



CIVIL RIGHTS INVESTIGATOR  
TRAINING & CERTIFICATION LEVEL ONE COURSE

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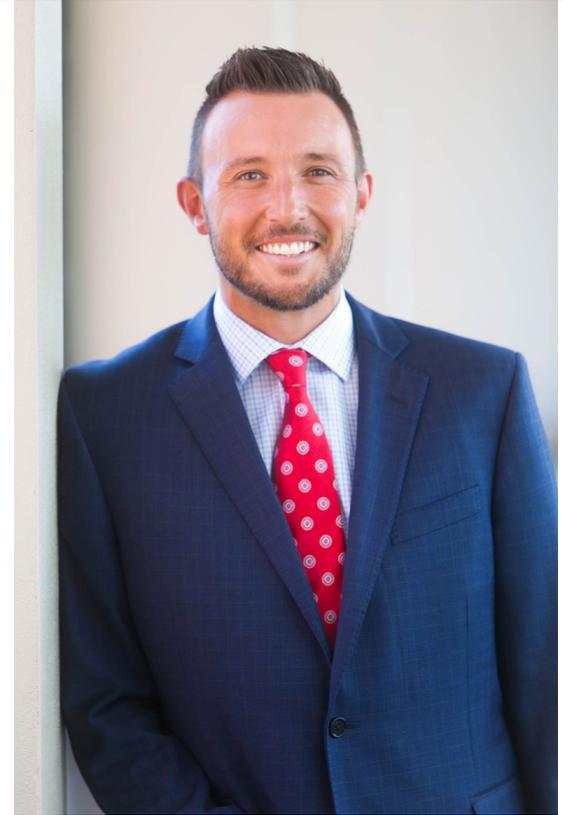
Orlando, FL

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# FACULTY



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# LEVEL 1 INVESTIGATIONS TRAINING



## Part 1

- I. Overview of Title IX
- II. Expanded Legal Basis for Title IX Liability
  - i. Foundational Caselaw
  - ii. Due Process Overview
- III. Title IX Coordinator Oversight
- IV. Notice: Actual & Constructive
- V. Overview of Civil Rights Investigation & Resolution Model
- VI. Preliminary Inquiry
  - i. Gatekeeping
  - ii. Interim Actions
- VII. Beginning the Investigation
  - i. Investigation Timeline
  - ii. Standard of Proof
  - iii. Investigation Strategy

# OVERVIEW OF TITLE IX

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- Text of the Law
- The IX Commandments
- Equality v. Equity

# TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. PART 106 (1972)



*“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”*



# THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community

Investigation  
(prompt & fair –  
VAWA Sec. 304)

Process

Remedies

# EQUALITY V. EQUITY

## EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.

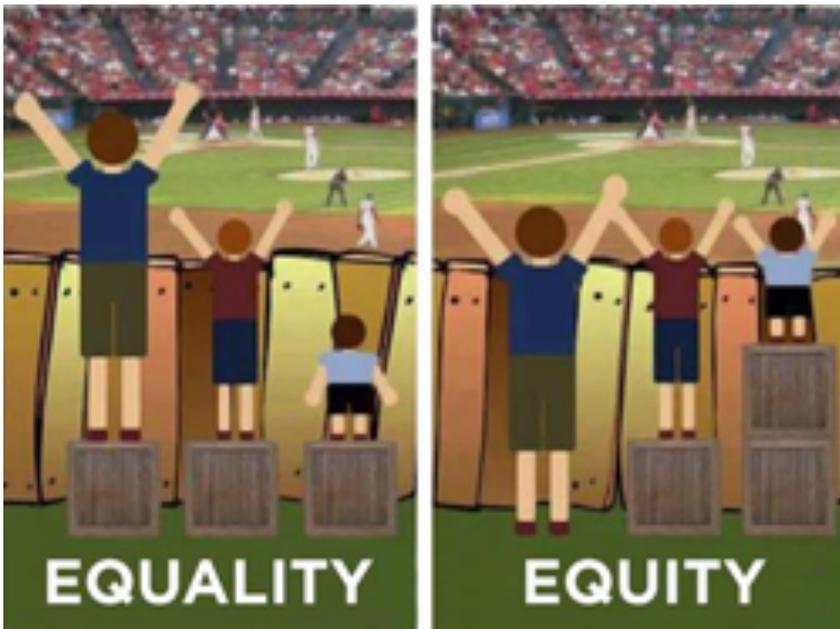


In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

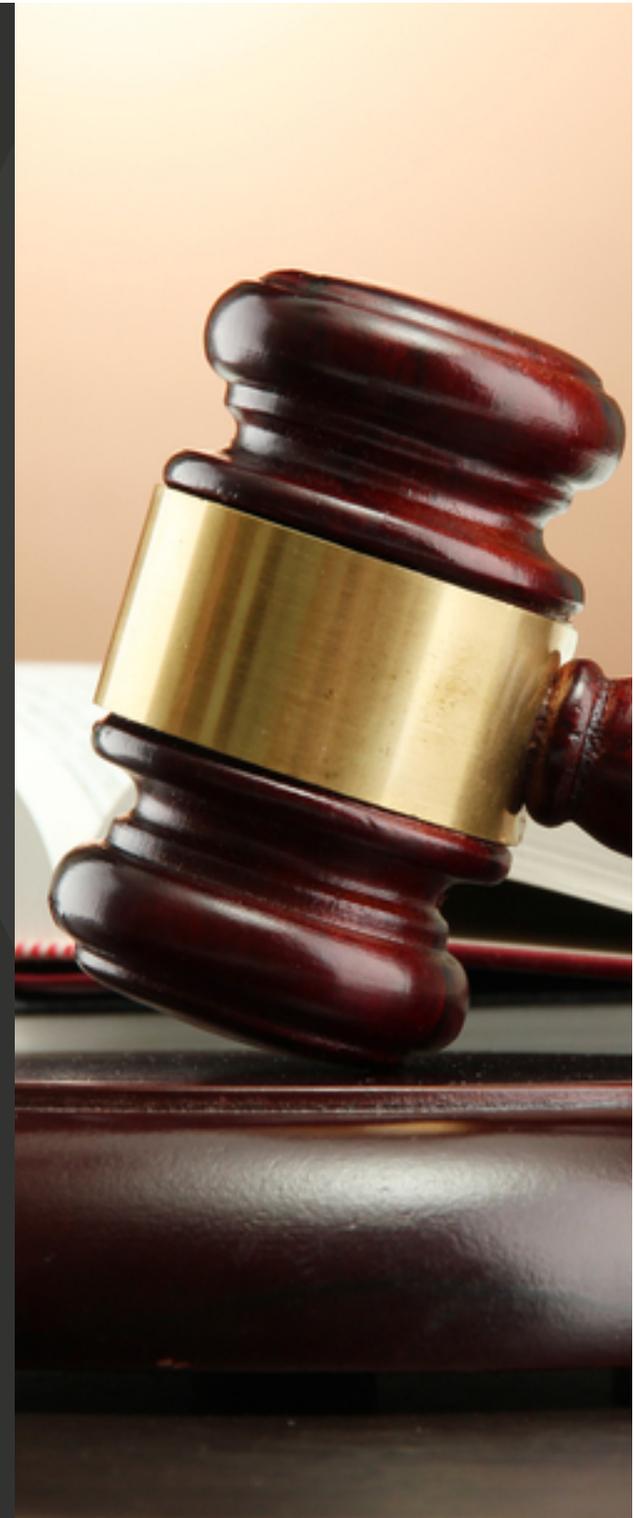
# EQUITY BY AND THROUGH THE PROCESS



- You will get this right when you can do equity through equity.
- Each party's rights, privileges and opportunities need to be balanced.
- Not exactly parity, but equitable procedures that reach equitable outcomes that impose equitable remedies.
- Equitable = fair under the circumstances.
- What you do for one party, ask whether you need to do for the other(s).

# LEGAL BASIS FOR TITLE IX LIABILITY

- Significant Cases
- Other Relevant Cases
- Intersection of Title VII and Title IX
- Title IX and VII Inter-related Investigations
- Due Process
- VAWA Section 304 Reauthorization Updates to the Clery Act



# SIGNIFICANT CASES



- *Franklin v. Gwinnett Public Schools*
- *Gebser v. Lago Vista*
- *Davis v. Monroe County Bd. of Education*
- *Jackson v. Birmingham Bd. of Education*
- *Fitzgerald et al., v. Barnstable School Committee et al.*

# FRANKLIN V. GWINNETT PUBLIC SCHOOLS 503 U.S. 60 (1992)



- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
- District and Circuit Court of Appeals dismissed the case, finding Title IX does not allow for award of monetary damages.
- U.S. Supreme Court decided that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.

# GEBSER V. LAGO VISTA INDEP. SCHOOL

U.S. SUPREME CT. (JUNE 22, 1998)



- Case involved faculty/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against institutions when an employee/student consensual relationship is basis of claim.
- Court said you cannot recover monetary damages against the school **unless** the behavior has been reported to someone with power to alter the situation (“actual notice”) and **“deliberate indifference”** has been demonstrated by the school.

# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Three-part standard:
  1. An official of the educational institution must have had “actual notice” of harassment;
  2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
  3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate.
- Parents complained to three teachers and principal.
- The school took no action until the boy was charged with, and pled guilty to, sexual battery.
- Filed Title IX action, alleging that persistent harassment and deliberate indifference resulted in her inability to attend school and participate in activities.

# DAVIS V. MONROE COUNTY BD. OF ED. 526 U.S. 629 (1999)



- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in the *Gebser* case:
  - The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.” Additionally, court held:
    - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
    - Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”

# JACKSON V. BIRMINGHAM BD. OF ED.

U.S. SUPREME CT. (MARCH 29, 2005)



- A deeply divided U.S. Supreme Court decided this landmark case in 2005.
- This case involved a claim of retaliation for filing complaints of sex discrimination under Title IX.
- Roderick Jackson, a high school teacher and coach, complained to school officials about the school's inequitable treatment of the girls' basketball team.
- Retaliation-based case.
- The federal district court and appellate court ruled against Jackson.

# JACKSON V. BIRMINGHAM BD. OF ED.

U.S. SUPREME CT. (MARCH 29, 2005)



- The Supreme Court overturned lower courts, stating that:
  - Private parties can seek damages for intentional sex discrimination under Title IX.
  - Retaliation against a person who complains about sex discrimination is in itself a form of “intentional discrimination,” even if plaintiff is not an “actual” recipient of gender-based discrimination.
  - It is discrimination based on gender because it is “an intentional response to the nature of the complaint: an allegation of sex discrimination.”

# FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE U.S. SUPREME CT. (JAN. 21, 2009)



- This case represents legal challenge brought against a school district by parents of a kindergarten child subjected to student/student sexual harassment.
- Parents challenged the school did not respond adequately, under Title IX requirements, to daughter's allegations of sexual harassment by older student.
- The parents also brought a §1983 claim against the school superintendent and the school committee.

# FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE U.S. SUPREME CT. (JAN. 21, 2009)



- Supreme Court ruled on whether Title IX provides the exclusive remedy for addressing gender discrimination in the school, or if a §1983 action could be brought as a means of enforcing the federal rights.
- It held that Title IX is not the exclusive mechanism for addressing gender discrimination, nor a substitute for a §1983 action.
- It stated that Title IX provides for both an administrative remedy (OCR) and civil damages actions against an institution, but not school officials, teachers, or other individuals.

# FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE U.S. SUPREME CT. (JAN. 21, 2009)



- However, §1983:
  - Provides means to enforce the rights of aggrieved person against school officials, teachers, or other individuals in their **personal capacity**.
  - Creates the path to hold individuals personally liable, providing for award of damages, injunctive relief, **and attorney fees**.
  - Follows that the courts apply school-focused Title IX case law similarly to colleges and universities.

# OTHER RELEVANT CASES



- ***DeJohn v. Temple University***, 3rd Circuit Court of Appeals, Aug. 2008.
- ***Jennings v. University of North Carolina at Chapel Hill***, 4th Circuit Court of Appeals, April 2007.
- ***Williams v. University of Georgia System et al.***, 11th Circuit Court of Appeals, Feb. 2007.
- ***Lisa Simpson, Anne Gilmore v. University of Colorado Boulder, et al.***, 10th Circuit Court of Appeals, Sept. 2007.

# INTERSECTION OF TITLE VII AND TITLE IX



- Title IX consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.



# TITLE IX AND TITLE VII INVESTIGATIONS (CONT.)



- Consider:
  - Role of institutional equity/AA/EOP officer.
  - Human resources/faculty.
  - Coordinator of school/campus conduct.
  - Athletics.
  - Public safety/SRO/Law enforcement.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
- Coordination of remedies in student/employee and employee/student resolution processes.
- What happens when employee is a student or student is an employee?

# DUE PROCESS FOUNDATIONS

## DIXON V. ALABAMA



## Dixon v. Alabama State Board of Education

294 F.2d 150 (5th Cir. 1961)

- Due Process:
  - Notice and hearing required prior to expulsion from a state college or university.
- Rights adhered to responding parties because of the posture of the case.
- All due process cases flowing from Dixon attached additional rights to the responding party.
- Responding parties in Dixon were actually civil rights victims.

# DUE PROCESS: CURRENT ISSUES



- Due Process is at the heart of current litigation and OCR regulatory guidance. Processes are becoming increasingly complex
- Current key issues:
  - Standard of Proof
  - Detailed Notice of Allegations/Investigation
  - Hearings & Investigations
  - Cross-examination
  - Attorney involvement
  - Providing copies of report and evidence for review
  - Bias by Investigators, Hearing Officers, Appellate Officers
  - Training: Biased training; insufficient training
  - Improper influences impacting decision (E.g.: Athletics; Social Media; Power/Position)

# TITLE IX COORDINATOR OVERSIGHT

- The Role of the Title IX Officer in the Investigation Process
  - Supervisor of the Investigation Structure
  - Supervisor of the Investigation Process
  - Trainer for Investigators

# SUPERVISOR OF THE INVESTIGATION STRUCTURE



- The Title IX officer is responsible for:
  - The appointment of investigators.
  - Training investigators, hearing boards, and appeals officers.
  - Supervision of investigators and investigations.
  - Strategizing investigations.
  - Assurance of initial remedial actions.
  - Timeline compliance.
  - Communication and coordination of investigation teams.
  - Providing institutional memory to investigators.
  - Retaining a record of all activities.

# SUPERVISOR OF THE INVESTIGATION PROCESS



- The Title IX officer or designee is responsible for:
  - Notice of investigation.
  - Gatekeeping.
  - Determining extent of investigation.
  - Notice of charge/allegation.
  - Notice of hearing.
  - Notice of outcome.
  - Duty to warn.
  - Assurance of remedies.
  - Recordkeeping of all activities.

# TRAINER FOR INVESTIGATORS



- Frequency of training for investigators.
- Internal and/or external trainers.
- Who can be an Investigator?
  - Staff.
  - Faculty.
  - NOT students.
  - Note: Conflicts of Interest in Proposed Regs.
- External investigations/outourcing oversight.

# NOTICE: ACTUAL & CONSTRUCTIVE

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- Responsible Employee
- Actual Notice
- Constructive Notice
- When do you Investigate?

# NOTICE – ACTUAL AND CONSTRUCTIVE



- In the context of harassment, a school has notice if a responsible employee knew, or in the exercise of reasonable care, should have known about the sexual harassment or violence.
- OCR enforcement of Title IX uses both an actual notice and constructive notice standard because OCR investigations are an administrative enforcement process – different than a civil lawsuit for monetary damages.
- But note that 2019 proposed Regs would do away with constructive notice as basis for OCR enforcement

# RESPONSIBLE EMPLOYEE



- A **Responsible Employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

**!** Institutions must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

# RESPONSIBLE EMPLOYEE



- Proposed Regs shift Responsible Employee definition to:
  - Anyone who has the authority to take action to redress the harassment
  - All pre-K-12 teachers when conduct is student-on-student
- This is only the standard for when OCR would deem a school to have received actual notice that creates an obligation to act.
- It is the bare minimum requirement.
- ATIXA still recommends that institutions require all employees to report harassment or discrimination, unless confidential
- ATIXA recommends that institutions use discretion to investigate a broader range of allegations than is required by OCR Regs, which set the floor, not the range of best practice.

# ACTUAL NOTICE



- Individual files a Title IX complaint.
- Individual notifies the Title IX Coordinator or other Responsible Employee.
  - In pre-K-12, this includes all teachers
- Individual reports to school/campus police or security official/SRO.

# WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal, written, signed complaint
- When the Coordinator deems an investigation is warranted
- Rumors, gossip, social media, etc. can be notice
  - Investigating on these bases is discretionary (but often recommended), particularly in light of the Proposed Regs.
  - OCR may not think they are, but will a court agree?
- Once actual notice exists, the further action is required.
  - Small “i” preliminary inquiry, and maybe...
  - Big “I” comprehensive investigation.

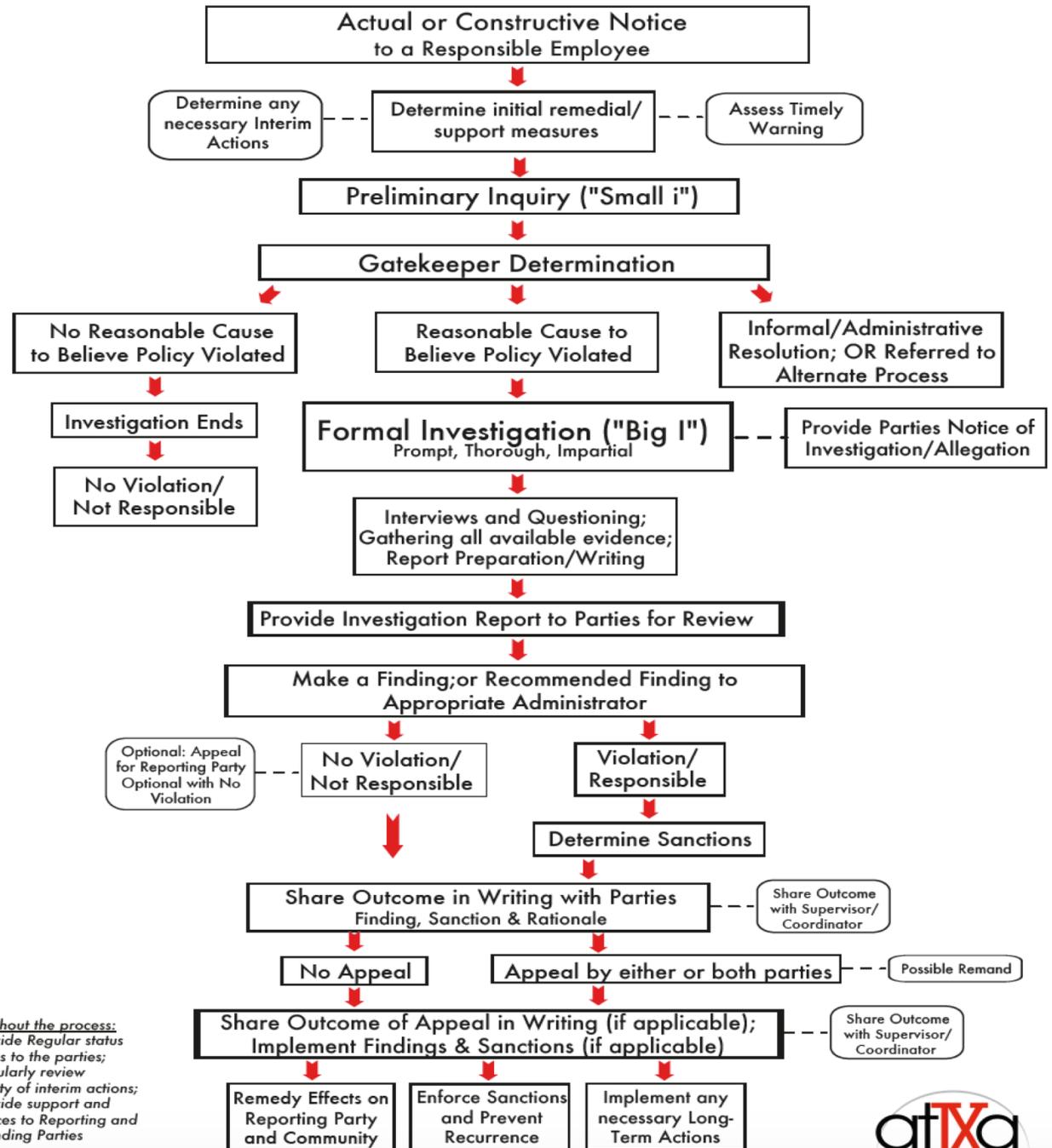
# CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

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- Civil Rights Investigation Model
- Investigation & Hearing Panel Model
- The Process & Ten Steps
- Jurisdiction
- Who Should Investigate?
- Confidentiality & Privacy

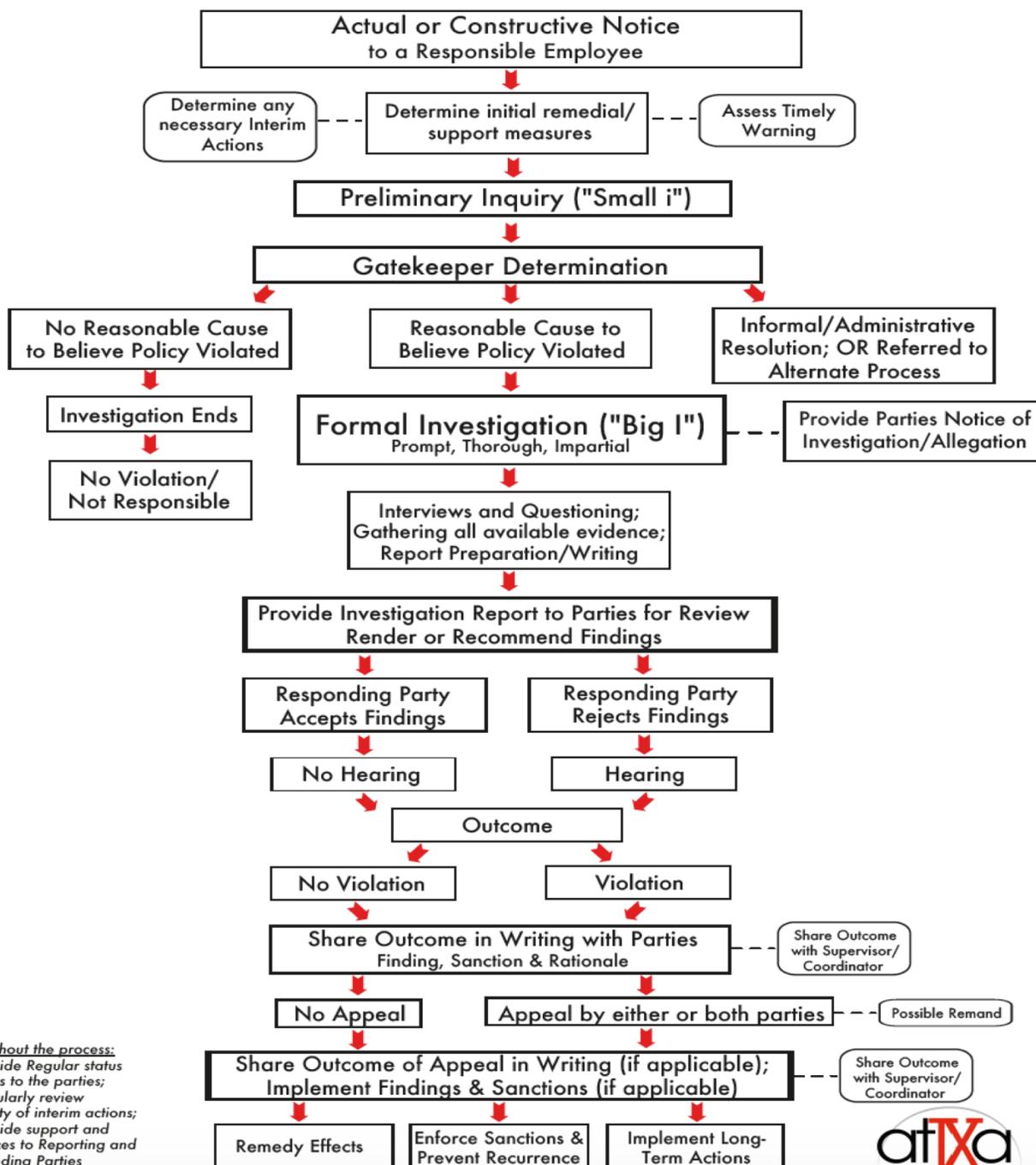
# ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART

## CIVIL RIGHTS INVESTIGATION MODEL



# INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART

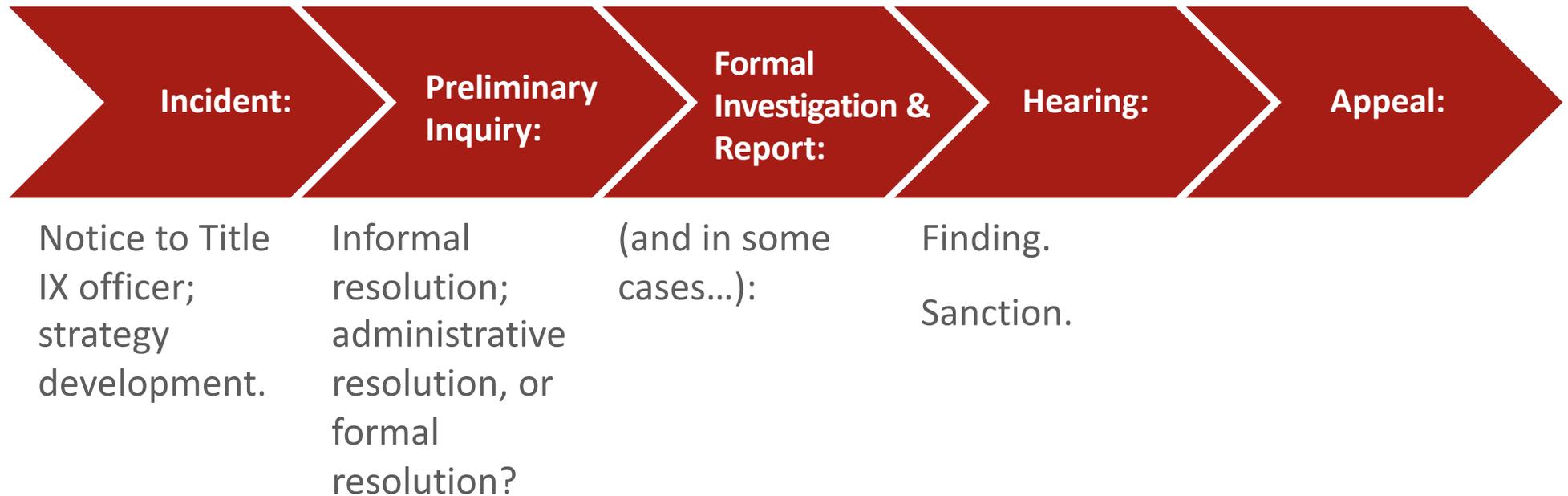
# INVESTIGATION AND HEARING PANEL HYBRID MODEL



*Throughout the process:*  
 1: Provide Regular status updates to the parties;  
 2: Regularly review necessity of interim actions;  
 3: Provide support and resources to Reporting and Responding Parties



# THE PROCESS



# TEN STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Witness interviews.
8. Evidence gathering.
9. Analysis.
10. Finding.

# CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL



- How does this model alter the current student conduct model used to address sexual assault, stalking, intimate partner violence, etc.?
  - An active gathering of information by the investigator or investigators; not intended to “build a case.”
  - Does not impact the implementation of informal or alternative dispute resolution approaches.
  - Characterized by an intentional effort to make procedural and support mechanisms equitable.
  - Typically provides a right of appeal for all parties to the report, not just the responding party.

# WHEN DOES TITLE IX APPLY?



- Proposed Regs say Title IX does not apply outside the U.S., but more accurate to say that OCR will not enforce extraterritorial complaints.
  - Implications for Study Abroad
  - Contrary case law
- *Davis* standard --Title IX applies and jurisdiction is required when the institution has:
  - **Control over the harasser** (discriminator); **AND**
  - **Control over context of the harassment** (discrimination)...
  - There is also likely a requirement that the reporting party experiences discrimination in a federally-funded educational program.

- For sexual misconduct/Title IX allegations:
  - Despite OCR’s determination not enforce regarding off-campus cases, there is still potential expectation from the courts that recipients have **SOME** jurisdiction over off-campus incidents as necessary to address the in-program effects of off-campus misconduct – **“Nexus”**
- Jurisdictional limitations:
  - Geographic and temporal.
- When is a student a “student?”
  - Application-Admission-Registration-Attendance-Breaks.
- Incidents that occur prior to enrollment?
- What about employees outside the scope of employment?

# WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable.
  - Title IX Coordinator.
  - Standing panel of investigators.
  - Human resources or student services.
  - Administrators, faculty.
  - One investigator or two.
  - Outside investigator
  - Coordinating investigation in multiple processes.
  - NOT General Counsel

# SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



No specific requirement, but:

- Investigation must be prompt, thorough, and impartial.
- Investigator must collect the maximum amount of relevant information available to make a determination.
- A pool of investigators may help to ensure that your investigation meets these requirements.

- Other benefits:
  - Who investigates may be strategic to each specific case.
  - Ability to brainstorm investigation steps and lines of questioning with co-investigators, and to co-facilitate interviews.
  - Flexibility if there is any conflict with investigators and parties.
  - Documentation.

# INVESTIGATION TEAM PROCESS OVERVIEW



- The investigation team, in consultation with their supervisors, and/or the Title IX Coordinator, strategizes the entire investigation, including methodology, order, timeline, goals, obstacles, etc.
- Interview all witnesses.
- Gather and assesses all available evidence.
- Write a report.
- Depending on your process, make a finding or recommendation (will vary by school).
  - May recommend sanction.

# RELUCTANCE TO REPORT



When a reporting party is reluctant to make a formal allegation, or seeks to withdraw a formal allegation, the Coordinator will determine if the institution will honor that request.

- A risk or threat assessment of some kind, as well as consideration of the reporting party's reasons will usually influence the Coordinator's determination.
- A comprehensive investigation and/or resolution does not automatically need to involve the reporting party, as it may, in many circumstances, be conducted without their involvement, if sufficient independent evidence allows, or a remedial response will suffice.

# RELUCTANCE TO REPORT (CONT.)



- Privacy vs. Confidentiality vs. Privilege
- The reporting party should be notified as to their options:
  - That the process will still be available to them, regardless of how long they wait.
  - That the institution will support them in any way it can (e.g. housing, classes, no contact orders, etc.).
  - That, if information is brought to attention of the institution that may involve a threat to community, the school may be forced to proceed with an investigation, but that reporting party will be notified of the process and treated as if they are fully participating, if they wish.

# REQUESTS FOR CONFIDENTIALITY



- The college or university should explain to the reporting party that:
  - Its responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by reporting party.
  - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party or others in cases involving: pattern, predation, violence, threat, weapons, minors, or other compelling safety risks.
  - Only those with a need to know will be informed.
    - Train those who will be informed about confidentiality
  - If the responding party is an employee, the institution may need to proceed under Title VII.

# REQUESTS FOR CONFIDENTIALITY



- If a reporting party requests confidentiality and/or does not want the institution to investigate:
  - The institution should take all reasonable steps to respond and investigate consistent with that request
  - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students or the reporting party.
  - Institution will offer support and resources
  - Proceeding without a reporting party's participation has due process implications for the responding party
  - If the reporting party does not participate in the hearing, according to the Proposed Regs, none of their evidence from the investigation will be admissible in the hearing.

# PRELIMINARY INQUIRY

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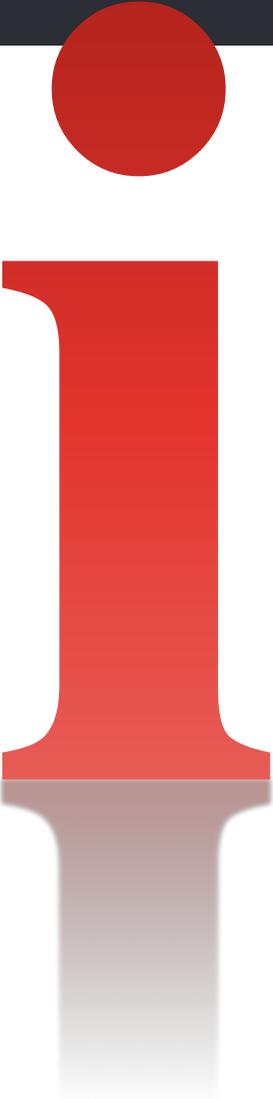
Preliminary Inquiry

Gatekeeping

Interim Actions

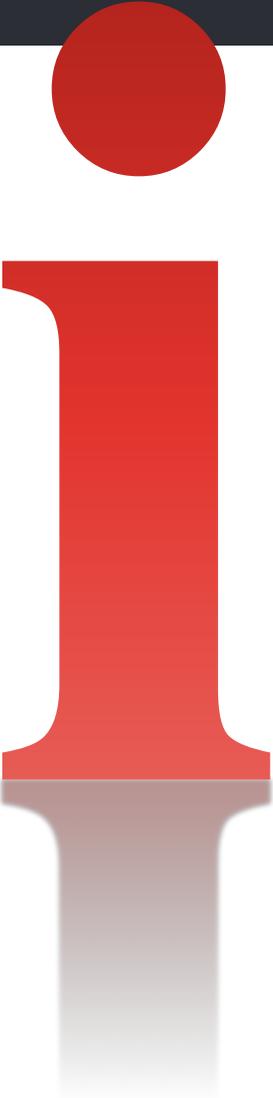
# PRELIMINARY INQUIRY



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- A large, stylized red number '1' is positioned on the left side of the slide. It consists of a solid red circle at the top, a thick red vertical bar in the middle, and a red base that tapers into a grey shadow at the bottom.
- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary.
  - Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
  - Push one Domino™ over at a time.
  - How much involvement does reporting party want?
  - Can we remedy informally or without discipline?
  - Give reporting party as much control as possible in the process.
  - May help to determine if there is reasonable cause to move process forward, and what policy violations should the responding party be noticed on.

# PRELIMINARY INQUIRY (CONT.)



- 
- A large, stylized red number '1' with a circular dot above it, serving as a decorative element on the left side of the slide.
- Establish a preliminary timeline for the investigation.
  - Investigate all allegations to determine:
    - The extent of the harassment.
    - The acuity of the threat it represents to students or employees.
    - What might be necessary to put an end to it.
  - Be able to show that a comprehensive civil rights investigation was completed and documented.
  - Responding to anonymous reports:
    - Determine if a trend or pattern may be apparent.
    - You may have a duty to attempt some form of remedial response, even to an anonymous report.

# GATEKEEPING



- As the investigation unfolds, the investigators should determine if there is *reasonable cause* to believe that policy has been violated.
- If that threshold is reached, the investigators should communicate with the coordinator to ensure a notice of allegation is issued.
- If investigation cannot produce sufficient evidence of reasonable cause, the investigation should end prior to the issuance of the notice of allegation and no hearing should be held.

# WHAT IS THE GATEKEEPING FUNCTION AND WHY IS IT ESSENTIAL?



- Whether your goal is equity, due process, essential fairness, equal dignity, or a process infused with the humanity of the participants, it is unfair for a responding party to be dragged through a process without substantiating evidence.
- Significant reputational harm can result from allegations of sexual harassment, etc.
- An allegation must be supported by *reasonable cause* to permit its **full** pursuit.
- While it is not common, there are those who would weaponize a Title IX complaint, and we are obligated to protect the integrity of our process from that type of abuse.

- Prepare and deliver the notice of investigation (and possibly notice of allegation, if appropriate) on the basis of the initial inquiry.
  - Should provide the details of the allegation(s), applicable policies, applicable procedures, etc.
  - Notice of investigation should be shared verbally and sent in writing to all parties.
  - Notice of allegation (charge) should also be shared with all parties.
  - Usually notice is given in advance (minimum of 2-3 days), and Proposed Regs would limit surprise interviews.

# HOW IS NOTICE OF INVESTIGATION GIVEN TO THE RESPONDING PARTY?



- Who is the responding party?
  - Student.
  - Staff.
  - Faculty.
  - Visitor (e.g., contractor, invitee, etc.).
  - Visitor (e.g., non-affiliated, guest, etc.).
- How is notice typically provided?
  - Written (i.e., electronic and/or paper).
  - Verbal.

# INTERIM ACTIONS AND REMEDIES



- Throughout process:
  - Investigate.
  - Stop behavior.
  - Prevent re-occurrence:
    - Consider the effect of “educational” sanctions...typically insufficient for more serious violations
    - Consider what education/training needs to be implemented, changed, etc.
- Remediate impact (often not sanction-based).
- *NOTE: Remember to provide support and resources to reporting and responding parties throughout the process, and don't forget to remedy on behalf of community, not just parties.*

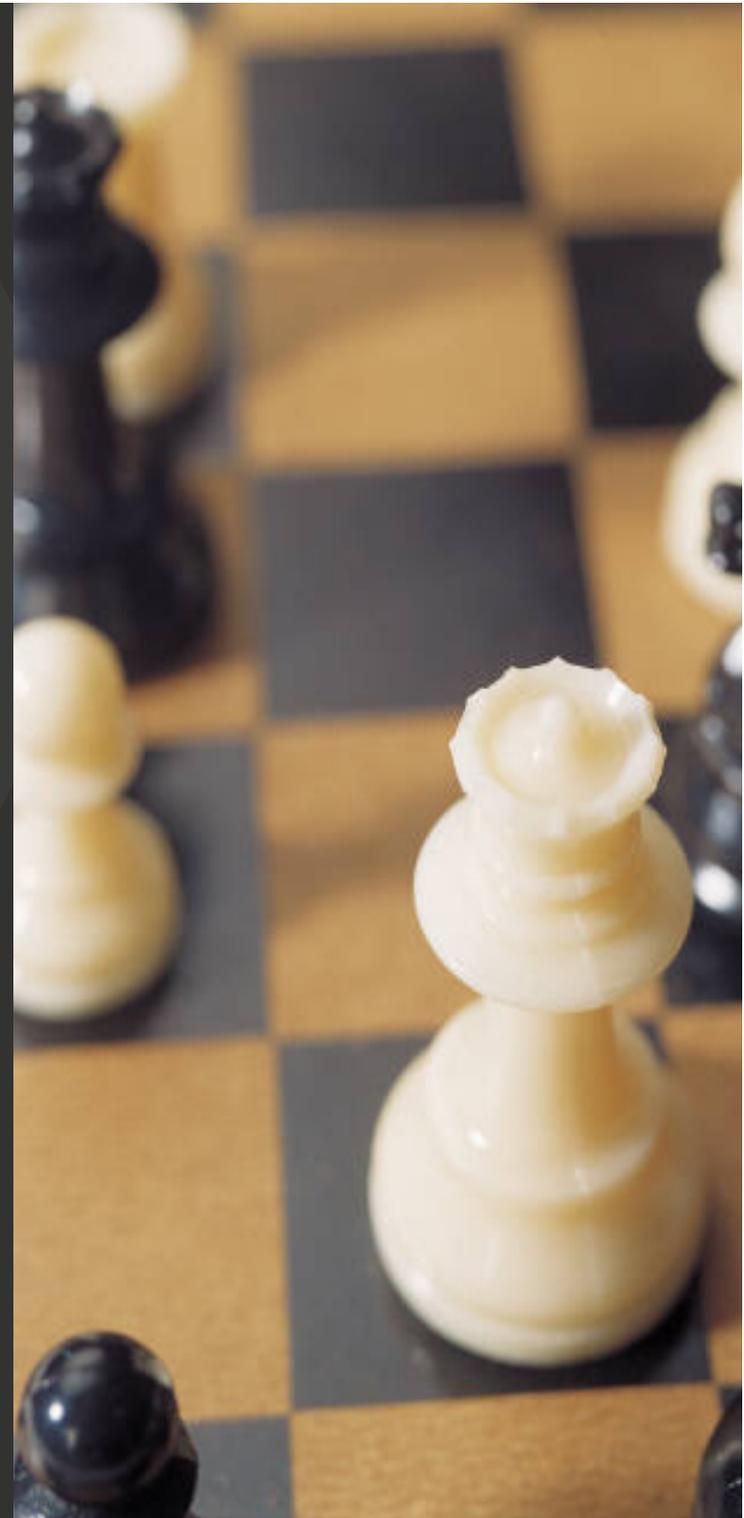
# COMMON INTERIM ACTIONS



- Providing a campus escort.
- Minimizing interaction between reporting party and responding party (e.g.: shifting classes, work, etc.).
- Relocating to a different classroom, residence hall, work space, course group, etc.
- Providing counseling services.
- Providing medical services.
- Providing academic support services, such as tutoring.
- Transportation options.
- Offering no-contact orders.
- Arranging for the reporting and/or responding party to re-take a course/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken with respect to reporting party to assure they are non-retaliatory.
- Holding school-wide training and education initiatives.
- Interim suspension.
- Change supervisor.

# BEGINNING THE INVESTIGATION

- Timeframes for Resolution
- Informal or Formal Resolution Process?
- Role of law enforcement
- Standard of Proof
- Formal Comprehensive Investigation
- Notice to the Parties
- Strategize the investigation



# PROMPT TIMEFRAMES FOR RESOLUTION



- 60-90 days to resolution is a good guide for more complex cases.
  - Timeline starts from notice, not from the incident itself.
  - No set requirement, other than to have prompt, designated timeframes in your procedures.
  - Goal is to avoid undue delay.
  - For K-12, timeframe is often much shorter
  - What about injunctions?
  - What about Summer break? Sabbatical? FMLA? Winter break? Studying abroad?

# TIMELINES



- Ensure that all steps in the investigation are conducted according to the timelines in the institution's procedures.
  - Procedures should provide some flexibility to timeframes
- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible.
  - To secure necessary remedies as soon as possible.
- Document and communicate unavoidable delays.
- Provide notice of extensions.

# INFORMAL AND FORMAL RESOLUTION PROCESS



OCR endorses and encourages informal resolution, and we believe it is a best practice, when voluntary.

- Some minor incidents can be resolved through confrontation, documentation, and/or intervention.
- More significant discrimination can also be resolved informally, by process in which responding party accepts responsibility, and/or by some forms of ADR or conflict resolution.
  - Mediation is **typically not** appropriate or effective as a stand-alone resolution mechanism for sexual assault or violence.

# ROLE OF CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS



- Can campus law enforcement be the Title IX investigatory arm? Should it be?
  - Legal standards for criminal investigations are different.
  - Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.
  - Conflict-of-interest with sworn officers.
  - Add value by supporting institutional investigation efforts.
- Establish MOUs with campus police and other local enforcement and update annually.
  - The power of the table top exercise.

# WHAT IS THE APPROPRIATE STANDARD OF PROOF?



- Different Standards: What do they mean? Why do they exist?
  - Beyond a reasonable doubt.
  - Clear and convincing evidence.
  - **Preponderance of the evidence.**
- The Proposed Regs skew toward the Clear and Convincing Evidence standard (without fully requiring it), but ATIXA prefers Preponderance of the Evidence as the most equitable standard.
- If you use C&C, be able to clearly articulate and define it.
- See: *ATIXA Guide to Choosing Between Preponderance of the Evidence and Clear and Convincing Evidence*; located at <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# FORMAL COMPREHENSIVE INVESTIGATION



- Commence a thorough, reliable, impartial, prompt and fair investigation.
- Determine the strategy for the investigation.
  - Witness interviews.
  - Evidence gathering.
  - Intended timeframe to complete the investigation.
  - Finding.
  - Presentation of finding.
- Complete the investigation promptly, and without unreasonable deviation from the timeline.

# NOTICE TO THE PARTIES



- In a civil rights model, notice has many phases, some or all of which may come to pass (equitably):
  - Notice of investigation and/or initial meeting.
  - Post-gatekeeper phase, notice of allegation (charge).
  - Post-investigation, notice of hearing (if applicable).
  - Updates on status of investigation (ongoing).
  - Notice of outcome and sanctions.
  - Notice of appeal.
  - Notice of final determination.

# WITNESS INTERVIEWS



- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary.
- Solicit a witness list from the reporting party.
- Solicit a witness list from the responding party.
- Determine when you are going to question responding party.
- **Suggested default order\***: Reporting party → Reporting party's witnesses → Neutral witnesses → Responding party's witnesses → Responding party → Any additional witnesses identified by Responding party → Round 2 → Round 3.

\*Every case is different

# STRATEGIZE THE INVESTIGATION



- Common questions to consider:
  - Which process is appropriate?
  - Whom to interview?
  - When/In what order?
  - What information/evidence can be obtained?
  - How and when do we notify the parties and witnesses?
  - Who needs to be aware of the investigation?
  - When and how do we share evidence/information with the parties?

# STRATEGIZE WHEN TO INTERVIEW PARTIES AND WITNESSES



- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible.
  - To secure necessary remedies in a timely manner.
- Strategize notifying the responding party of the report:
  - Immediately upon receipt of the report or notice, or...
  - In other circumstances, interviewing witnesses and accumulating evidence first may be better strategy.

# EVIDENCE GATHERING



- Engage in the active accumulation of evidence.
- Timeliness.
- Document receipt of information and other materials as they are obtained in the course of the investigation.
- Verify/authenticate evidence.
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted.



# LEVEL 1 INVESTIGATIONS TRAINING



## Part II

- I. Questioning Skills
  - i. The Goals of Questioning
  - ii. Questioning Skills
  - iii. Questioning Exercise
- II. Interviewing Skills
  - i. Interview Skills
  - ii. Interviewing Reporting Party
  - iii. Interviewing Responding Party
- III. Helpful Investigation Documents
- IV. Making a Finding & The Investigation Report
- V. Sanctions & Appeals
- VI. Trauma Informed Interviewing
- VII. 2017 Q&A on Campus Sexual Misconduct: OCR (supplement)

# QUESTIONING SKILLS

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- Questioning
- Challenging/Difficult Witnesses
- Lying Witnesses

# QUESTIONING SKILLS



- What are the goals of questioning?
  - Learn the facts.
  - Establish a timeline.
  - Understand each party’s perception:
    - Of the event and of the process.
  - Try to learn what is more likely than not to have happened
    - Three sides to every story (or more).
- NOT the goals of questioning...
  - Curiosity.
  - Chasing the rabbit into Wonderland.
- The “Gotcha” moment won’t typically come. Not your role. You are not law enforcement or prosecutors.

# QUESTIONING SKILLS



- To consider before asking questions:
  - What are the relevant issues?
  - What do I need to know?
  - Why do I need to know it?
  - What is the best way to ask the question?
  - Am I minimizing the re-traumatization potential?
  - Am I avoiding blaming or biased questions?
  - Am I the right person to ask this?

# QUESTIONING SKILLS



- Open-ended questions (tell us...who, what, how?)
- Close-ended questions (Did you, were you?)
  - Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions
  - I have two questions, First..., Second...
- Try not to ask Multiple Choice Questions
  - Were you a), b), c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

# QUESTIONING SKILLS



- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusing or argumentative.
- If your skepticism shows, make sure you intend it to show, otherwise keep your cards close to your vest.
- Don't make questions too long or confusing.
- If you ask a bad question, take it back.

# QUESTIONING SKILLS



- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy.
  - E.g.: that's too bad; I'm glad you said that.
- Do not moralize.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," and "had a few drinks."
- Do not ask questions that invite a reporting party to second-guess their actions, as this may be perceived as blaming.

# QUESTIONING EXERCISE



## Please critique the following questions:

- What effect did your actions (or behavior) have on others? On the community? On yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- Did you sign the Honor Code during orientation?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?

# QUESTIONING EXERCISE



## Please critique the following questions:

- What other options were there for you in this situation?
- What was the purpose of your behavior?
- How would you feel if others were engaged in comparable behavior?
- What would be the consequences to the community if everyone engaged in comparable behavior?
- How does your responsibility for living within community standards apply to your actions in this situation?
- How might you react if such a situation were to come up again?

# INTERVIEWING SKILLS

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- Establish Pre-interview Ground Rules
- Providing policies & procedures
- Demeanor of Investigator(s)
- Interview Skills
- Rapport Building
- Setting Up Reasonable Expectations
- Feedback to Witnesses
- Case Study

**Remember: As an investigator, you  
have no “side” other than the  
integrity of the process!**

# ESTABLISH PRE-INTERVIEW GROUND RULES



- Who will attend?
- How will records be kept? Recording? Access.
- Role of Advisors.
- Role of Attorneys.
- Difference between Advisor/Attorney role in interviews vs. in a hearing
- Involvement of Roommates, Parents, Union Reps, etc.
- FERPA/confidentiality.

# PROVIDING POLICY AND PROCEDURE COPIES



- Each party should receive a copy of:
  - The specific policies alleged to have been violated (not a link), including any sub-parts or sections.
  - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link).
- Consider providing parties with your non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

# DEMEANOR OF INVESTIGATOR(S)



- Work to establish a baseline of relaxed conversation.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
  - Avoid writing while party/witness is talking, if possible.
  - Do not be thinking about your next question while party/witness is talking.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking.

- General Interview Skills:
  - Outline your interview questions in advance, but be flexible.
  - Plan the order of interviews; may be beneficial to interview responding party last.
  - Most beneficial to conduct interviews in person.
  - Interviews should be conducted in a neutral, quiet, and private setting with a minimal or no likelihood of interruptions.
  - Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.

# INTERVIEW SKILLS (CONT.)



- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble for alcohol/drug use, etc.; Explain amnesty policy.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties in the case.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.

- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.

# INTERVIEW SKILLS (CONT.)



- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.
- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts).
- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails, etc.).
- Let parties/witnesses know you may need to follow up with them as the investigation progresses.
- Recommend that the parties consult their advisors before discussing the investigation with others.
- Remind witnesses not to discuss the investigation with those outside the investigation process.

- Understand the goals of an “interview” versus an “interrogation.”
  - An interview is a conversation designed to elicit information in a non-accusatory manner.
  - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended.
- Is person comfortable that you will conduct the investigation fairly and objectively?
  - Team or peer-led investigations can help create a rapport much more easily.

# SETTING UP REASONABLE EXPECTATIONS



- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly.
- Be sure reporting and responding parties understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the reporting party and the responding party to ask questions.
- Keep the reporting party in the loop as to exactly when notice will be given to the responding party.

# SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION



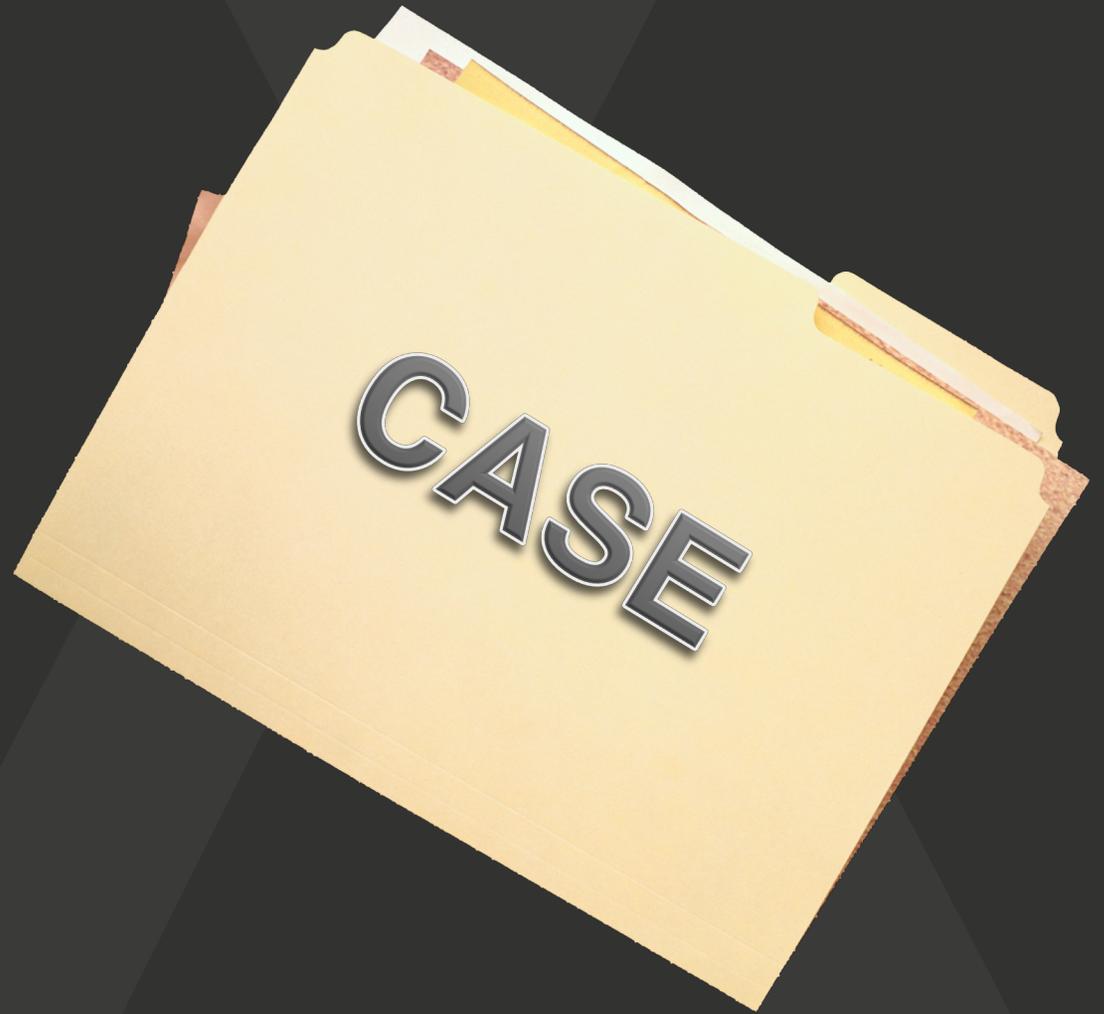
- Decide how much information you will share in advance of each interview, and have a rationale for what information will be shared and what will not be shared.
- Explore only those facts that are relevant to the issue at hand.
- Start with broad questions, then move to narrow, more pin-point questions.
- It can be difficult for the responding party to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport building. Be specific in terms of explaining the allegations.

# FEEDBACK TO WITNESSES



- Witnesses may ask or say:
  - Am I being investigated?
  - What are you really investigating?
  - How will you use the information you are given?
  - Is it confidential?
  - Will I get into trouble by giving you this information?
  - I don't want to cooperate.
  - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.

# CASE STUDY



# INVESTIGATION DETAILS:

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- Evidence Collection and Issues of Concurrent Criminal Action
- Interviewing the Reporting Party
- Interviewing the Responding Party
- Interviewing Witnesses
- Difficult Witnesses

# EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Active accumulation of evidence.
- What if law enforcement is the sole source of evidence collection?
  - And they won't release the evidence to you?
  - Does it matter if they are local or campus law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if the responding party threatens to call a lawyer or files a lawsuit?
- What if the reporting party files a lawsuit or complaint with OCR?

# INTERVIEW SCHEDULING



- Try to anticipate how long each interview will take (e.g. How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave open an amount of time roughly equivalent to the length of the interview for post-interview teamwork, review of notes with your co-investigator and to prepare for the next interview.

# INTERVIEWING THE REPORTING PARTY



- Acknowledge difficulty of reporting and thank them.
- Acknowledge that they may have told this story multiple times already.
- Explain why you are taking notes and/or ask for permission to record, if applicable.
- Provide a copy of your policies and procedures.
- Ask them to share a complete account of what occurred.
  - Have them give full narrative without asking questions, then drill down on details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.
  - What will witnesses likely say/know?

# INTERVIEWING THE REPORTING PARTY (CONT.)



- Ask about those they spoke to and told about the incident.
- Ask what the reporting party's motivation is for reporting and what that individual hopes to see as a result.
- Find out if the individual's academics and/or work have been affected.
- Ask how this has affected the reporting party emotionally and/or physically.
- Advise that the allegations will be discussed with the responding party and witnesses.
- Let the reporting party know next steps and when you will be in touch.

# INTERVIEWING THE REPORTING PARTY (CONT.)



- Considerations for Interim Actions :
  - Notify of their option to report to police; institution will help facilitate report.
  - Emotional, academic, and/or physical impact.
  - Counseling and advocacy options (on and off-campus).
  - Retaliation – prohibition and to whom to report.
  - No-contact orders.
  - Course adjustments.
  - Housing adjustments.
  - Etc.

# VAWA SECTION 304 INFORMATION FOR REPORTING PARTY



- Reporting parties should receive written information regarding:
  - Procedures victims of IPV, Sexual Assault, and Stalking should follow.
  - Interim measures (e.g. academic, living, transportation, work).
  - Services available on and off-site (e.g., counseling, advocacy, health, etc.)
  - Reporting options (e.g. campus police, local police, student conduct, HR, etc.)
  - Protection options (e.g. order of protection, no-contact orders, etc.)

# INTERVIEWING THE RESPONDING PARTY



- Acknowledge difficulty of the situation and thank the responding party for meeting with you.
- Provide a copy of your policies and procedures.
- Ask the person to share a complete account of what occurred.
- Question the responding party as to the allegations – ask a combination of open-ended and closed-ended questions.
- Get detailed – do not leave a question unanswered.
- Ask about witnesses and any other relevant information.
  - What will witnesses likely say/know?
- Ask about possible motivation for allegation(s).

# INTERVIEWING THE RESPONDING PARTY (CONT.)



- Provide support and resources throughout the process as needed.
- Let the responding party know next steps and when you will be in touch.
- Discuss counseling options if the individual is not already connected.
- Discuss non-retaliation and any intermediary steps such as no-contact orders, housing moves, and exclusions.
- If interim suspension/action is employed, review the terms and provide a timeframe.
- Encourage the person to maintain privacy of the investigation or consult their advisor before sharing.

# INTERVIEWING WITNESSES



- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the behavior, neutrally.
- Ascertain relation to the other parties in the matter.
- Ask questions, and address the need for complete truthfulness.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
  - Did they see any change in behavior?

# INTERVIEWING WITNESSES (CONT.)



- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to private investigators.
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted.
- Discuss non-retaliation and give examples.
- Discuss privacy and FERPA guidelines.
- Ask all interviewees to contact you if they remember anything else or want to add to their interview.

# CHALLENGING/DIFFICULT WITNESSES



- Set the tone:
  - Thank them.
  - Review your role as a neutral fact-finder.
  - Put them at ease – ask about them without being phony.
  - Acknowledge any hesitation/awkwardness as normal.
  - Review retaliation against a witness.
  - Review immunity.
  - Review confidentiality.
  - Review expectation of truthfulness.

# LYING WITNESSES



- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open for follow up.

# RESISTANT AND QUIET WITNESSES



- Gauge their resistance or hesitation and try to address their motivation individually.
- Answer their questions about the process.
- Back up when needed.
- If they open up, be responsive.
- Explain expectations of the school and rationale for the duty to participate.
- Advance preparation will help when open-ended questions don't work.

# OTHER CONSIDERATIONS



- Consider carefully who should lead the interview.
- Ask open-ended questions first.
- Allow time.
- Use breaks.
- Remain calm and professional.
- If you ask a bad question, simply apologize, restate, correct, etc.
- Allow for flexibility.

# HELPFUL INVESTIGATION DOCUMENTS

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- Developing a timeline of the incident
- Post-interview documents
- Witness lists and flowcharting

# INCIDENT TIMELINE



- Discuss timeline of event/s with all parties/witnesses.
- Obtain as much detail as possible.
- What times can be established from phone calls, email, texts, and receipts.
- Identify any “gaps” and address them – may lead to information not previously shared.
- Timing highly relevant to alcohol/drug consumption.

# INCIDENT TIMELINE (CONT.)



- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important.
- Establishing a reliable timeline useful when questioning witnesses such as bartenders and Uber/cab drivers, and when searching for video footage.

# THE FIVE DOCUMENTS TO CREATE POST-INTERVIEW



1. Interview Transcript in Final Form (to be verified by witness).
2. Opinions & Perceptions.
3. Future Pointers Document.
  - New Witnesses.
  - New Evidence.
  - Future Questions to Ask.
  - Witnesses to Go Back to With New Information.
4. The “Drips” Document.
5. Bulleted Key Takeaways from the Interview.

# WHAT TO DO WITH POST-INTERVIEW DOCUMENTS



- The interview transcripts go into the report, as appendices, and also into the file.
- The opinions and perceptions documents may or may not be retained, depending on the advice of counsel.
- The future pointers document is kept in the file, as a final checklist of investigation completeness.
- The drips documents are kept in the file or later destroyed, based on school policy.
- The bulleted takeaways are included in the report; no need to keep that document, but it can be kept in the file.

# INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION



- “The File”:
  - The responding party’s file.
  - The reporting party’s file.
  - The investigation file (including investigation report).
  - Personal case notes.
  - Witness education records.
- Subpoenas:
  - If you get one, call your general counsel!
- Understand the court process and your role in it.

# WITNESS LIST AND FLOWCHARTING BEST PRACTICES

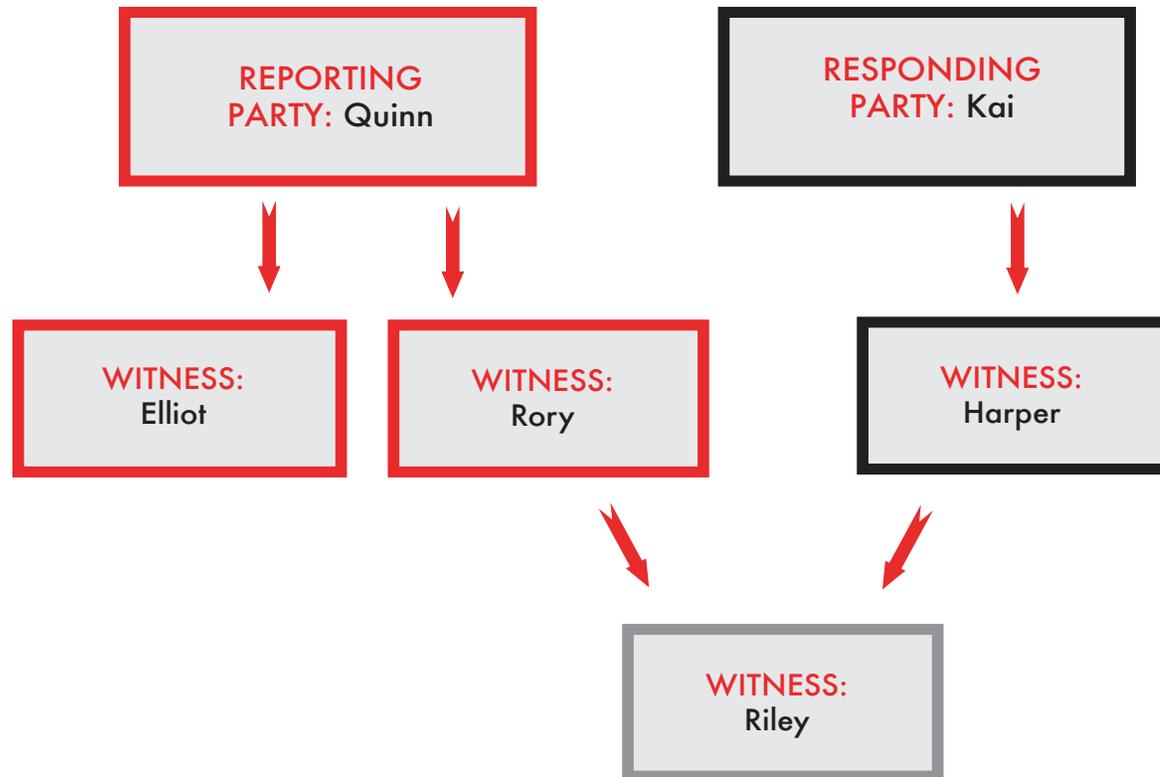


- Keep freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the reporting party leads you to, the witnesses responding party leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

# WITNESS FLOWCHART SAMPLE



## Flowchart of Witnesses



# MAKING A FINDING & THE INVESTIGATION REPORT

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- Analysis and finding
- Prior acts as evidence
- Who makes the finding?
- Overview of the investigation report
- A Hearing?

# ANALYSIS AND FINDING



- Review the institutional policies that apply.
- List the evidence and what it shows (relevance).
- Evaluate evidence/assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make determination or recommendation based on preponderance of the evidence, whether a policy violation is more likely than not.
- Cite concrete reasons for the conclusion(s) in written report.
- Refer allegations and findings to appropriate administrator for implementation, sanctioning, and/or hearing.

# PRIOR ACTS AS EVIDENCE



- Previous conduct violations by the responding party are not generally admissible in conduct proceedings.
- BUT, they are essential (and legally required) considerations in any civil rights investigation.
- Must be considered as evidence of finding, not just of sanction.
- Previous findings must be considered.
- The entire continuum of violence may establish pattern, but the more similarity, the stronger the weight of the evidence.

# WHO RENDERS THE FINDING?



- Variations in role of decision process.
  - Investigator renders the finding.
  - Investigator recommends the finding to an administrator or hearing panel.
  - Investigator presents investigation report to administrator or hearing panel with findings.
  - Investigator presents investigation report to administrator or hearing panel without findings.
- Importance of investigation report.
  - How much credibility assessment and analysis to include?

# THE INVESTIGATION REPORT



- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Unbiased summary or compilation of other information collected
    - E.g.: copies of texts, emails, and social networking messages, information from law enforcement, medical exams, video surveillance and photographs, etc.
    - Remember that the parties have the right to review ALL available evidence prior to a decision/hearing.

# THE INVESTIGATION REPORT



- Assess weight, relevance, and credibility of information gathered.
- Assess credibility of parties, witnesses.
- Explain unsuccessful attempts to collect information and/or interview witnesses.
- Highlight key factual findings for each allegation.
- The report should reference or contain all policies and procedures currently applicable.

# THE INVESTIGATION REPORT



- Develop how prior, similar acts by the responding party are relevant and to what.
- Measure the information gathered against the policies alleged to have been violated, applying the standard of proof (analysis).
- Depending on your process you may also recommend a finding on whether the policy has been violated, or make the finding.
  - Allow the parties to accept or reject the finding

# WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is increasingly viewed as necessary by the courts and OCR.
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- A well-conducted civil rights investigation can result in an accepted finding and waiver of hearing by the responding party.
- Waivers must be freely decided and non-coerced.
- Hearings can still occur when information is contested.

# WHAT ROLE DOES THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence (redacted).
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- If credibility must be assessed, it needs to be assessed in person by the decision-maker(s).
- The investigator's finding should not influence the hearing, so may be appropriate to withhold/redact that information and allow the decision-maker to be fully objective/impartial.

# SANCTIONS & APPEALS

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- Sanctioning considerations
- Common sanctions
- Sanctioning in sexual misconduct cases
- Basic overview of appeals

# SANCTIONING CONSIDERATIONS



The sanction must be reasonable and proportionate to the severity of the behavior.

- May consider prior misconduct.
- The role of precedent.
- May consider attitude, aggravation, mitigation, contrition, etc..
- Should be educational, but safety is primary consideration.
- Remedy for loss or injury to school or persons.
- Compliant with laws and regulations (e.g.: Title IX).
- Should consider the education impact on the parties.

# COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension or removal.
- Limited access to school/campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Training/Education
- Discretionary sanctions.
- In-school suspension (K-12).
- Suspension.
- Expulsion.

# COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/management process.
- Training (e.g. sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Investigation alone may not be sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
  - Separation/expulsion.
  - Suspension.
  - Lesser sanctions.
- Engage in strategic education and training as remedies.
- Conduct a risk assessment audit and mitigation process.

# SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
  - STOP -- Bring an end to the discriminatory conduct.
  - PREVENT -- Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - REMEDY -- Restore the reporting party as best you can to their pre-deprivation status.
- Can be real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

# CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigation (e.g. no contact orders, etc.).
- Ensure that long-term actions/remedies are equitable.
- Consider restorative justice as part of remedial process.
- Monitor for retaliation; respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal case law.

# SHARING OF OUTCOMES



- Title IX requires institutions to apprise parties of the status of investigations, **findings, sanctions** (or remedial actions) **AND THE RATIONALE THEREFORE**.
  - Provide this information in writing and place no conditions on receiving or sharing it.
- FERPA, the Clery Act/VAWA, and OCR 2019 Regs are the primary sources of mandates for outcome notification.
  - Clery/VAWA disclosure of sexual assault outcomes/sanctions.
  - FERPA re-disclosure restrictions lifted in 2008.
  - FERPA cannot be construed to conflict with or prevent compliance with Title IX.

# VAWA REAUTHORIZATION UPDATES TO THE CLERY ACT (CONT.)



Institutional disciplinary procedures shall “provide a prompt, fair and impartial investigation and resolution.”

- Reporting and responding parties are entitled to the **same opportunities** to have a support person/advisor of their choice at **any** proceeding or related meeting.
- Reporting and responding parties must be simultaneously informed in writing of:
  - **The outcome**...that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.
  - The institution’s procedures for appeal.
  - Any change to the results that occurs prior to the time that such results become final.
  - When such results become final.

# THE APPEALS PROCESS

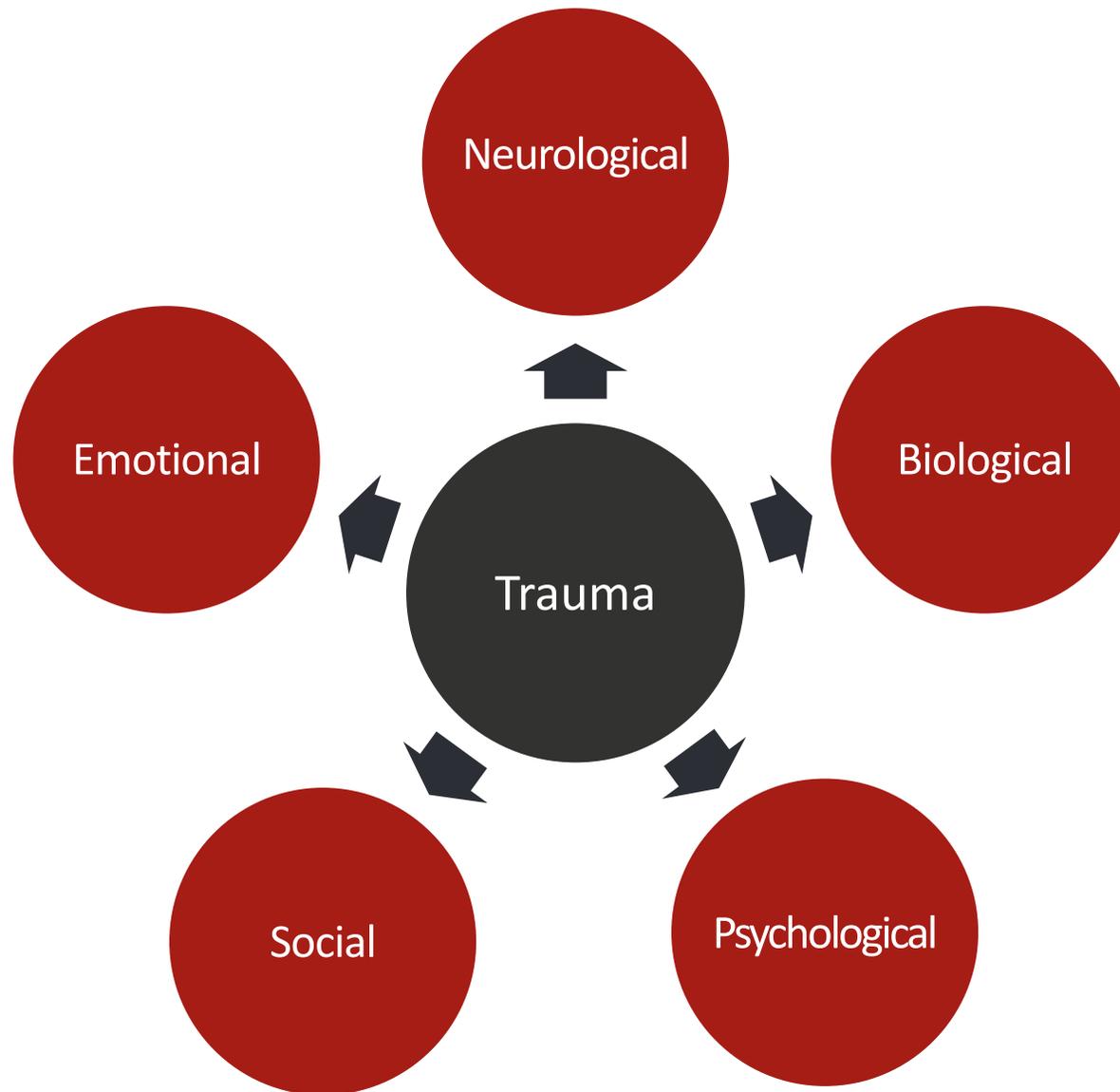


- Equitable.
- Clearly communicated to reporting and responding parties.
- One level of appeal is best practice.
- Defined window of time to request appeal.
- Clear grounds for appeal.
- Committee versus individual determination preferred.
- Deference to original hearing authority.
- Remand.

# TRAUMA-INFORMED INTERVIEWING

- Sexual Assault as trauma
- Considerations for interviewing

# IMPACT OF TRAUMA ON FUNCTIONING



# THE BRAIN'S RESPONSE TO TRAUMA



In response to the anticipated trauma of sexual assault or other violence, hormones can be released into body which impact:

- Ability to react physically.
- Ability to think rationally.
- Ability to consolidate or group memories.

*This is a neurobiological response, not a choice.*

# INTERVIEWING CONSIDERATIONS



- Prioritize developing rapport and building trust.
- Emphasize transparency and predictability.
- Physical aspects of interview (light, access, comfort, etc.).
- Be cognizant of why someone may have responded in a “counterintuitive” manner.
- Be mindful that recall is often difficult and slow following trauma.
- Use non-judgmental/non-blaming language.
- Avoid re-traumatization (but must still ask necessary questions).

# A TRAUMA INFORMED RESPONSE ALSO:



- Promotes safety.
- Recognizes the impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Understands how trauma can impact someone's academics/work/social life.
- Recognizes the need for support/positive relationships.
- Honors choice with the goal of empowerment.
- Is respectful, and considers boundaries and privacy.
- It does NOT mean that you cannot or do not question the credibility of the Reporting Party.

# WHAT MIGHT SHUT A REPORTING PARTY DOWN

- Unsupportive responses.
- Avoid:
  - Taking control any more than you have to.
  - Escalating the situation.
  - Defining or labeling a reporting party's experience.
  - Asking why questions.
    - “Why did you . . . ?”
  - Verbalizing judgment in the moment.
  - Telling reporting party they must press charges.

# THE PREDATORY PERPETRATOR



- It is hard to identify a predator absent evidence of pattern acts.
- We can't profile or base decisions on personality characteristics or statistics.
- Still, experienced investigators develop “Spidey sense” that informs their investigations:
  - Sociopathy (Read *The Sociopath Next Door*, by Martha Stout, Ph.D.).
  - Can the responding party empathize?
  - Do they show genuine remorse?
  - Are they able to reflect on how they have impacted another person?
  - Are their justifications of their actions rationalizations or nothing more than attacks on their accuser or other externalizations?

QUESTIONS?



# CONTACT INFORMATION

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CIVIL RIGHTS INVESTIGATOR  
TRAINING & CERTIFICATION LEVEL TWO COURSE

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Orlando, FL | January 24-25, 2019

# YOUR FACULTY



**Anna Oppenheim, J.D.**  
Supervising Lead Consultant, TNG  
Advisory Board Member, ATIXA



**Joseph Vincent, MLS**  
Associate Consultant, TNG

# LEVEL 2 INVESTIGATIONS TRAINING



## Agenda

- I. Policy Overview
  - A. Sexual Harassment
  - B. Sexual Misconduct
    - i. Non-Consensual Sexual Contact
    - ii. Non-Consensual Sexual Intercourse
    - iii. Sexual Exploitation
  - C. Other Violations
- II. Elements of Civil Rights Investigation Model
- III. Traits of an Effective Investigation
- IV. Due Process
- V. Questioning Witnesses
  - A. Difficult Witnesses (Lying/Resistant/Quiet)
  - B. Questioning Model
  - C. Questioning Activity
- VI. Note-Taking, Recordkeeping, and Report Writing
- VII. Evaluation of Evidence and Decision-making Skills
- VIII. Bias & Prejudice
- IX. The Investigation Report
- X. Report Writing Exercise

# LEVEL 2 INVESTIGATIONS TRAINING



## Agenda

- I. Sanctioning
  - A. Sanctioning Practice
- II. Analyzing the Information and Making a Finding
- III. Trauma and Investigations
- IV. Inclusive Investigations
- V. Disciplinary Investigations and VAWA Sec. 304 & The Clery Act
- VI. Investigating Retaliation
- VII. Consent Construct
  - A. Analytic for Sexual Misconduct: Force/Incapacity/Consent
- VIII. Case Studies
  - A. Sexual Assault without Alcohol
  - B. Sexual Assault with Alcohol
  - C. Sexual Harassment
  - D. Stalking
  - E. Relationship Violence

# UNDERSTANDING THE POLICIES

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- Sexual Harassment
- Non-Consensual Sexual Contact
- Non-Consensual Sexual Intercourse
- Sexual Exploitation
- Stalking
- Relationship Violence
- Bullying
- Hazing
- Other Misconduct Offenses



Policies

# SEXUAL HARASSMENT



## Sexual harassment is:

- Unwelcome
- Sexual, sex-based, and/or gender-based verbal, written, online, and/or physical conduct.

# SEXUAL HARASSMENT DISCIPLINARY STANDARD



- Sexual harassment may be subject to discipline when it takes the form of:
  - Quid Pro Quo harassment;
  - Retaliatory harassment; and/or
  - Creates a hostile environment.

# 3

## Types of Sexual Harassment

# QUID PRO QUO SEXUAL HARASSMENT



- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
- By a person having power or authority over another, when
- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.

# RETALIATORY HARASSMENT



- Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.
- Also includes retaliation against a reporting party by the responding party or that person's friends or others who are sympathetic to the responding party.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

# HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
  - Sufficiently severe, or
  - Persistent or pervasive, and
  - Objectively offensive that it:
    - Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the school's educational [and/or employment], social and/or residential program.

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Increasing problem of conflating discomfort or being offended with the higher standard of hostile environment
- The frequency (persistent or pervasive), nature, and severity of the conduct.
- Whether the conduct was physically threatening.
- Whether the conduct was humiliating.
- The effect on reporting party's mental or emotional state.

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Whether conduct was directed at more than one person.
- Whether the conduct **unreasonably** interfered with the reporting party's educational or work performance.
- Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment.

# NON-CONSENSUAL SEXUAL CONTACT



- **Non-consensual sexual contact is:**
  - Any intentional sexual contact,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force.

# SEXUAL CONTACT DEFINED



- **Sexual contact** includes:
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; **OR**
  - any other intentional bodily contact in a sexual manner.

# NON-CONSENSUAL SEXUAL INTERCOURSE



- **Non-consensual sexual intercourse is:**
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force.

# INTERCOURSE DEFINED



- **Sexual Intercourse** includes:
  - Vaginal or anal penetration by a penis, object, tongue or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.

- **Sexual Exploitation:**

- When an individual(s) takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, that behavior does not otherwise constitute one of the other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to...

# SEXUAL EXPLOITATION (CONT.)



- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond boundaries of consent (e.g. letting friends hide in the closet to watch you having consensual sex).

# SEXUAL EXPLOITATION (CONT.)



- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Prostituting another person.
- Intentionally/recklessly exposing one's genitals in non-consensual circumstances; inducing others to expose theirs.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

- **Stalking:**
  - Repetitive and menacing,
  - Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.
- This definition of stalking also allows campuses to distinguish stalking from lurking, which is often fixation without menacing or harmful intent, and which is often steady state, whereas stalking often becomes more intrusive over time.

# STALKING (CONT.)



- May be a series of legal actions, but campus policy is not required to mirror criminal standards in most jurisdictions.
- Can be a form of sexual harassment, too.
- We distinguish the ATIXA model definition of stalking (as we do with Domestic Violence/Dating Violence) from the VAWA definitions which do not reflect best practices, and are used only for the reporting of crime statistics.

# INTIMATE PARTNER VIOLENCE (IPV)



- Violence or emotional abuse between those who are in or have been in an intimate or romantic relationship to each other.
  - Examples include:
    - Physical abuse by a spouse or partner such as hitting, slapping, pushing, or strangling.
    - Sexual violence by a spouse or partner.
    - Extreme verbal abuse by a spouse or partner.
- Other terms include interpersonal violence, relationship violence, dating violence, and domestic violence.
- Typically involves another code violation.
- If based on gender/sex, would fall within Title IX.
- Combines the VAWA offenses of domestic and dating violence.

# BULLYING



- Defined as:
  - Repeated and/or severe,
  - Aggressive behavior,
  - Likely to intimidate or intentionally hurt, control, or diminish another person, physically or mentally,
  - That is not speech or conduct otherwise protected by the First Amendment.

*Bullying falls within Title IX  
when gender-based.*

# BULLYING (CONT.)



- Often includes comments about race, color, national origin, sex, sexual orientation, or disability.
- Often involves an imbalance of power, aggression, and a negative, repeated behavior.

- **Hazing:**
  - Acts likely to cause physical or psychological harm or social ostracism to any person within the school community, when related to the admission, initiation, pledging, joining, or any other group-affiliation activity (as defined further in the hazing policy).
- When sexual in nature (sex or gender-based is not applicable here because of the fraternity/sorority exception under Title IX).

# OTHER MISCONDUCT OFFENSES



- Threatening or causing physical harm, extreme verbal abuse, or other conduct which threatens or endangers the health or safety of any person.
- Discrimination: actions that deprive other members of the community of educational or employment access, benefits, or opportunities on the basis of sex or gender.
- Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another.
- Any rule violated on the basis of the reporting party's sex/gender, which is severe enough to cause a discriminatory effect.

# ELEMENTS OF CIVIL RIGHTS INVESTIGATION MODEL

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- Civil Rights Investigation Model Hallmarks
- Brainstorming Session

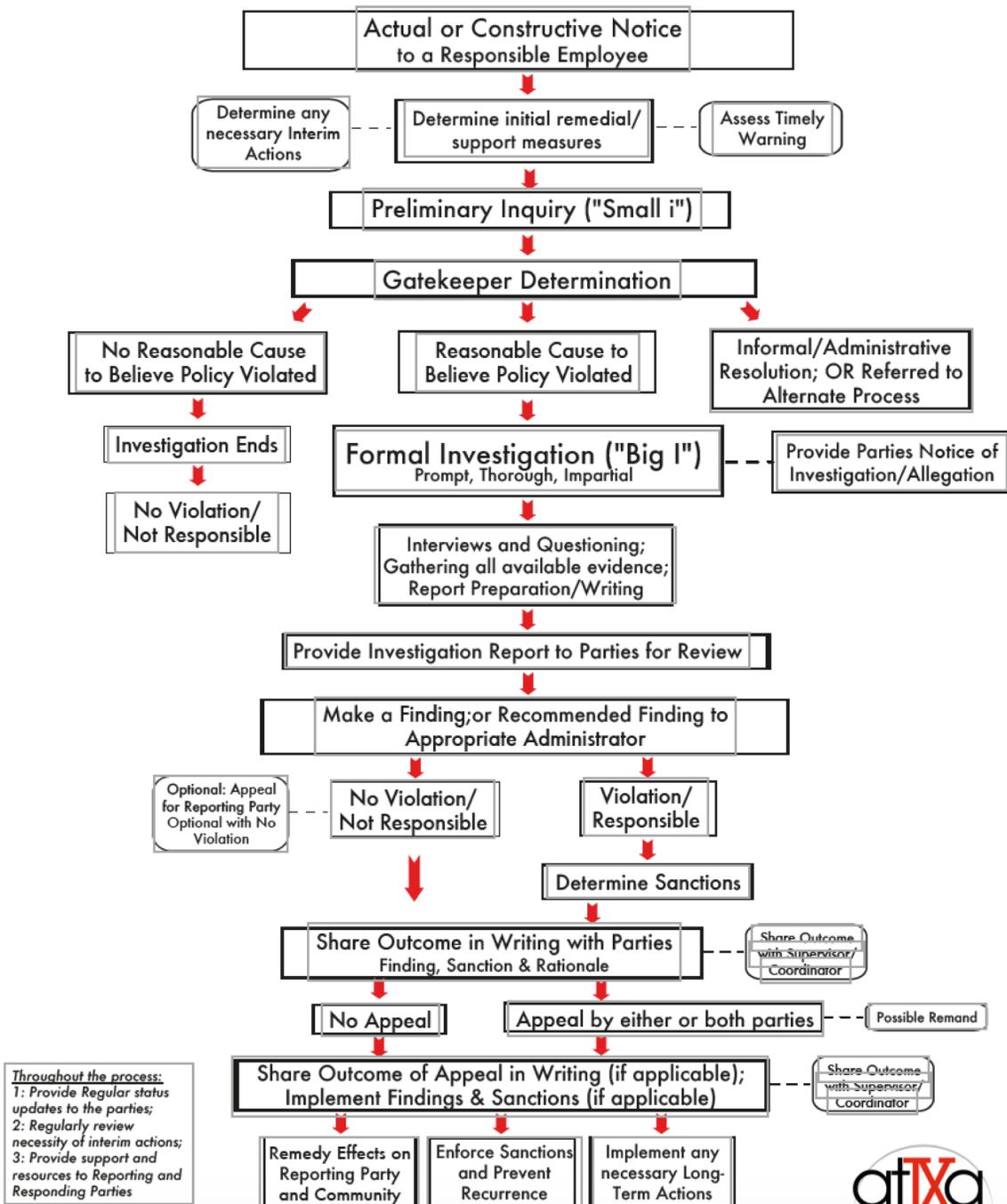
# CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS



- Active identification and strategic gathering of evidence.
- Investigation is the center of the procedure for resolution.
- Enhanced Due Process
- Grounded in the concepts of neutrality and equity.
- Most effective for victim-based violations.

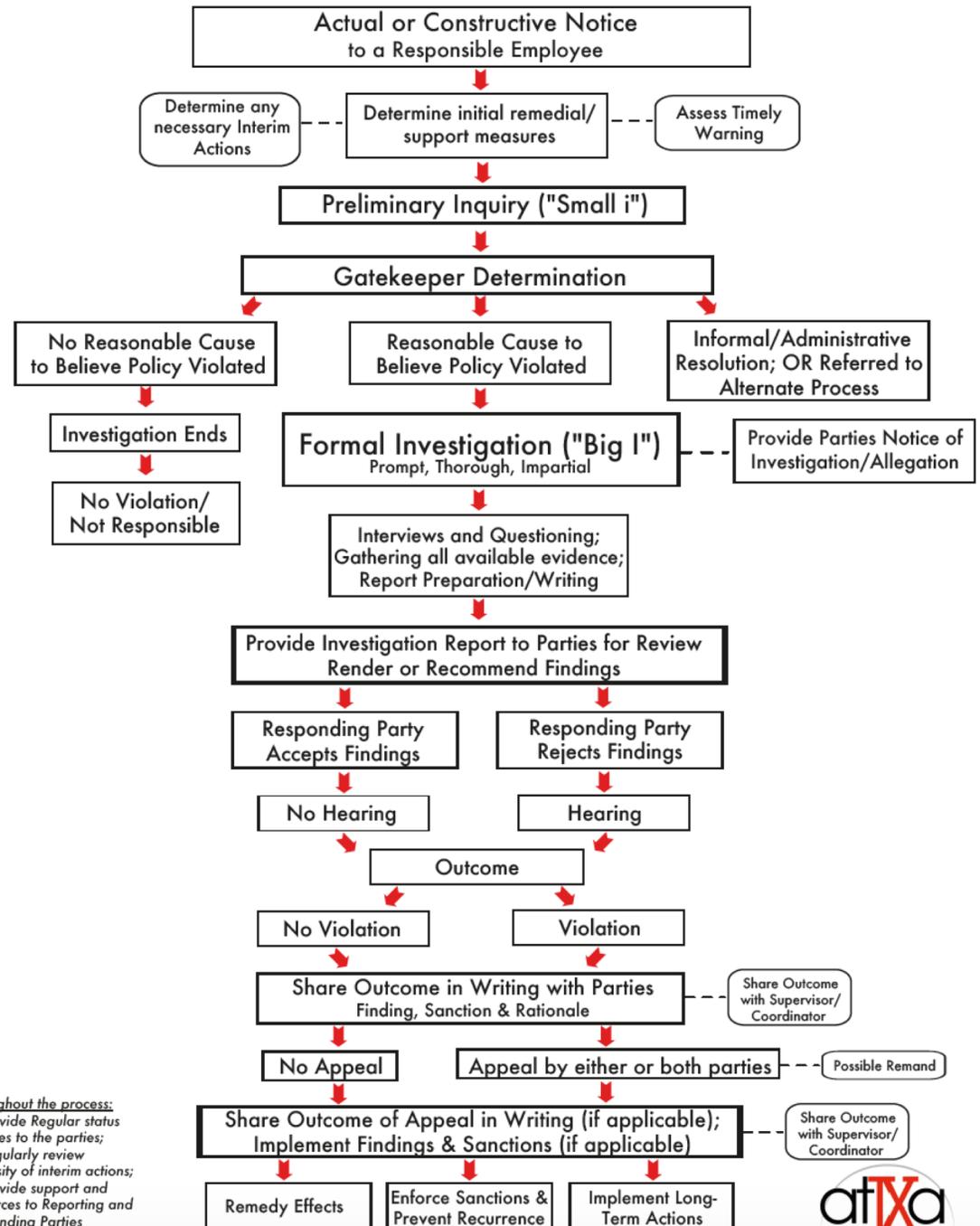
# CIVIL RIGHTS INVESTIGATION MODEL

## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



# INVESTIGATION AND HEARING PANEL HYBRID MODEL

## INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



Throughout the process:  
 1: Provide Regular status updates to the parties;  
 2: Regularly review necessity of interim actions;  
 3: Provide support and resources to Reporting and Responding Parties



# BRAINSTORMING SESSION



- Work with other attendees from your campus, or in groups of four to five.
- On your own, write a list of the three most attractive aspects of the civil rights investigation model for your campus.
- On your own, write a list of the three biggest impediments or challenges your campus may face in implementing or perfecting this model.
- Take turns sharing, and brainstorm as a group on ways to overcome the challenges. Share one challenge and one solution per group with the whole group.

# TRAITS OF AN EFFECTIVE INVESTIGATION

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- Active Accumulation of Evidence
- Consistent
- Planned/Strategic
- Documented
- Impartial



# DUE PROCESS

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- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

# WHAT IS DUE PROCESS?



- The set of rights-based protections that accompany disciplinary action by a school, college or university.
- Dictated by law & Regulations, courts, system, district, school, or college policies and procedures.
- Private schools refer to this as “Fundamental Fairness”
  - Though courts and OCR are increasingly using the term Due Process

# EVOLUTION OF DUE PROCESS



- Evolution of Due Process in education
  - Dean Wormer; Principal Strickland (1950's)
  - *Dixon v. Alabama* (1961) & *Goss v. Lopez* (1975)
  - Constituency-based policies and procedures
  - Due Process & Student Conduct Administration
  - Title VII and HR Models
  - Civil Rights Investigation Model & Hearings
  - Current caselaw and OCR Proposed Regs

# DUE PROCESS IN PROCEDURE



- A school's process should include (at a minimum):
  - Detailed and specific Notice of Allegation and/or Investigation.
  - Notice of Hearing.
  - Right to present witnesses.
  - Right to present evidence.
  - Right to an advisor of their choice
  - Opportunity to be heard and address the allegations and evidence.
  - Right to appeal (recommended).
  - Right to Cross-Examination
  - Right to review all relevant\* evidence AND the investigation report prior to a decision.

# DUE PROCESS IN DECISION



- A decision must:
  - Be based on a fundamentally fair rule or policy.
  - Be made in good faith (i.e., without malice, ill-will)
  - Be unbiased
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
  - Not be arbitrary or capricious.
- Sanctions must be reasonable, constitutionally permissible, and should relate to the violations

# QUESTIONING WITNESSES

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- Challenging/Difficult Witnesses
- Lying Witnesses
- Remember to conduct your interviews of the parties as if they are a hearing, because they are.

# CHALLENGING/DIFFICULT WITNESSES



- Set the tone:
  - Thank them.
  - Review your role as a neutral fact-finder.
  - Put them at ease – ask about them without being phony.
  - Acknowledge their hesitation.
  - Review retaliation against a witness.
  - Review immunity.
  - Review confidentiality.
  - Review expectation of truthfulness.

# LYING WITNESSES



- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open to follow up.

# RESISTANT AND QUIET WITNESSES



- Gauge their resistance or hesitation and try to address their motivation individually.
- Answer their questions about the process.
- Back up when needed.
- If they open up, be responsive.
- Explain expectations of the school and rationale for the duty to participate.
- Advance preparation will help when open-ended questions don't work.

# OTHER CONSIDERATIONS



- Consider who should conduct the interview.
- Ask open-ended questions first.
- Allow time.
- Utilize breaks.
- Remain calm and professional.
- If you ask a bad question, simply apologize, restate, correct, etc.

# QUESTIONING MODEL

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Using a case study, the presenters will model questioning techniques for challenging witnesses.



# QUESTIONING ACTIVITY WITH PARTICIPANTS



# SCENARIO

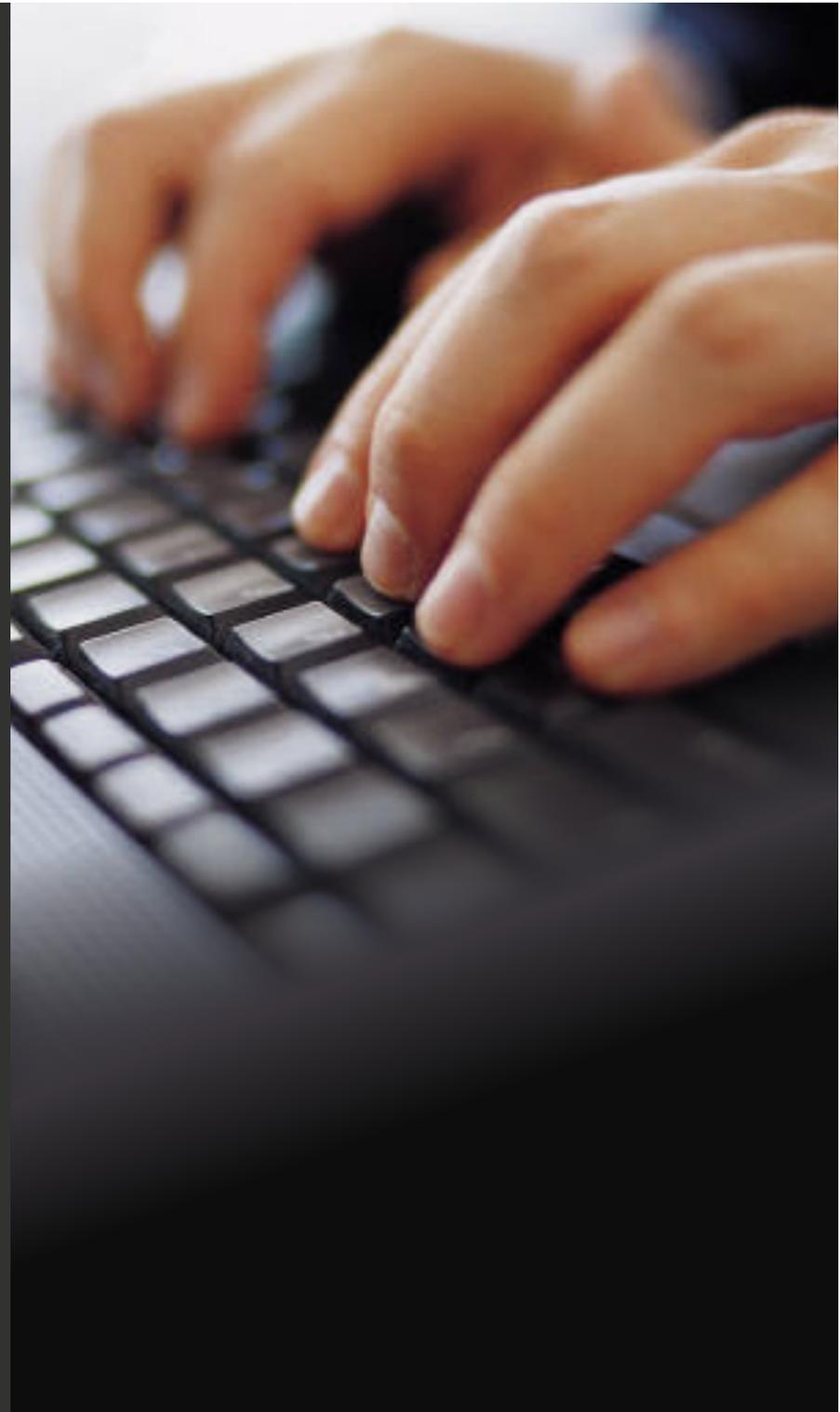


- Tanya and Mark are students. Tanya has alleged that Mark had sex with her without her consent. She had been drinking before they met up at a party on a Saturday, and thinks he had been drinking, too. Mark asked her to come over to watch a sporting event and she thought others would be there. Some things happened she was OK with, but then it got to a point where she wasn't OK with what was happening. When it was over, she went back to her residence hall and met up with her friend, Amy.

# NOTE-TAKING, RECORDKEEPING, AND REPORT WRITING

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- What Kinds Of Notes Should Be Kept?
- Note-Taking



# WHAT KINDS OF NOTES SHOULD BE KEPT?



- Assemble an investigative file and keep it in a secure location.
- Keep a timeline of the steps in the process, including dates of all meetings and interviews.
- Interviews – notes vs. recording.
  - Recording is becoming more common
- Notes – handwritten vs. computer.
- **Interviewee verification.**
- Records of all contacts, including emails and phone calls with all parties.

# NOTE-TAKING



- Taking notes may slow down the interview in a good way – may help detect deception.
- Use pre-prepared numbered questions as a framework, but be flexible.
- Note-taking should occur throughout the entire interview, not just when the responding party makes a pertinent disclosure or an “incriminating” remark.
- Documentation is critical: you are creating the record of the complaint.
- Remember that students have the right to inspect their education record under FERPA.

# NOTE-TAKING (CONT.)



- Notes should be complete and detailed.
  - Important for assessing credibility.
  - Decision may turn on small details.
- Where possible, include verbatim statements on critical issues – Use their words, not yours.
- Keep notes on what is told to the reporting party, responding party, and witnesses.
- You may want to summarize perceptions of credibility, honesty, etc.
  - Recognize, however, that all notes and evidence may be subject to review

# NOTE-TAKING (CONT.)



- Remember that “sole possession” FERPA exception is very limited.
- Date all records and include who was present at any meetings; number pages.
- Review your notes before the interview concludes.
- Clarify anything you are unclear about.
- Document any refusal to answer, evasion, or refusal to participate.
- Capture key quotes.
- Review and finalize notes immediately upon completion of interview.

# EVALUATION OF EVIDENCE AND DECISION-MAKING SKILLS

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- Understanding Evidence
- Credibility
- Analyzing the Information
- Making a Finding

# UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
  - Evidence is any kind of information presented with the intent to prove what took place.
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.
- Consider if drugs or alcohol played a role.
  - If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
  - Look for evidence of prior planning.

# CREDIBILITY



- Credible is not synonymous with truthful.
- Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
- Credibility is largely a function of consistency and corroboration.
- Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...

# FACTORS TO CONSIDER FOR CREDIBILITY



- Corroborating evidence
- Logic/consistency
  - Ask yourself, “Does this make sense?”
  - Be careful of own biases about what is or is not logical
- Inherent plausibility – is the evidence more likely than the alternative?
- Non-cooperation
  - Look for short, abrupt answers or refusal to answer.
  - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Demeanor (careful with this one)
  - Demeanor issues should be cue to ask more questions.

# MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it...this is not Lie to Me.

# ANALYZING THE INFORMATION



- Examine only actions that have a direct relation to the situation under review or a pattern of incidents.
- Explore motivation, attitude, and behavior of reporting party, responding party, and witnesses.
- Apply relevant standards:
  - Force, incapacity, and consent.
  - Unwelcomeness, reasonable person, and discriminatory effect.
- Analyze the broadest, most serious violations first and make a determination of each and every violation alleged, element by element.

# ANALYZING THE INFORMATION (CONT.)



- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
  - Is the question answered with fact(s)?
  - Is the question answered with opinion(s)?
  - Is the question answered with circumstantial evidence?

**!** Withhold judgment until all the evidence has been considered.

# FOCUS ON WHAT YOU DON'T KNOW, RATHER THAN WHAT YOU DO



- Find an opportunity to let your subconscious work on the gaps in information (e.g., yoga, meditation, etc.).
- If you are too busy analyzing what you know, you will not focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

# MAKING A FINDING



- Review the institutional policies in play.
- Parse the policy.
  - Specific findings for each policy and each responding party.
- Pose key questions.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not policy has been violated.
- Cite concretely the reasons for you conclusions.

# BIAS & PREJUDICE

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# “BIAS” DEFINED



- Tendency to believe that some people, ideas, etc. are better than others that usually results in treating some people unfairly.
- Strong interest in something or ability to do something.
- Inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (*merriam-webster.com*).
- “Biased” – To cause partiality or favoritism; influence, especially unfairly (*dictionary.com*).
- **“Confirmation Bias”**: The tendency to interpret new evidence as confirmation of one's existing beliefs or theories.
  - VERY common form of bias

# “PREJUDICE” DEFINED



- Unfair feeling of dislike for a person or group because of race, sex, religion, etc.
- Feeling of like or dislike for someone or something especially when it is not reasonable or logical (*merriam-webster.com*).
- Any preconceived opinion or feeling, either favorable or unfavorable (*dictionary.com*).
- A prejudicial action is harmful to someone. In the investigation context, the “harm” is an unfair decision.

## Key Issues

- Conscious vs. unconscious.
- Positive vs. negative.
- Social & cultural capital.
- Stereotyping.
- Cultural competence.
- Multi-partiality.
- Social justice.

# BIAS AND PREJUDICE CONT.



- Common hot-button areas of bias & prejudice that impact investigators:
  - Sexual orientation.
  - Gender, transgender, and gender identity.
  - Race.
  - Ethnicity.
  - Religion or religious beliefs.
  - Political views.
  - Athletes.
  - Greek life.
  - Alcohol or drug use.
  - Sexual freedom

# BIAS AND CONFLICT OF INTEREST



- Conflicts of interest create bias for or against
- Types of conflicts:
  - Wearing too many hats in the process
  - Legal Counsel as decision-maker
  - Non-impartial appellate officer, hearing officer, or board
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest
- Also, having disciplined a student or employee previously is often not a conflict of interest

# BIAS ISSUES IN RECENT CASELAW



- Bias in Procedure
  - Exclusion of evidence
  - “Believe First” or “I believe you”
  - Failure to follow procedures
  - Placing burden of proof on the responding party
- Biased training materials
- Insufficient Training
- Bias due to internal and external pressures (e.g. politics, identity of the parties or parents, lawsuits and attorneys, etc.)
- Conflicts of interest

# BIAS: SMALL GROUP DISCUSSION



- In small groups, discuss:
  - What are some bias-related issues you have seen in your work in higher education?
  - Are there bias/prejudices that you have seen on your campus?
  - How have you trained groups (faculty, staff, students) regarding bias and prejudice?
    - What has worked?
    - What has not worked?

# THE INVESTIGATION REPORT

UK

YOUR UNIVERSITY  
LOGO HERE

## SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

*This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.*

University of Knowledge

Date of Report:

This report addresses alleged violations of the **Policy Name(s)** of the University of Knowledge. **Names of Investigators** conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

### **Executive Summary:**

*(Summarize findings here.)*

### **Procedural History:**

*Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.*

On **Month XX, 20XX**, **Reporting Party** met with **Name Here** in the Office of Victim Assistance at University of Knowledge along with **Name Other Present Parties**. **Reporting Party** reported that **General Allegations** occurred on **Month XX, 20XX**. **Reporting Party** has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators **Name Here** and **Name Here** on **Month XX, 20XX**. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on **Month XX, 20XX**.

### **Involved Parties:**

**Reporting Party** is (e.g., a first-year undergraduate female residing in the residence halls).

1. **Responding Party** is (e.g., a male graduate student and a residence advisor in the residence halls).
2. **Witness 1** is (e.g., a freshman female residing in the residence halls and **Reporting Party's** roommate).
3. **Witness 2** is (e.g., a male undergrad living off-campus and a classmate and friend of **Reporting Party**).
4. **Witness 3** is (e.g., an employee of **Nearby Bar**; employee is not affiliated with the university).

# THE INVESTIGATION REPORT (CONT.)



- A skeleton template is helpful
- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Detail the allegations and how they were brought forward.
  - Explain the role of the parties and witnesses, and any relations between them.
  - Results of interviews with parties and witnesses.
  - Results of interviews with experts.
  - Summary of other information collected (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

# THE INVESTIGATION REPORT (CONT.)



- Assess weight, relevance, and credibility of information gathered.
- Assess credibility of parties.
- Explain unsuccessful attempts to collect information and/or interview witnesses.
- Highlight key factual findings for each allegation.
- The report should reference or contain all policies and procedures currently applicable.

# THE INVESTIGATION REPORT (CONT.)



- Develop how prior, similar acts by the responding party are relevant and to what.
- Measure the information gathered against the policies alleged to have been violated, applying the standard of proof (analysis).
- Depending on your procedures, recommend a finding on whether the policy has been violated, or make the finding.

# ELEMENTS OF AN INVESTIGATION REPORT



- Case identification information:
  - Case number, investigator(s), date of notice, date assigned to investigator, and date investigation closed.
- Source of initial complaint/allegation:
  - Source of complaint, name and contact information of the reporting party, and status; same for responding party.
- Details from initial report/complaint:
  - Nature of incident.
  - How report was received (e.g. security incident report, hotline, face-to-face, web form, etc.).

# ELEMENTS OF AN INVESTIGATION REPORT (CONT.)



- Document the purpose (scope) of the investigation.
  - This section must paint a clear picture of the investigation for the person reading the report.
  - Identify clearly which policies are in play.
- Document each of the tasks assigned and actions taken throughout the investigation, particularly if there are multiple investigators.
- Index all documentation relevant to the complaint.
  - E.g. research, notes, medical records, police reports, prior complaints, etc.

# ELEMENTS OF AN INVESTIGATION REPORT (CONT.)



- Investigation interview:
  - Name/title of the interviewer(s).
  - Name of the persons interviewed and their role in the investigation – reporting party, responding party, witness, etc.
  - Names of any other people who sat in on the interview and their roles.
  - Location of the interview.
  - Interview date.
  - Detailed notes of interview.
- Incident log.
- Finding and action taken.

# REVIEWING TEMPLATES FOR RECORDKEEPING AND REPORT-WRITING



- Format.
- Form.
- Flow.
- Style.
- Use of Appendices.
- Contents/Index.
- Tabs.
- Exhibits/Physical Evidence.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



# SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
  - Bring an end to the discriminatory conduct (Stop).
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
  - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

# WHAT SANCTIONS?



- A student is found responsible for non-consensual sexual intercourse involving another student; the panel determined the reporting party was incapacitated and the responding party should have known of this incapacity.
  - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication.
  - The responding party is an excellent student and is well-liked by campus community; he will graduate in a month.
  - The reporting party indicates that she does not want the responding party to be suspended or expelled.

# WHAT SANCTIONS?



- A male tenured faculty member is found responsible for non-consensual sexual intercourse involving a female student who is not in any of the professor's classes.
  - The investigator determines that the student was incapacitated and the responding faculty member should have known of that incapacity.
  - The faculty member is a full professor holding a prestigious endowed chair position.
  - The student and the professor had consensual sex five times after the non-consensual incident.
  - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

# TRAUMA AND INVESTIGATIONS

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- Introduction to Trauma
- Neurobiological Impact of Trauma
- Considerations for Interviewing

# WHAT IS TRAUMA?

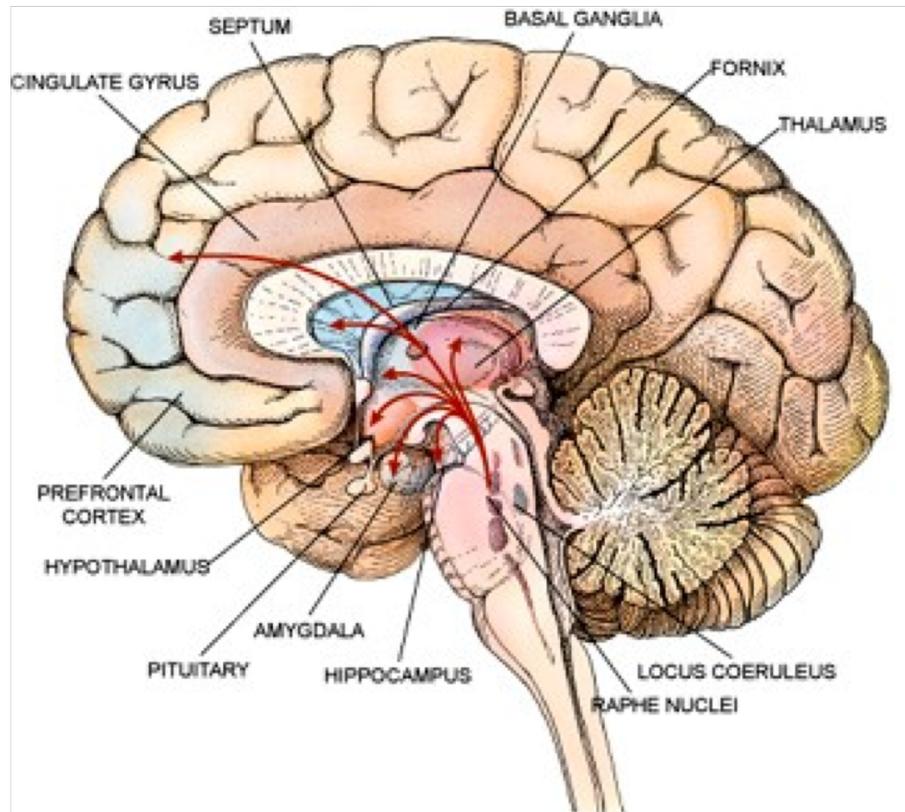


Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.

May result from:

- War
- Natural disasters
- Severely distressing events
- Violence
  - Including Intimate Partner Violence, Sexual Violence, Stalking, etc.

# HOW THE BRAIN AND BODY RESPOND TO TRAUMA



- Hypothalamus
- Pituitary
- Hippocampus
- Amygdala

# PERCEIVED THREAT



- When the amygdala senses a threat in the form of sexual assault, it signals to the hypothalamus, which signals to the pituitary gland, which signals to the adrenal gland, which releases hormones or chemicals throughout the body to help react to the threat and likely trauma.
- The amygdala does not distinguish between “types” of sexual assault,
  - E.g. stranger or acquaintance, but interprets them equally as threats to survival.
- The amygdala also does not typically differentiate between an actual threat and a perceived or subjective threat.
  - Sometimes also a function of prior experiences, rather than the immediate situation.

# HORMONAL FLOOD



- A release of a number hormones into the body to prompt survival and coping – can occur during an event perceived as traumatic
  - Catecholamine (adrenaline): responsible for fight or flight; creates mobilization, but impairs rational thought and decision-making.
  - Opioids: to deal with pain; creates flattening affect.
  - Cortisol: increases energy production during stressful situations; impairs blood sugar levels, immune system, and other bodily systems.
  - Oxytocin: promotes good feelings to counterbalance sensation of pain.

# HORMONAL FLOOD



- The hormonal flood may last for 96 hours (four days) and may be reactivated by a triggering event.
  - Physical toll on body: headaches, body ache, and GI issues.
  - Compromised decision-making.
  - Emotional swings.
  - Self-medicating behaviors.
- Yet we sometimes expect reporting parties to make major decisions and recount the incident during this time.

# EFFECTS OF FLOODING



Hormones are released in varying amounts and may result in behavioral differences among reporting parties:

- Fight, Flight, Freeze – not a choice.
- Also impacted by chemical surge into prefrontal cortex, impairing ability to think rationally.
- May present to you as confused, laughing, crying, flat, angry, irritable, or variable.

# TONIC IMMOBILITY



*Some reporting parties may also experience tonic immobility; like being awake during surgery.*

- Hormonal flood and dysregulation of the autonomic nervous system can cause the body to shut down.
- “Rape-induced paralysis.”
- Know what is happening, but can’t fight.
- Biological response based on survival; think of the animal world.

# MEMORY AND TRAUMA



- Memory is formed in two steps:
  - Encoding: organizing sensory information coming into brain.
  - Consolidation: grouping into memories and storing the stimulus.
- Trauma can interfere with the encoding and/or the consolidation of memory.
- May create fragmented memories.
- Recall can be slow and difficult.
- Alcohol may interfere further with memory.
- However, sensory information (smell, sound, etc.), may still function properly.

# RESPONSES TO TRAUMA ALSO IMPACTED BY:



- Personality.
- Coping strategies.
- Available support systems and resources.
- General resilience.
- Past history of traumatic experiences.
- Cultural differences in the perception and expression of trauma.
- Normalization/Adaptation.

# TRAUMA & INTERVIEWING



- Expecting a reporting party to give a linear account in the days after an incident, or after having been triggered, is not always realistic.
- Memory fragmentation can occur.
- Having “inconsistent” memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma.
- Considerations for credibility assessment?

# ADDITIONAL IMPACTS DURING THE 96 HOURS



- Physical toll on body: headaches, body ache, and GI issues.
- Compromised decision-making.
- Emotional swings.
- Self-medicating behaviors.

# INTERVIEWING CONSIDERATIONS



- Allowance for sleep cycles prior to interviews (if within 96-120 hours).
  - One to two sleep cycles makes a big difference in ability to connect memories.
- A non-linear account, with jumping around and scattered memories is not uncommon.
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Use strategies that pull out fragmented memories.
- Be patient during the interview and allow time.

# QUESTIONING AND TRAUMA



- Empathy is critical.
  - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
  - 5 senses
- What were your reactions to this experience?
  - Physically
  - Emotionally
- What, if anything, can you not you forget about this experience?

Source: Partially drawn from Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

- Trauma can negatively impact a reporting party's credibility.
- Trauma may help explain:
  - Inconsistencies in a reporting party's statement.
  - Lack of linearity in a reporting party's account or statement.
  - Reporting party's lack of memory about an incident.
  - Memory errors by the reporting party.
  - Reporting party's demeanor or affect.
  - Reporting party's brief answers, or answers lacking in detail.

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them.
  - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties.
  - If, for example, a reporting party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility.
  - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment.
- Use caution because actual or perceived trauma may have little or nothing to do with consent.

# INCLUSIVE INVESTIGATIONS

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- Working with Gender Non-Conforming Individuals
- Working with LGBTQ Individuals
- Same-Sex Sexual Violence
- Hate-Based Misconduct

# TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

# TERMINOLOGY (CONT.)



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

## Sexual Violence and Intimate Partner Violence Can Happen to Anyone...

- regardless of sex, gender, gender identity, and gender expression.
- regardless of sexual orientation.

# VIOLENCE AND SEXUAL ORIENTATION



- Lesbians and gay men reported IPV and sexual violence over their lifetimes at levels equal to or higher than heterosexuals:
- 44% of lesbian women, 61% of bisexual women, and 35% of heterosexual women experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.
- 26% of gay men, 37% of bisexual men, and 29% of heterosexual men experienced rape, physical violence, and/or stalking by an intimate partner at some point.
- Approximately one in five bisexual women (22%) and nearly one in 10 heterosexual women (9%) have been raped by an intimate partner in their lifetime.

Source: The Centers for Disease Control and Prevention's (CDC) National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation.

# RELUCTANCE TO REPORT



- Concern about a homophobic response.
- Concern about preconception that sexual assault cannot occur between same-sex partners.
- Fear of exposing LGBTQI community to negative stereotypes.
- Fear of the impact a report may have on a small, sometimes close-knit community at the school.
- Fear of reaction of family and friends.
- Fear of institution not understanding their identity, expression, or orientation.

# RELUCTANCE TO REPORT



- Fear of being outed and implications for medical treatment.
- Concern about how “systems” will respond, especially law enforcement.
- Previous negative experiences with school staff, the law, or community members.
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to “boys being boys.”

# CONSIDERATIONS FOR INVESTIGATIONS



- Educate yourself and your community
  - Do not expect parties to “educate you.” Stick to the facts.
  - Ask for additional education or training if needed.
- Be mindful of how power dynamics and targeting can come into play.
- Assume nothing and allow for self-identification.
- Provide a safe, non-judgmental, and respectful environment.

# CONSIDERATIONS FOR INVESTIGATIONS



- A visible reaction may negatively impact rapport.
- Use inclusive language; reflect language used by the parties during interviews and in all communication.
- Anticipate heightened confidentiality concerns.
- Use your school/campus/district/community-based experts.
- Be aware of your biases.

# HATE-BASED MISCONDUCT



- Targeting persons based on their real or perceived membership in an historically oppressed group.
  - When sex or gender is the basis, it's a TIX.
  - Be aware that trauma may be especially severe for the reporting party.
  - Reporting party may have heightened concerns about safety and retaliation.
  - Investigations may focus on identification of responding party or parties.

## EXAMPLE



Jay is a student who is gay and a member of the school cheer team. A group of football players repeatedly ridicules Jay about his effeminate mannerisms and clothing, and threatens to harm him if they run into him off campus. Jay starts skipping cheer practice and eventually quits the team rather than face the continued harassment.

## EXAMPLE



Ty, a student and RA who is biologically female but dresses and lives as a male, repeatedly catches a group of three students writing comments on the whiteboard on his door referring to him as “it.” The same group of students drunkenly confronts Ty in the hallway one night and starts pulling at his pajamas to “see what’s under there.” Ty moves off campus and gives up his job as an RA as a result.

# VAWA SEC. 304 & THE CLERY ACT

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- Overview of the Clery Act and VAWA
- VAWA 2013's "Big Four" Crimes
- Procedures for Victims
- Procedures Institutions Will Follow
- Institutional Disciplinary Policies and Procedures

# THE CLERY ACT



## Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting.
- Campus crime log.
- Campus Sexual Assault Victims Bill of Rights (1992).
- Primary crimes (7+3).
- Hate crimes (8 categories).
- Policy and procedure disclosures.
- Timely Warnings & Emergency Notifications.
- Sex offender information dissemination.
- Enforcement and fines.
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304.



# THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are **universal and instructive for all educational institutions**, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

# RECENT CLERY AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



## Section 304: “Campus SaVE”

- Section 304 significantly amended the Clery Act.
- Final Regulations released October 15, 2014.
- Effective date of the law was July 2015.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.
- Prohibits retaliation.

The “Big 4”

# VAWA “BIG FOUR” CRIMES

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- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking



# VAWA 2013 – SEC. 304: UCR DEFINITIONS: DATING VIOLENCE



- **Dating Violence**

- *Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*

# VAWA 2013 – SEC. 304: UCR DEFINITIONS: DOMESTIC VIOLENCE



- **Domestic Violence**

- *By a current or former spouse or intimate partner of the victim;*
- *By a person with whom the victim shares a child in common;*
- *By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;*
- *By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;*
- *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.
  - **Rape:** the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.
  - **Fondling:** the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.*
  - Includes:
    - Rape
    - Fondling
    - Incest
    - Statutory Rape

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Rape**

- *The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.*

- **Statutory Rape:**

- *Sexual intercourse with a person who is under the statutory age of consent.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Fondling**

- *The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.*

- **Incest**

- *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: STALKING



- **Stalking**

- *Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:*
  - *Fear for the person’s safety or the safety of others; or*
  - *Suffer substantial emotional distress.*
  
- **Course of Conduct:** *two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.*

# DISCIPLINARY PROCEDURES UNDER VAWA SEC. 304

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# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Prompt, Fair, and Impartial Process
  - Prompt, designated timeframes (can be extended for good cause with notice to parties).
  - Conducted by officials free from conflict of interest or bias for either party.
  - Consistent with institutions' policies.
  - Transparent to accuser and accused.
  - Timely and equal access to parties “and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings.”

# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Policy statements must also include:
  - “A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged” VAWA offenses AND that,
  - “Describes **each type** of disciplinary proceeding used by the institution” including:
    - The steps.
    - Anticipated timelines.
    - Decision-making process.
    - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made).
    - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense.

# VAWA 2013 SEC. 304 STANDARD OF EVIDENCE



- ASR Policy statement of disciplinary procedures must also include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses.
  - No specific standard required
- However, the institution must use the standard of evidence described in the statement in all such proceedings.

- Proceedings must “be conducted by officials who receive **annual** training on”:
  - Issues related to the four VAWA offenses
  - How to conduct an investigation and a hearing process that:
    - Protects the safety of victims.
    - Promotes accountability.
    - Caution: this does not mean the training should be biased or slanted in favor the reporting party.
      - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party.

# VAWA 2013 SEC. 304 “PROCEEDING”



- “Proceeding” is defined broadly as:
  - “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, **fact-finding investigations, formal or informal meetings, and hearings.**”
  - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim.”
- This disclosure is required for **any and all** faculty, student, and staff disciplinary procedures.
- “You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e., on or off your institution’s Clery Act geography).”

# VAWA 2013 SEC. 304 ADVISORS



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
  - An advisor is “any individual who provides the accuser or accused support, guidance or advice.”
  - An advisor is optional and can be **anyone** (including an attorney or a parent).
  - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions.
  - Institutions should notify parties of these restrictions prior to proceedings.
  - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool.
  - Advisors can serve as proxies if an institution so chooses.

- When a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution will provide the student or employee a written explanation of the [their] rights and options
  - **"Must be a prepared, standardized and written set of materials, including detailed information regarding a victim's rights and options."**
    - This does not mean that you hand the student a copy of the [ASR] or the policy statements contained in the [ASR].

# VAWA 2013 SEC. 304 WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written information should be provided to students and employees about existing resources (updated regularly):
  - Counseling & Mental Health
  - Health
  - Victim advocacy
  - Legal assistance
  - Visa and immigration assistance
  - Student financial aid
  - Other services available for victims
  - Both within the institution and in the community
- Information should include contact information about these resources, including how to access these resources.

*NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.*

# VAWA 2013 SEC. 304

## WRITTEN MATERIALS PROVIDED TO VICTIMS



- Written Materials should also include victims about options for, and available assistance in, and how to request changes to:
  - Academic
  - Living
  - Transportation
  - Working situations, or
  - Protective measures (e.g., no contact orders, Orders of Protection, etc.)
- The institution must make such accommodations if the victim requests them and they are reasonably available.
  - “the institution is **obligated** to comply with a student [victim]’s reasonable request for a living and/or academic situation change following an **alleged** sex offense.”

*NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.*

# VAWA: LAW ENFORCEMENT



- “Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to:
  - Notify proper law enforcement authorities, including on-campus and local police
  - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
  - Decline to notify such authorities
  - Clarifications from The Clery Handbook:
    - An institution’s ASR statement must provide specific contact information for the authorities
    - An institution’s ASR statement must also explain what is involved in making a police report

*Note: The Clery Handbook adds: “The statement that your institution will comply with a student’s request for assistance in notifying authorities is **mandatory.**”*

# VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME



- Require simultaneous notification, in writing, to both accuser and accused, of:
  - The result of any institutional proceeding arising from allegations of VAWA offenses.
    - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution.”
    - Result = Finding, Sanction, and Rationale.

*Note: The Clery Handbook contains an explicit FERPA exclusion.*
  - Procedures for appeal (if any).
  - Any change to results.
  - When such results become final.

# VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME



- What must be included in the rationale?
  - How evidence and information presented was weighed.
  - How the evidence and information support the result and the sanctions (if applicable).
  - How the institution’s standard of evidence was applied.
    - Simply stating the evidence did or did not meet the threshold is insufficient.
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.”

# INVESTIGATING RETALIATION CLAIMS

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- Basic Legal Principles
- Investigating Retaliation Claims



# RETALIATION BASIC LEGAL PRINCIPLES



*The Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.*

- Protected activity under Title IX:
  - Reporting sex discrimination, including sexual harassment and assault.
  - Filing a discrimination complaint.
  - Assisting someone in reporting discrimination or filing a complaint.
  - Participating in any manner in an investigation of discrimination, for example as a witness.
  - Protesting any form of sex discrimination (e.g. lack of equity in athletics).

# INVESTIGATING RETALIATION CLAIMS: KEYS TO UNDERSTANDING



- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Since someone's intention is rarely displayed openly, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

# PRELIMINARY ELEMENTS OF A RETALIATION CLAIM



- The following elements establish an *inference of retaliation*:
  - Did the reporting party engage in protected activity?
    - Usually straightforward,
    - Unless there is a question of reasonableness of belief or manner.
  - Was reporting party subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and adverse action?
    - Did individual accused of retaliation know about activity?
    - How soon after the protected activity did the adverse action occur?
  - If these three elements are not shown, the claim fails.

# RETALIATION AND ADVERSE ACTION



- Common definition of **adverse action**:
  - Significantly disadvantages or restricts the reporting parties as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
  - Precluded from their discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

# INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE



- What is the stated non-retaliatory reason for the adverse action?
  - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
  - This is the heart of the case – is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation.

# INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?



- Factors to consider:
  - The explanation makes sense.
  - The action was consistent with established policy or practice.
  - No adverse action was taken against others who engaged in protected activity.
  - Reporting party was treated the same as other individuals.

# INVESTIGATING RETALIATION CLAIMS IS THERE EVIDENCE OF PRETEXT?



- Factors to consider:
  - The explanation given is not credible.
  - Other actions by the same individual are inconsistent with the explanation.
  - The explanation is not consistent with past policy or practice.
  - There is evidence of other individuals treated differently in similar situations.

# CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent
  - Case Study

# CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

# OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the accused individual know, or
  - b. Should s/he have known that the alleged victim was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?

- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
- Types of force to consider:
  - Physical violence: hitting, restraint, pushing, kicking, etc.
  - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat.

- Types of force to consider (cont.)
  - Intimidation: an implied threat that menaces and/or causes reasonable fear.
  - Coercion: the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency.
      - Intensity.
      - Duration.
      - Isolation.

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident in light of all the facts available.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
  - Blackout ≠ incapacitation, automatically.
  - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how.
  - Partial blackout must be assessed as well.
- What if the responding party was drunk too?

- What was the form of incapacity?
  - Alcohol or other drugs.
    - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
    - Incapacity = an extreme form of intoxication.
  - Administered voluntarily or without reporting party's knowledge.
  - Rape drugs.
  - Mental/cognitive impairment.
  - Injury.
  - Asleep or unconscious.

# INCAPACITY (CONT.)



- First, **was the reporting party incapacitated** at the time of sex?
  - Could the person make rational, reasonable decisions?
  - Could the reporting party appreciate the situation and address it consciously such that any consent was informed –
    - **Knowing who, what, when, where, why, and how.**
- Second, **did the responding party know** of the incapacity (fact)?
- Or, **should the responding party have known** from all the circumstances (reasonable person)?

# SOME FACTS ABOUT ALCOHOL



- Most abused drug on college campuses.
- Most commonly used date rape drug.
- Time – the **only** sobering tool.
  - One “drink” per hour.
  - “Myth of puking.”
- Pace of consumption.
- Food in the stomach.
- Carbonation and alcohol.
- Medications and alcohol.

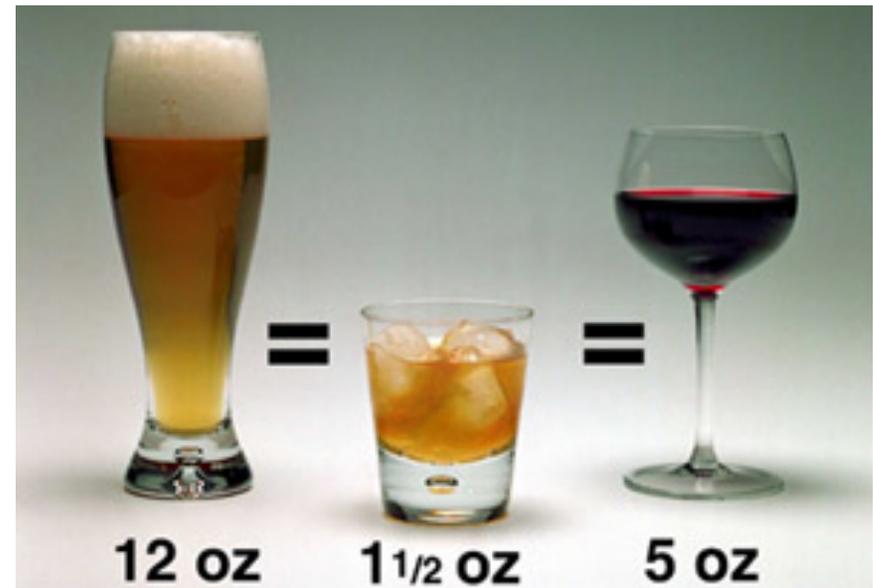
# COMMON INTOXICATION FACTORS



- Rate of consumption.
- Strength of drink.
- Food in the stomach.
- Body weight.
- Body type – body fat percentage.
- Gender:
  - E.g., enzymes, hormones, body fat, and water in body.
- Functional tolerance.
- Medications.
- Illness and dehydration.
- Fatigue.
- Caffeine.
- Genetics.
- Ethnicity.

# BAC/BAL

- One “drink”  $\approx$  .025 BAL.
  - 12 oz.
  - 5 oz. wine.
  - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
  - .015/hr. (avg.).
  - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



# BAC/BAL (CONT.)



- .05-.07: Buzzed; feeling of well-being; minor memory and coordination impairment.
- .07-.09: Slight impairment of coordination, vision, reaction time; judgment and self-control reduced.
- .10 -.125: Significant impairment of coordination, reaction times, and judgment; possible slurred speech.
- .13-.15: Severe motor impairment; blurred vision, loss of balance; judgment and perception severely impaired.

# BAC/BAL (CONT.)



- .16-.19: “Sloppy drunk;” increased negative feelings; possible nausea; blackout possible.
- .20: Dazed and disoriented; possible difficulty standing or walking; possible nausea and vomiting; blackouts possible.
- .25: Severe mental, physical, and sensory impairment; nausea and vomiting – asphyxiation concerns; blackouts possible.
- .35: Possible coma; level of surgical anesthesia.
- .40: Coma possible; death possible due to respiratory arrest.

# INCAPACITY ANALYSIS



- If the reporting party **was not** incapacitated, move on to the Consent analysis.
- If the reporting party **was** incapacitated, but:
  - The responding party did not know it, **AND**
  - The responding party would not have reasonably known it = policy not violated. Move to Consent analysis.
- If the reporting party **was** incapacitated, and:
  - The responding party **knew it or caused it** = policy violation. Sanction accordingly.
  - The responding party **should have known it** = policy violation. Sanction accordingly.

# CREATE A TIMELINE



- First must determine by a “more likely than not” standard if the reporting party was incapacitated.
  - This inquiry will likely be triggered by statements such as: “The next thing I remembered was.....”  
“I woke up and.....”  
“I don’t remember anything after.....”
  - That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the reporting party was incapacitated (using a preponderance of the evidence standard).

# TIMELINE CONSTRUCT



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
  - What were you drinking (e.g. wine, beer, or hard liquor)?
  - How much were you drinking (e.g. shot, 12 oz., or large cup)?
  - How many drinks did you have?
  - Were you using any recreational drugs?
  - When did you eat? What did you eat?
  - Are you on any personal medications?

# TIMELINE CONSTRUCT (CONT.)



- Continue the first five questions up until the point in time that reporting party indicates he/she cannot remember anything.
- **Note:** If reporting party did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
  - Where were you when you were drinking?
  - Did you leave your drink at any time then resume consuming?
  - Did anyone provide drinks for you?

# TIMELINE CONSTRUCT (CONT.)



- You will need to make an assessment if, based on the preponderance of the evidence, the reporting party was more likely than not incapacitated.
- If the answer is “No,” then you would proceed to the Consent analysis.
- If the answer is “Yes,” then go to part two of your analysis.
- Conduct the same timeline for the responding party, superimposed on the reporting party’s timeline.

# TIMELINE CONSTRUCT (CONT.)



- Ask the responding party if reporting party was:
  - Slurring words?
  - Stumbling?
  - Acting unusual (e.g., not making sense, appearing drunk, etc.)?
  - Falling asleep?
  - Throwing up?
  - Disoriented?
  - And, if responding party knows reporting party, was s/he acting different from the way s/he usually acts?

# TIMELINE EXAMPLE

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- Creating a Timeline
- Timeline Construct
- Some Facts About Alcohol
- Incapacity Analysis
- Consent
- Rules to Remember
- Case Studies

# CREATING A TIMELINE

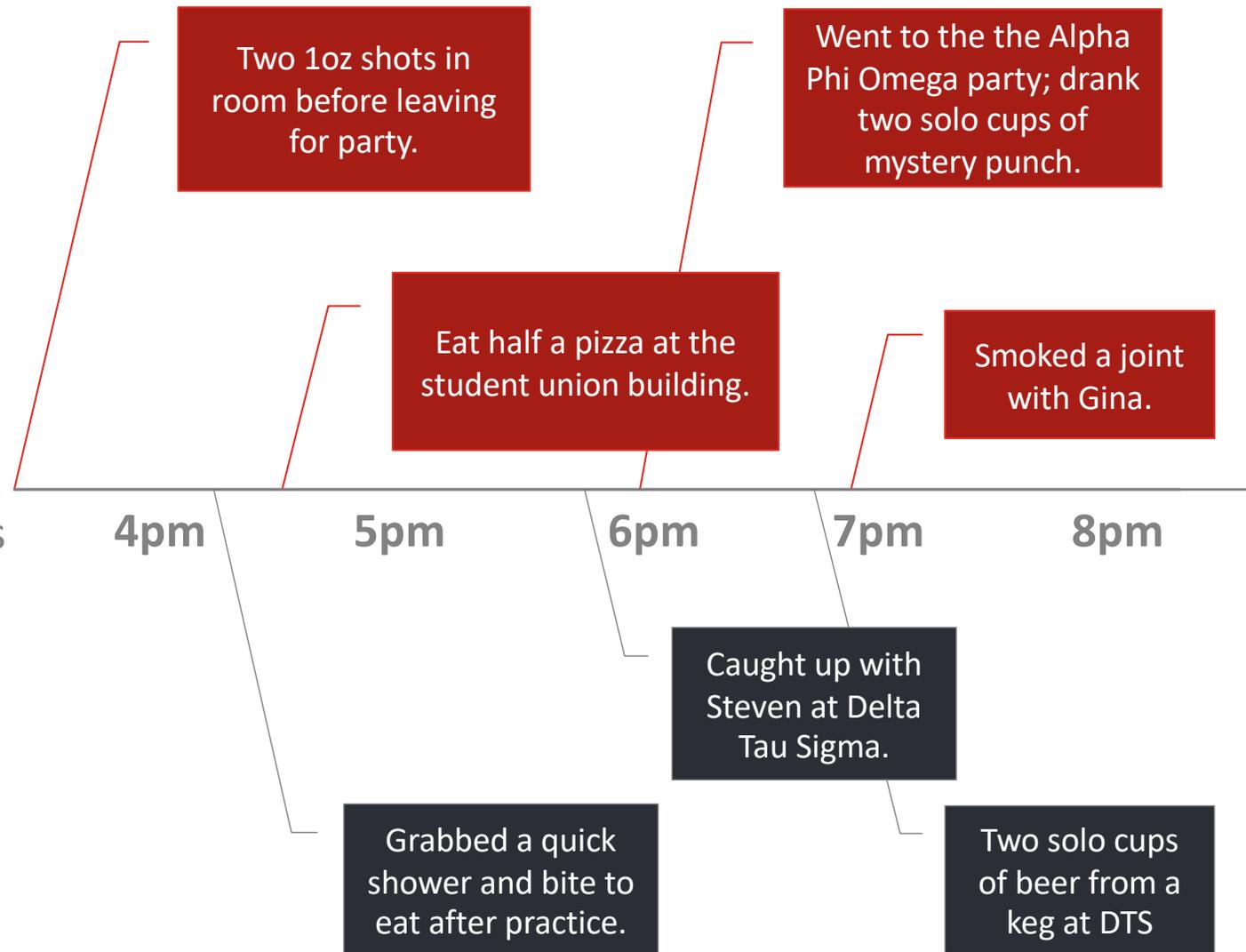


Use the preponderance of evidence standard.

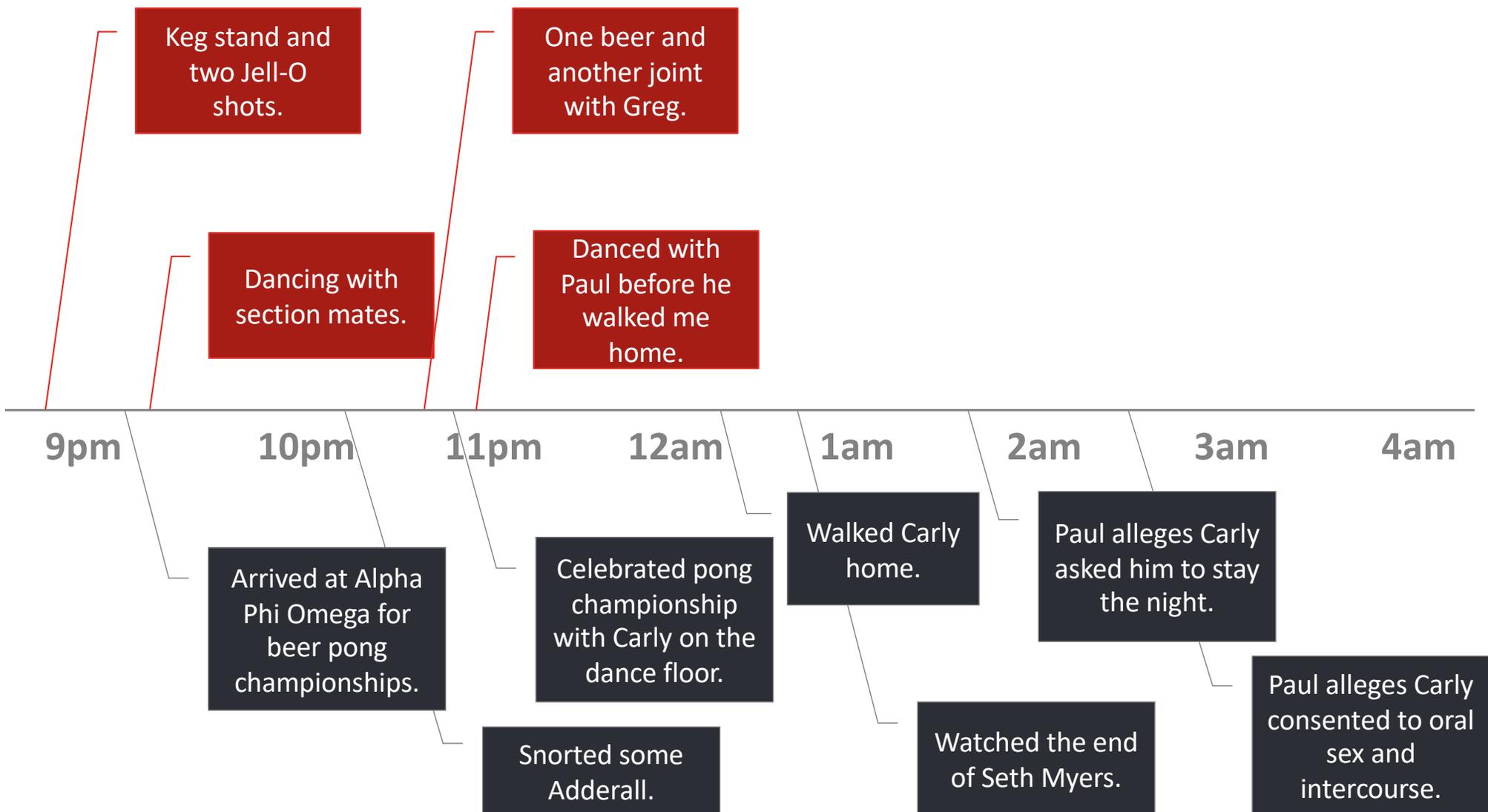
Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

Match up as many times and locations as possible.

What did the other party observe?



# CREATING A TIMELINE (CONT.)



# TIMELINE CONSTRUCT (CONT.)



*You need to determine whether it was reasonable that the responding party knew the reporting party was incapacitated.*

- Determine if responding party knew reporting party previously.
- If so, ask if reporting party was acting differently from previous similar situations.
- Review what the responding party observed the reporting party consuming (via your timeline).
- Determine if responding party provided any of the alcohol / drugs for the reporting party.

# CONSENT



- Question 3 is the Consent question: What clear words or actions by the reporting party gave the responding party permission for the specific sexual activity that took place?
- Equity demands a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone’s will, unwanted, someone unable to consent, etc.).

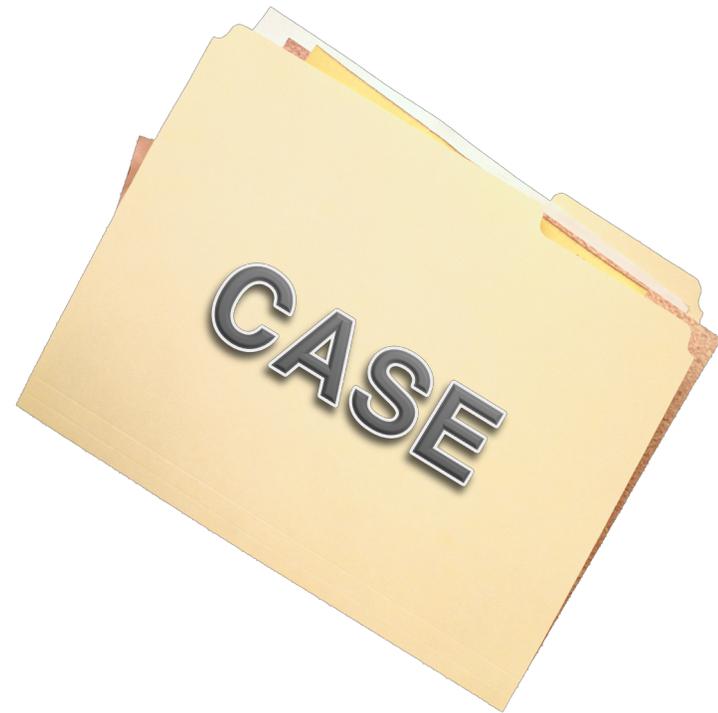
# RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal permission.
- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.

# CASE STUDIES

- Sexual assault without alcohol.
- Sexual assault with alcohol.
- Sexual harassment.
- Stalking.
- Relationship violence.



QUESTIONS?

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# CONTACT INFORMATION

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