to engage in sexual intercourse. At 6:30 a.m. that morning, Jane Roe 1 tapped John Doe's shoulder and asked him to leave; John Doe left.

On December 27, 2021 John Doe was informed of Jane Roe 1's complaint through the Notice of Investigation letter.

When John Doe returned to campus after winter break, he asked around to gather information about the encounter. John Doe alleges that these conversations "trigger[ed] more of a recollection of the early hours of December 13." At that time, he was able to recall that "he rode Traveller, that he had been led around by someone, had sat next to two people in a living room . . . had used the bathroom once with great difficulty, had kissed Jane Roe 1, had engaged in oral sex and had erectile disfunction."

After winter break, Jane Roe 1 discussed her complaint with members of John Doe's fraternity with whom she was friends and asked them to "oust" John Doe or demand his resignation from the fraternity. During this time, through common friends, Jane Roe 1 learned that Jane Roe 2 and Jane Roe 3 had previously had similar experiences with John Doe. Jane Roe 1 contacted Jane Roe 2 and Jane Roe 3 and learned about their experiences and shared her experience. On January 25, 2022, John Doe offered his resignation from his fraternity upon request from members of his fraternity.

1. John Doe's Counterclaim against Jane Roe 1

On January 26, 2022, John Doe filed a counter-complaint of nonconsensual sexual penetration against Jane Roe 1, alleging that Jane Roe 1 had committed nonconsensual sexual penetration on December 13, 2021, because John Doe had been too incapacitated from alcohol to consent to sexual conduct. On February 1, 2022, John Doe amended his complaint against Jane Roe 1 to add a charge of sexual exploitation because he remembered being given an alcoholic drink in Jane Roe 1's living room despite his intoxicated state. John Doe submitted a statement from an expert witness (a toxicologist) he consulted that states it is the expert's opinion, based on a review of John Doe's statement, that John Doe was incapacitated on the night in question involving Jane Roe 1 and not capable of consenting to penetration.

Jane Roe 1 denied that John Doe was not capable of consenting and produced text messages to the investigator to contradict John Doe's claims of incapacitation. Those were text messages from John Doe to Jane Roe 2 on the night in question. The text messages included the following: Jane Roe 2: "wya?" John Doe: "leaving beta now. Why?" Jane Roe 2: "Parker was asking about where you had gone." John Doe: "I am going to Jane Roe 1's place. Will contact Parker tomorrow."

The investigators spoke with witnesses who interacted with John Doe at the fraternity party, collected video evidence from the party, and examined text messages during the time at issue. The witnesses who spoke to John Doe on the night of the incident, including Jane Roe 1's roommate, stated that John Doe did not have trouble talking, standing or walking and that he did not otherwise exhibit outward signs of intoxication. Videos taken at the party showed that John Doe was walking without difficulty.

ii. **Jane Roe 2**

John Doe and Jane Roe 2 had some sort of ongoing relationship that started during their first year of college and lasted from fall 2018 to mid-Oct. 2019. John Doe characterizes the relationship as a "hook-up relationship" but also describes Jane Roe 2 as his "ex-girlfriend."

On January 23, 2022, Jane Roe 2 met with the Title IX Coordinator and filed a formal complaint against John Doe. Jane Roe 2 reported after speaking with Jane Roe 1 and Jane Roe 3 about their experiences.

Jane Roe 2 alleged that on October 7, 2018, John Doe "engaged in non-consensual penetration with Jane Roe 2 in her bed in her room when two other people were there."

According to Jane Roe 2, they were in bed watching a movie in her room with two other individuals that were friends of John Doe, but she did not know well. They had all consumed alcohol prior to putting the movie on. The lights in the room were off. John Doe began to attempt to fondle her under the covers. She pushed his hand away. He continued to fondle her and penetrated her with his finger. She kept trying to push his hand away. He then got on top of her and penetrated her. According to Jane Roe 2, she did not want to engage in the conduct while the other individuals were in the room and did not consent at that time.

Jane Roe 2 and John Doe continued to date after that night. Jane Roe 2 did not share with others about the incident until after they broke up in October 2019. After they broke up, in November 2019, she shared with some friends about what had happened. Jane Roe 2 explained that she did not share with anyone at the time because it wasn't until she had distance from the relationship that she was able to come to terms with what had occurred. Jane Roe 2 and John Doe had many common friends, so Jane Roe 2 and John Doe continued to see each other at his fraternity's parties. Jane Roe 2 said that she decided to report when she learned that other individuals had experienced nonconsensual behavior from John Doe.

John Doe said he penetrated her with his finger on that night, but no vaginal/penile penetration occurred. According to John Doe, he penetrated her after she had started stroking his penis under the covers. He denied that she pushed his hand away or indicated she wanted him to stop. John Doe alleges that their breakup "upset" Jane Roe 2 and that is why she falsified a report against him.

The witnesses that Jane Roe and John Doe said were present during the encounter did not really remember that night, especially as it was three years ago. They vaguely remembered watching the movie in Jane Roe's room, but didn't believe that anything stood out about the night. They also indicated that they had probably all been drinking, as it was common for them to do so.

iii. Jane Roe 3

Jane Roe 3 alleged that on October 28th, 2020, Jane Roe 3 went to a party at John Doe's fraternity house (when she was a first-year student and John Doe was a junior). She connected with John Doe at the party and she went back with him to his residence in the third-year village. According to Jane Roe 3, she started to kiss and make out with him. However, he was being too aggressive, he was intoxicated, and it wasn't feeling good, so she told him to stop. Despite her saying, "stop," he continued to grope her breasts. He also started to try to take off her underwear under her skirt and she told him

to stop and pushed his hand away. He did not stop and continued to touch her over her underwear. Jane Roe 3 said she got really scared at that point. She then pushed him off really forcefully and said loudly, “stop” and ran out of the room. Jane Roe 3 shared with friends what had occurred the next day, but did not report at that time.

In early January 2022, Jane Roe 3 learned about Jane Roe 1 and Jane Roe 2’s complaint against John Doe from mutual friends and met with Jane Roe 1 and 2. At some point in January 2022, Jane Roe 3 created an Instagram page, which according to John Doe, was “dedicated to slandering” John Doe, and which John Doe alleges she used to “encourage other women to make false statements defaming” John Doe. On the Instagram page, Jane Roe alleged that John Doe had sexually assaulted her as well as other women. According to Jane Roe, she created the Instagram page after learning about the other reports to try to protect other women from John Doe. She shared her experience with him to alert other W&L women to be careful.

On February 5, 2022, the community assistant of Jane Roe 3's residence filed an incident report stating that he had been informed by other students that Jane Roe 3 had been sexually assaulted. On February 6, 2022, Jane Roe 3 attended a meeting with the Title IX Coordinator and filed a formal complaint that John Doe had engaged in nonconsensual sexual contact with her on October 28, 2020.

John Doe alleges that Jane Roe 3 “had been enamored with” John Doe during fall term 2020 and “sought to have a committed monogamous relationship” with John Doe despite John Doe's statement that he “was not interested in the same type of relationship with her.” According to John Doe, He met Jane Roe 3 at a party. She suggested going back to his place, so they went. They started kissing and making out. It was all consensual. When he started taking his pants off, she told him she didn’t want to have sex. He said, okay, they kissed a little more, and then she got up and left. She never told him to stop touching her. When she told him to stop, he stopped. John Doe alleges that she became upset when he refused to have a monogamous relationship with her and started to defame him to try to get back at him.

iv. Jane Roe 4

Jane Roe 4 and John Doe are both seniors. John Doe and Jane Roe 4 “had casually dated in late 2019.” Jane Roe 4 was a sorority sister of Jane Roe 3. In early February 2022, Jane Roe 4 learned about Jane Roe 3’s allegations after a sorority sister that knew of Jane 4’s allegations connected them. After Jane Roe 3 filed a formal complaint, she let Jane Roe 4 know that she had done so. Jane Roe 4 then filed a formal complaint as well with the Title IX Coordinator on February 10, 2022.

Jane Roe 4 alleged that she went to John Doe's residence after a party in the early morning hours of November 13, 2019, she told John Doe that she did not want to have sex without a condom. Jane Roe 4 said that, nonetheless, John Doe had sex with her without a condom, and without her consent. According to Jane Roe 4, her and John Doe were making out and each took their own clothes off. John Doe gave her oral sex, which was consensual. John Roe 4 told John Doe that if they were going to have sex, he needed to wear a condom. John Doe said, "it's okay. It's okay" and got on top of her and penetrated her. Jane Roe 4 said, "no," but John Doe did not stop and kept saying, "it's okay." Jane Roe 4 was then completely shocked and didn't do anything. John Doe did not remember the specific evening in question with specificity. But he "denied that Jane Roe 4 and he had sexual intercourse on November 13, 2019" and stated that "if they had, it was consensual."

**v. John Doe's Harassment and Retaliation Complaint Against Jane Does
1-4**

On February 5, 2022, John Doe received an email from the editor-in-chief of the Ring Tum Phi, a student run campus newspaper. John Doe was then the President of the Executive Committee. The *Ring Tum Phi* editor-in-chief notified the EC of an "upcoming Ring Tum Phi article regarding a Title IX investigation in which the respondent is a member of the EC, and one of the complainants is a member of SPEAK." The Ring Tum Phi editor-in-chief asked if the EC wanted to make a comment and noted that the article would be published at 5 p.m. that day. John Doe contacted the Title IX Coordinator and advised that the article would interfere with his privacy and the confidentiality of the disciplinary proceedings.

On February 6, 2022, the Ring Tum Phi published the article. The article did not use John Doe's name, but stated that there was more than one investigation proceeding against a member of the Executive Committee. After the article was published John Doe stated that "several people came up to" him and told him "they knew it was about him." He also saw posts on Yik Yak where posts stated that the article was about him.

On February 26, 2022, John Doe filed a complaint of harassment and retaliation against Jane Roe 1-4 alleging that they had provided confidential and defamatory information about their allegations to the Ring Tum Phi editor. John Doe also alleged that Jane Roe 1 had contacted his fraternity to have him removed from his organization and he had to resign as a result. There were posts on Yik Yak, that John Doe believes either were made by Jane Roes 1-4 or someone close to them that indicated that he was a serial rapist. He alleged "it is becoming clear that the Jane Roes, especially Jane Roe 3, have been orchestrating a campaign to level as many charges against John Doe as possible to derail

any hope he has of graduating on time. The timing of these complaint filings is not coincidental and began when Jane Roe 3 created a fake Instagram page dedicated to 'slandering' John Doe." John Doe argued that due to the Jane Roes' campaign against him he "suffered a serious psychological toll." He "felt under siege, was severely depressed as a result of the four false sexual misconduct disciplinary cases in which he was not guilty."

b. Hearing

John Doe objected to the hearing panels hearing any information about the existence of the other reports as the cases did not meet the standard for consolidation in the policy. The investigators affirmed that the cases were not consolidated and were all separate cases for which separate hearings would be held and decisions must be made independently. However, the investigators determined that the existence of the other complaints was relevant as it went towards credibility and would be included for the hearing panel. The investigators explained that the hearing panel would ultimately determine the relevance of any information and John Doe was welcome to argue that the other complaints were not relevant at the hearing. Five separate hearings were held, but information of the other allegations was included in the materials the hearing panels received for each hearing. Although the hearing panels were not identical, they all had overlapping members.

Pursuant to the policy, John Doe was permitted to argue that the evidence was not relevant at the hearing and did so. The hearing panels ultimately determined that the cases were relevant as all were substantially similar in that they alleged a lack of consent for sexual activity, specifically not stopping sexual activity when told to stop. Additionally, the hearing panels found the other complaints relevant as an explanation for Jane Roe 2-4 reporting at the time that they did as all said that they reported when they learned of the other reports. John Doe argued that Jane Roe 2-4's delay in reporting impacted credibility, so learning of the other complaints were used by Jane Roe 2-4 as an explanation for the timing of their reports. The hearing panels ultimately considered the existence of the prior reports when evaluating credibility and making their conclusions.

i. Jane Roe 1:

The hearing panel made credibility determinations in favor of Jane Roe 1 based on her statement of events, which were corroborated by the text message exchange directly afterwards indicating that she had withdrawn consent, and the existence of other reports that showed a potential pattern that John Doe had not stopped sexual activity

when told to stop. Additionally, the panel determined that John Doe's lack of memory of the night made his statement of events less credible. The panel found John Doe responsible for nonconsensual sexual penetration.

In regards to John Doe's counterclaim of nonconsensual sexual penetration by Jane Roe 1, the hearing panel did not find that John Doe had established incapacitation by a preponderance of the evidence. The hearing panel based that on the testimony of witnesses who spoke to John Doe on the night of the incident, including the roommate who interacted with John Doe directly before sexual activity. Additionally, the video footage that showed that John Doe was walking without difficulty, and a text message sent by John Doe at 2:15 am used correct spelling and punctuation, contained complete words and phrases, and indicated an awareness of where he was going. While the panel determined that he was intoxicated and his memory was impacted, he still had the capacity to consent to sexual activity.

The panel found Jane Roe 1 not responsible for sexual exploitation because John Doe failed to establish incapacitation and so could not meet the elements. Additionally, even if Jane Roe 1 had offered John Doe a drink, there was no evidence that she did so to induce incapacitation to make John Doe vulnerable to sexual misconduct.

ii. Jane Roe 2:

The hearing panel did not find the evidence sufficient to establish a violation of nonconsensual sexual penetration by a preponderance of the evidence. The witnesses that Jane Roe and John Doe said were present during the encounter did remember anything that stood out about the night. Jane Roe 2 had not shared with others directly after the incident and first shared with friends over a year after it had occurred. Additionally, Jane Roe 2 continued to interact with John Doe after the incident and even communicated by text message with him as late as December 2021. While the panel did not find the evidence sufficient to show a violation by a preponderance of the evidence, the panel concluded that the allegations of Jane Roe 2 were not intentionally false and malicious as John Due had argued.

iii. Jane Roe 3:

The hearing panel found John Doe responsible for nonconsensual sexual contact. The hearing panel made credibility determinations in favor of Jane Roe 3 and found that nonconsensual sexual contact occurred. This was due to Jane Roe 3 sharing with friends immediately afterwards and the existence of the other reports showing a pattern of behavior on the part of John Doe.

iv. Jane Roe 4:

The hearing panel made credibility determinations in favor of Jane Roe 4 that sexual penetration did occur that night and that Jane Roe 4 had told John Doe she did not want to have sex without a condom, but he did not stop having sex. The panel noted that it found Jane Roe 4 more credible due to the level of specificity that Jane Roe 4 remembered that night in contrast to John Doe, who was not able to recall that night with specificity. Additionally, the other reports weighed in favor of Jane Roe 4.

v. John Doe's complaint:

The hearing panel found that the alleged conduct of the complainants—potentially sharing the existence of the reports with the Ring Tum Phi, creating the Instagram account, and speaking to his fraternity--did not constitute retaliation in response to participation in the complaint process or harassment on the basis of a protected category. John Doe was not able to prove by a preponderance of the evidence that the complainants shared the reports with the Ring Tum Phi as the evidence indicated they had shared with a friend who had then shared with the Ring Tum Phi. The policy does not prohibit the parties from speaking about the incident in order to obtain support and nothing in the sexual misconduct policy prohibited an individual from sharing allegations of misconduct with others.

c. John Doe Appeal

John Doe argues the following:

- i. Procedural error—the policy requires that the panel only consider relevant evidence. The panels considered evidence of the other complaints, which John Doe argues should have been determined to be irrelevant as they were separate cases. John Doe argues that the other complaints were unduly prejudicial against John Doe and constituted improper character evidence. By considering the other complaints, in which he had not yet been found responsible for, John Doe was only found responsible because other complaints existed, and as the complainants learned about each other and reported in the same time frame, the reports are evidence of a campaign of harassment against John Doe.
- ii. Bias of the hearing panels—John Doe argues the hearing panels were “openly hostile” to him. “The hearing panels’ partiality clearly indicates that it wants to find me responsible for everything

that they can. When I spoke at the hearing, the demeanor of the panelists throughout the hearing implied that they could barely be bothered to listen, and looked as if their minds were already made up. The demeanor of the panelists during the hearings, and their rationale for a sanction of dismissal in which they describe having ‘serious concern regarding the continued nature of the disturbing pattern of behavior in which you engage....we implore you to engage in more thoughtful self-reflection and/or seek counseling for your inexcusable behavior,’ reveal a deep antagonism toward me that is tantamount to a disqualifying degree of prejudice. This antagonism caused the panels to fail to consider evidence that supported me.” For example, in regards to Jane Roe 1, John Doe argues that the hearing panel concluded that John Doe was not incapacitated despite it being “contrary to a medical expert opinion that I submitted.” The hearing panel also “arbitrarily disregarded text messages from complainant stating that she ‘wasn’t very loud’ about her alleged withdrawal of consent.” John Doe argued that the panel failed to consider that Jane Roe 1 may have had an ulterior motive in accusing John Doe as she had recently dated a member of John Doe’s fraternity, had been dissatisfied with that relationship, and had been taken to formal by another member of John Doe’s fraternity.” John Doe argues that the hearing panel treated his counter-claim of nonconsensual sexual penetration due to incapacitation differently than it would have done if he was a female complainant. John Doe argues that the panel rejected his harassment claims because of gender bias rather than merit of the claims.

- iii. Bias of investigators—John Doe argues that the investigators were biased because they refused his request to interview additional witnesses. John Doe had requested that the investigators interview members of his fraternity, his academic advisor, the other members of the Executive Committee, several of his professors, a past girlfriend, and his athletic coach about his upstanding character, propensity for truthfulness, and respect for others. The investigators agreed to interview a past girlfriend regarding her experiences with John Doe, but did not interview the other individuals mentioned as they had concluded the proffered witnesses would not provide relevant evidence. Additionally, John Doe points to the alleged procedural error (noted below) as further evidence of the bias of investigators.

- iv. Procedural error and defect/new evidence—John Doe argues that the investigators did not turn over exculpatory evidence to him as required. The investigators did not share with John Doe that Jane Roe 1 did poorly in a class prior to the incident and was able to withdraw from class without penalty as a supportive measure. The investigators did not provide all supportive measures provided to the parties in the investigation materials, and John Doe argues that they should have done so as he believes the supportive measure provided is exculpatory as it provides a reason for Jane Roe 1 to falsify the report. He argues that he learned of this evidence after the hearing and so it was not provided to the original hearing panel. He argues that it constitutes new evidence.

As the Appeal Panel—what evidence would you seek (if any) to make your decision? What would be your decision?