

July 22, 2019

Honorable Presiding Justice Lee Smalley Edmon
Honorable Justice Halim Dhanidina
Honorable Judge Serena R. Murillo
Second Appellate District, Division Three
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: *John Doe v. Occidental College*, Request for Publication of Decision filed July 2, 2019
Court of Appeal Case No. B282292
Superior Court Case No. BS150532

Honorable Presiding Justice Edmon, Justice Dhanidina, and Judge Murillo,

This letter is submitted by Equal Rights Advocates (“ERA”) pursuant to California Rule of Court 8.1120(a) to request certification for publication of this Court’s opinion in the above-captioned case. ERA is joined in this request by Family Violence Appellate Project, Family Violence Law Center, Law Office of Arabella Malinis, Nancy K.D. Lemon, KWH Law Center for Social Justice and Change, National Women’s Law Center, ADZ Law LLP, and California Women’s Law Center. (A contact for each organization is listed below.)

The opinion in *John Doe v. Occidental College* (“*Occidental*”) should be published because it adds to a growing body of California case law addressing procedural requirements in university adjudications of alleged sexual misconduct, a significant issue of public interest. The opinion provides guidance to universities, students, parents, legal advocates, and other stakeholders regarding what constitutes adequate process, the importance of designing systems of adjudication with both parties’ needs in mind, and the substantial level of deference owed to the credibility assessments made by hearing officers in these cases.¹ Accordingly, this opinion should be certified for publication because it meets standards for certification under California Rules of Court, Rule 8.1105(c), subsections (1), (2), (3), (4), (6), and (7).

¹ In addition to providing important guidance in California, publication of the *Occidental* opinion is helpful to courts in other states seeking guidance from California in interpreting Title IX and/or applicable state laws.

I. Adjudication of Campus Sexual Violence Cases Is A Significant Issue of Continuing Public Interest.

Sexual violence is highly prevalent on college campuses; research indicates that more than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.² The numbers are even greater for more vulnerable populations: nearly 1 in 4 transgender or gender nonconforming students are sexually assaulted during college.³ Despite its prevalence, sexual assault is generally underreported: studies estimate that only 7-12% of college student survivors report their sexual assault to their school or law enforcement.⁴ Considering its prevalence, sexual assault on college campuses and how schools handle reports of such assaults is clearly a matter of public interest. Moreover, campus Title IX adjudications have received substantial attention in the media.⁵ Thus, in addition to being *in* the public's interest to certify, this case is *of* significant interest to the public, and therefore meets standard for certification under subsection (6) of Rule 8.1105(c).

Not only is certification of the *Occidental* opinion in the public interest because it addresses the problem of college sexual violence in general, but it also addresses the institutions' response to reports of sexual violence, which is of particular interest because it can have devastating effects on a victim student. In those rare circumstances when a student actually does report sexual assault, for example, a school's failure to respond appropriately can result in

² David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N OF AMER. UNIV., Sept. 2015, at 13-14, <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

³ Cantor, *supra* note 1.

⁴ *Poll: One in 5 women say they have been sexually assaulted in college*, WASH. POST, June 12, 2015, <https://www.washingtonpost.com/graphics/local/sexual-assault-poll/> (last visited July 18, 2019); The White House, *The Second Report of the White House Task Force to Protect Students from Sexual Assault*, Jan. 5, 2017, at 10, <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF> (finding that only 7 percent of self-identified rape victims reported the rape to school authorities) (last visited July 18, 2019).

⁵ See, e.g., Teresa Watanabe & Suhauna Hassain, *Ruling affirming the rights of students accused of sexual misconduct roils California colleges*, LOS ANGELES TIMES, Feb. 14, 2019, <https://www.latimes.com/local/education/la-me-california-universities-title-ix-20190215-story.html> (last visited July 19, 2019); Maria Medina, *Students Concerned with New Sexual Misconduct Policy at Cal State Universities*, CBS SF BAY AREA, Apr. 2, 2019, <https://sanfrancisco.cbslocal.com/2019/04/02/students-concerned-with-new-sexual-misconduct-policy-at-cal-state-universities/> (last visited July 19, 2019).

institutional betrayal.⁶ Amongst scholars of trauma psychology, the term “institutional betrayal” refers to the additional harm that occurs when an educational institution, by its failure to respond supportively to incidents such as peer-to-peer sexual harassment and assault, perpetuates a new trauma upon trauma victims who are dependent upon that institution.⁷ Research indicates that such institutional betrayal increases, worsens, and lengthens the traumatic harm suffered by a student victim beyond that which they would have experienced from the underlying assault alone.⁸ The increased harm is not only psychological, but can also result in decreased physical health, delay in the victim seeking services or reporting further harassment, and emotional disengagement from the institution as a whole.⁹ Trauma resulting from a school’s inappropriate response to a report of sexual assault therefore directly interferes with the victim’s access to education, which may lead to eventual push-out.¹⁰

Thus, it is in the public’s interest to certify for publication a case addressing what constitutes an appropriate response by a university, thereby meeting the standard for certification under subsection (6) of Rule 8.1105(c).

II. *Doe v. Occidental* Makes Important Contributions to California Case Law on Due Process in Educational Adjudications of Sexual Misconduct.

⁶ Smith, C.P. & Freyd, J.J., *Institutional Betrayal*, AMERICAN PSYCHOLOGIST, Vol. 69, No. 6, 575-587, at 576 (September 2014); see also Campbell, R., *Rape survivors’ experiences with the legal and medical systems: Do rape victim advocates make a difference?* VIOLENCE AGAINST WOMEN, Vol. 12, Issue 1, pp. 30-45, (2006).

⁷ Freyd, J., *Betrayal-trauma: traumatic amnesia as an adaptive response to childhood abuse*, ETHICS & BEHAVIOR, Volume 4, 307-29 (1994).

⁸ See, e.g., Stader, D. & Williams-Cunningham, J., *Campus Sexual Assault, Institutional Betrayal, and Title IX*, CLEARING HOUSE: A J. OF ED. STRATEGIES, pp. 198-202, Vol. 90, Issue 5-6 (2017).

⁹ See, e.g., Fitzgerald, L.F., et al., *Antecedents and consequences of sexual harassment in organizations: A test of an integrated model*, JOURNAL OF APPLIED PSYCHOLOGY, Vol. 82, No. 4, pp. 578-586 (1996) (as to decreased physical health); Platt, M., Barton, J. & Freyd, J.J., *Domestic Violence: A betrayal trauma perspective*, VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: MAKING AND BREAKING CONNECTIONS, Vol. 1, pp. 185-207 (2009) (as to decreased physical health and emotional disengagement by the victim from the institution as a whole); Sadler, A.G., et al., *Life span and repeated violence against women during military service: Effects on health status and outpatient utilization*, J. OF WOMEN’S HEALTH (2004) (as to delay in the victim seeking services or reporting further harms).

¹⁰ See, e.g., MONIQUE MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 136 (2016); Audrey Chu, *I Dropped Out of College Because I Couldn’t Bear to See My Rapist on Campus*, VICE, Sept. 26, 2017, https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

The *Occidental* opinion adds much needed clarity to case law in this area, which has been actively developing in California over the past several years but remains incomplete. *See, e.g., John Doe v. Kegan Allee* (2019) 30 Cal.App.5th 1036 (“*Allee*”); *John Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055 (“*CMC*”); *John Doe v. University of Southern California* (2016) 246 Cal.App.4th 221 (“*USC*”); *John Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055 (“*Regents*”). The Court in *Allee*, decided earlier this year, notes that “[a] spate of recent cases has attempted to more clearly delineate the contours of a ‘fair hearing’ in university disciplinary proceedings involving allegations of sexual misconduct, where the resolution of conflicting accounts turns on witness credibility.” 30 Cal.App.5th at 1062. However, as noted in *Occidental*, California cases thus far still have not “plainly define[d] the components or standards of a fair hearing in student disciplinary proceedings involving allegations of sexual misconduct.” *Opn.* at 14.

Occidental further contributes to the effort to establish such standards. The opinion provides a helpful overview of the key procedural elements that California courts have found thus far are required of universities. *Id.* These elements include giving the respondent specific notice of allegations and an opportunity to refute them, granting a hearing of some form if serious sanctions are at issue, adhering to the university’s own policies and procedures, and providing a meaningful opportunity to present a defense. *Opn.* at 14-15. However, it remains unclear how these general requirements might specifically apply to a different set of facts, and whether additional or different procedures might be necessary to ensure due process under a different investigative and adjudicative model. *Occidental* is particularly useful because it applies the recently developed case law to a new set of facts. One major difference in the facts of *Occidental* is that neither party claimed incapacitation was a factor. As a result, the determination was purely a question of which party was more credible on the issue of consent.

Moreover, because “no particular form of student disciplinary hearing is required in California,” *Opn.* at 15, different universities have very different investigative and adjudicative processes. For example, in *Regents*, the university used a process in which an employee conducts an investigation, invites the accused to a one-on-one “Administrative Resolution” proceeding with the Dean and, if the case is not resolved at that stage, refers the matter to a hearing which may be conducted by a single review officer or by a panel comprised of staff, faculty, and/or students. *Regents*, 5 Cal.App.5th at 1078-80. In *CMC*, by comparison, the

university's process was to retain a third-party investigator, and schedule an "Investigation Findings and Review" meeting with other faculty and staff, who together decided whether the accused violated school policy. *CMC*, 25 Cal.App.5th at 1061-63. Occidental employs yet a different procedure, wherein Occidental initiates an investigation by either a third-party investigator or an employee, whose findings and recommendations may be referred to an adjudicator for a hearing.¹¹ *Opn.* at 3-4. Thus, *Occidental* not only applies the existing procedural requirements to a new set of facts, it details the specific procedures Occidental used in adjudicating the matter and assesses their adequacy under standards of fairness.

In providing an overview of existing case law on this important topic, *Occidental* makes a significant contribution to legal literature, and additionally applies the existing law to a new set of facts and investigative procedures, providing important guidance to educational institutions in keeping their school communities safe. Therefore, *Occidental* meets the standards for publication outlined in subsections (2), (6), and (7) of Rule 8.1105(c).

III. *Occidental* Underscores that University Proceedings Should Account for the Needs of Victims as Well as the Accused.

In addition to outlining required procedural elements to ensure fairness for the respondent, the *Occidental* opinion also explains that universities need not conduct formalized, criminal-style hearings and, significantly, emphasizes that these proceedings must take into account the needs of the alleged victim as well as the Respondent. *Opn.* at 14-15. Indeed, the Court underscores that, rather than only accommodating the interests of fairness for the respondent, "[d]isciplinary proceedings involving sexual misconduct must also account for the well-being of the alleged victim, who often 'live[s], work[s], and stud[ies] on a shared college campus' with the alleged perpetrator." *Opn.* at 15 (citing *USC*, 246 Cal.App.4th at 245).

Prior California cases have acknowledged, in passing, that the design of these proceedings can be consequential for the complainant as well as for the respondent. *See Allee*, 30 Cal.App.5th at 1066 (acknowledging "the risk that an accusing witness may suffer trauma if personally confronted by an alleged assailant at a hearing"). However, *Occidental* makes clear that universities should consider the respondent's interest in a fair hearing "on the one hand"

¹¹ Although many schools have changed their procedures in response to recent cases, those procedures still vary significantly from school to school.

while considering the complainant’s interest in a hearing that protects his or her well-being “on the other hand,” holding these two interests in equal import. Opn. at 15. This is a significant addition to existing law, and adds clarification regarding the procedural safeguards articulated by prior opinions. For this reason, the opinion meets the standard for certification outlined in subsections (1) and (3) of Rule 8.1105(c): it explains that the existing rule of law outlining procedural requirements is aimed not just at preserving fairness for the accused, but also at accounting for the needs of the complainant, and also establishes that schools should consider the needs of both students equally when implementing adjudicative procedures.

In addition, student victims across the state will benefit from publication of the *Occidental* opinion because schools will adjust their practices in response thereto, placing more emphasis than they otherwise would on the needs of the victim, thereby providing a more equitable and less traumatic experience to the many student victims already involved or soon-to-be involved in the adjudication process of their sexual misconduct claims. For this reason, the opinion additionally meets the standard for certification outlined in subsection (6) of Rule 8.1105(c), as it is in the public interest to protect current and future sexual assault victims’ rights as well as those of respondents.

IV. *Occidental* Makes Clear that Courts Should Not Disturb a University’s Credibility Assessment.

Occidental states clearly that the abuse of discretion standard – rather than independent review – is the appropriate standard in cases brought under California Code of Civil Procedure §1094.5 reviewing university sexual misconduct disciplinary proceedings. Opn. at 21. While prior cases also state as much, the *Occidental* opinion goes further by explaining why abuse of discretion is the appropriate standard, particularly from a policy standpoint, noting the importance of affording universities the freedom to determine who may study at their institutions. *Id.*

Additionally, while recent writ cases have made clear that certain procedures – such as a hearing – are required in sexual assault cases turning on the credibility of witnesses, the *Occidental* opinion expounds upon that requirement and states explicitly that substantial deference is owed to the adjudicator’s credibility assessments at such a hearing: “Credibility is an issue of fact for the adjudicator to resolve. The adjudicator gave reasons for her conclusion

that Roe’s account was more reliable. We may not reassess that finding.” Opn. at 24; *cf. Allee*, 30 Cal.App.5th at 1039 (holding that when a student accused of sexual misconduct is facing serious sanctions and the case turns on the credibility of witnesses, the accused must have the opportunity to direct questions to witnesses). In *Occidental*, the outcome “was predicated on credibility findings” and therefore provides useful guidance on how credibility assessments made at hearings required by *Allee* should be reviewed. The *Occidental* opinion therefore meets standards for certification (3) and (4) because it provides clarity on the reasons for the applicability of the abuse of discretion standard and explicitly asserts that credibility findings should not be disturbed unless “no reasonable person could reach the conclusion reached by the [university].” Opn. at 22 (internal citation omitted).

For the reasons set forth above, and because an opinion that meets standards for certification under Rule 8.1105(c) “should be certified for publication,” we respectfully request that this Court certify *Occidental* for publication. Cal. Rules of Court, rule 8.1105(c).

Respectfully Submitted,

Brenda Star Adams
Equal Rights Advocates

Shuray Ghorishi, Senior Attorney
Family Violence Appellate Project

Cory Hernandez, Staff Attorney
Family Violence Law Center

Arabelle Malinis, Esq.
Law Office of Arabelle Malinis

Pamelya Herndon, CEO
KWH Law Center for Social Justice
and Change

Shiwali Patel, Director, Justice for Student
Survivors, National Women’s Law Center

Amy Poyer, Senior Staff Attorney
California Women’s Law Center

Tulin D. Acikalin, Partner,
ADZ Law, LLP

Nancy K.D. Lemon, Lecturer in
Domestic Violence Law & Director,
Domestic Violence Field Placement
UC Berkeley School of Law