



CIVIL RIGHTS INVESTIGATOR
TRAINING & CERTIFICATION LEVEL TWO COURSE

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YOUR FACULTY



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LEVEL 2 INVESTIGATIONS TRAINING



Agenda

- I. Effective Investigations
- II. Due Process
 - A. In Procedure
 - B. In Decision
- III. VAWA Sec. 304 & Clery Act
 - A. Disciplinary Procedures under Sec. 304
 - B. VAWA “Big Four” Crimes
- IV. Applying Institutional Policies
 - A. Three Types of Sexual Harassment
 - B. Non-Consensual Sexual Contact/Intercourse
 - C. Other Sexual Misconduct Offenses
- V. Consent Construct
 - A. Force
 - B. Incapacity
 - C. Effects of Intoxication
 - D. Timeline Construct
- VI. Investigating Retaliation

LEVEL 2 INVESTIGATIONS TRAINING



Agenda

- I. Challenging Witnesses
 - A. Difficult
 - B. Lying
 - C. Resistant/Quiet
- II. Questioning Model
- III. Taking Notes
- IV. Evaluation of Evidence and Making Determinations
 - A. Credibility Assessment
 - B. Information Analysis
- V. Bias & Prejudice
 - A. Conflicts of Interest
 - B. Bias in Recent Case law
- VI. The Investigation Report
 - A. Essential Elements
 - B. Templates for Record-Keeping
- VII. Sanctioning
- VIII. Trauma and Investigations
 - A. Trauma & Interviewing
 - B. Trauma & Credibility
- IX. Inclusive Investigations

EFFECTIVE INVESTIGATIONS

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



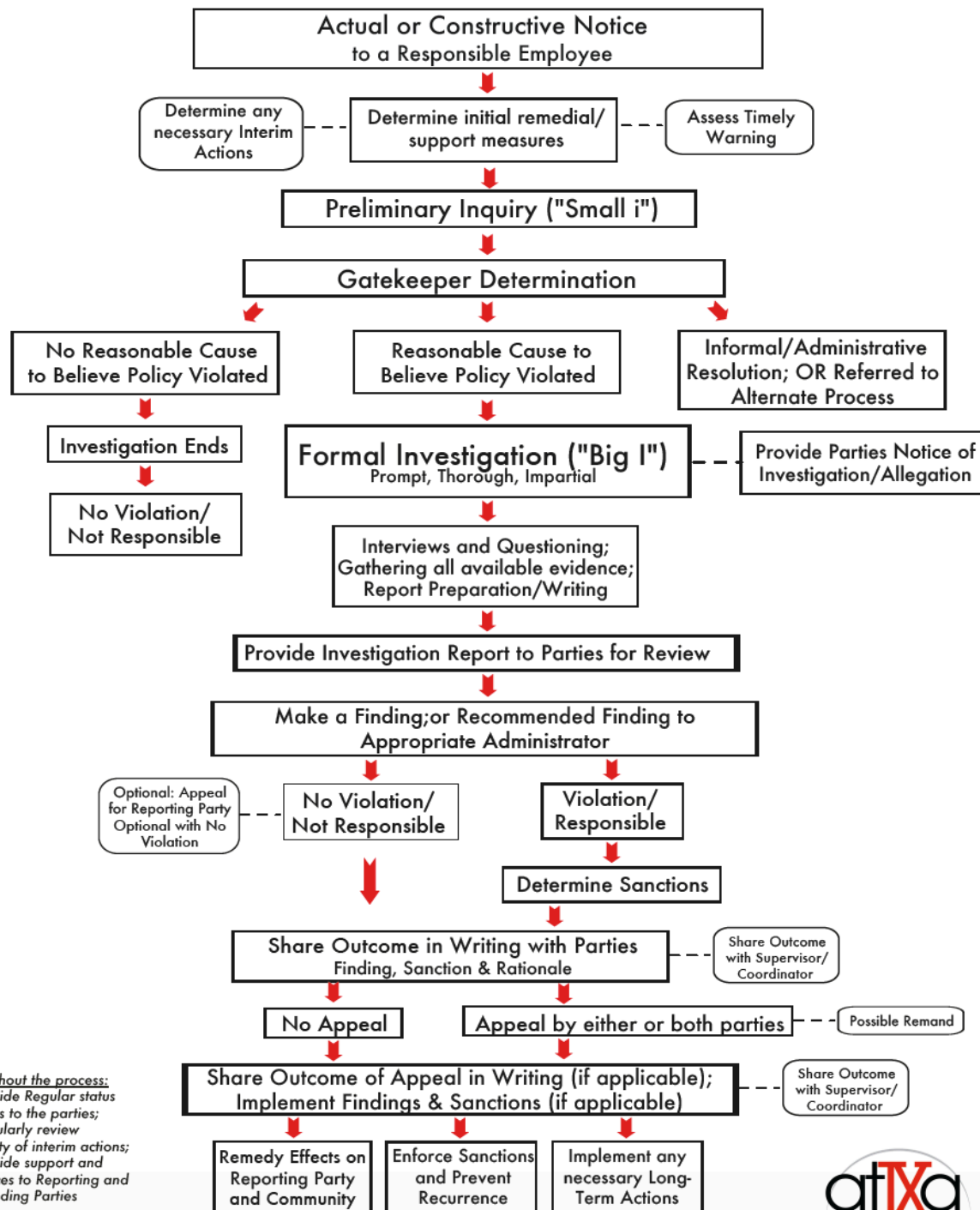
CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS



- 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

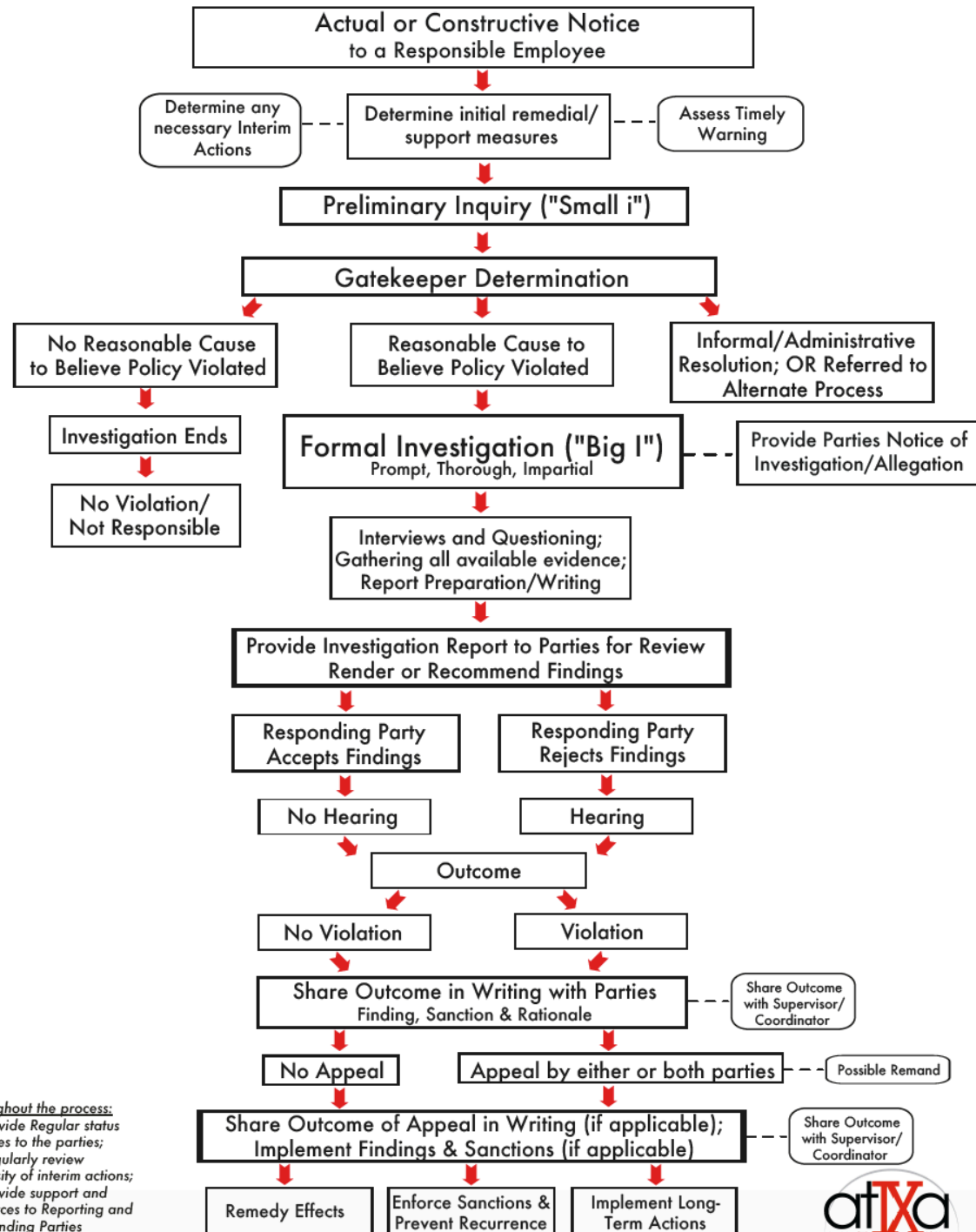


Throughout the process:
 1: Provide Regular status updates to the parties;
 2: Regularly review necessity of interim actions;
 3: Provide support and resources to Reporting and Responding Parties



INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



BRAINSTORMING SESSION



- Work with other attendees from your institution/district, 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 institution/district.
- On your own, write a list of the three biggest impediments or challenges your school(s) 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.

DUE PROCESS

- 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 case law and OCR proposed regulations

- 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.

*Proposed regulations state ALL evidence

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

VAWA SEC. 304 & THE CLERY ACT

- Overview of the Clery Act and VAWA
- Institutional Disciplinary Policies and Procedures
- VAWA 2013's "Big Four" Crimes

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 PreK-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.

CLERY ACT AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



VAWA Section 304:

- **Section 304** significantly amended the Clery Act.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
 - Sexual assault.
 - Stalking.
 - Dating violence.
 - Domestic violence.
- Prohibits retaliation.

The “Big 4”

DISCIPLINARY PROCEDURES UNDER VAWA SEC. 304

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).”

- 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.

- “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.”

VAWA “BIG FOUR” CRIMES: DEFINITIONS

- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking



- **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.*

- **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.*
 - Includes:
 - Rape
 - Fondling
 - Incest
 - Statutory Rape

- **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**

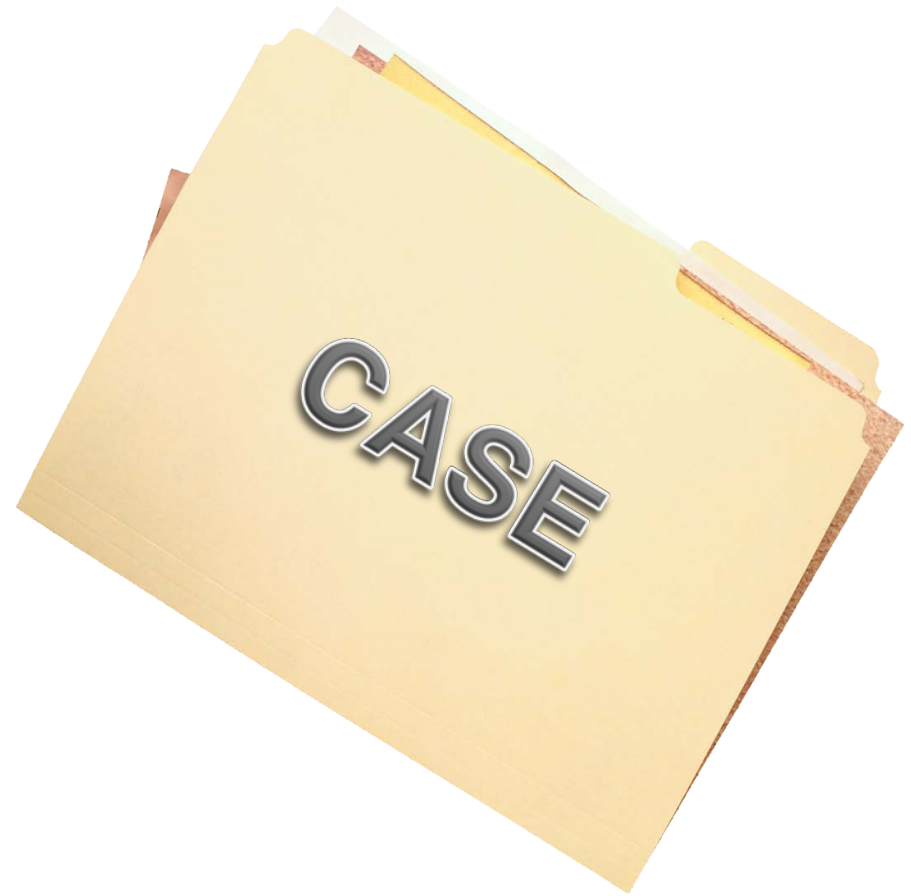
- *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

- **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.*

CASE STUDY

Using a case study, attendees should evaluate the available facts, identify evidence (available and still needed), and assess compared to the model of proof.



TRAVIS AND JUSTIN

Travis was on the lacrosse team for three weeks. Travis reported that he was being sexually harassed by Justin, the lacrosse team captain. In the span of two weeks, Justin has asked Travis out three times. The first time Justin asked Travis out, it was in the locker room when they both were naked, and Justin put his hand on Travis' back. The second time Justin asked, he was pretty drunk and got in Travis' personal space at a bar. The third time, Justin walked up next to him in the shower and tried to grab Travis' buttocks. Travis also kissed Justin at a party the weekend before the shower interaction.

APPLYING INSTITUTIONAL POLICIES: ATIXA MODEL POLICIES

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

Sexual harassment is:

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

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

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 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.*

- ***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...*

- Examples
 - 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).

- Examples (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.*
- Note: 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.

- 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.

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

- **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).

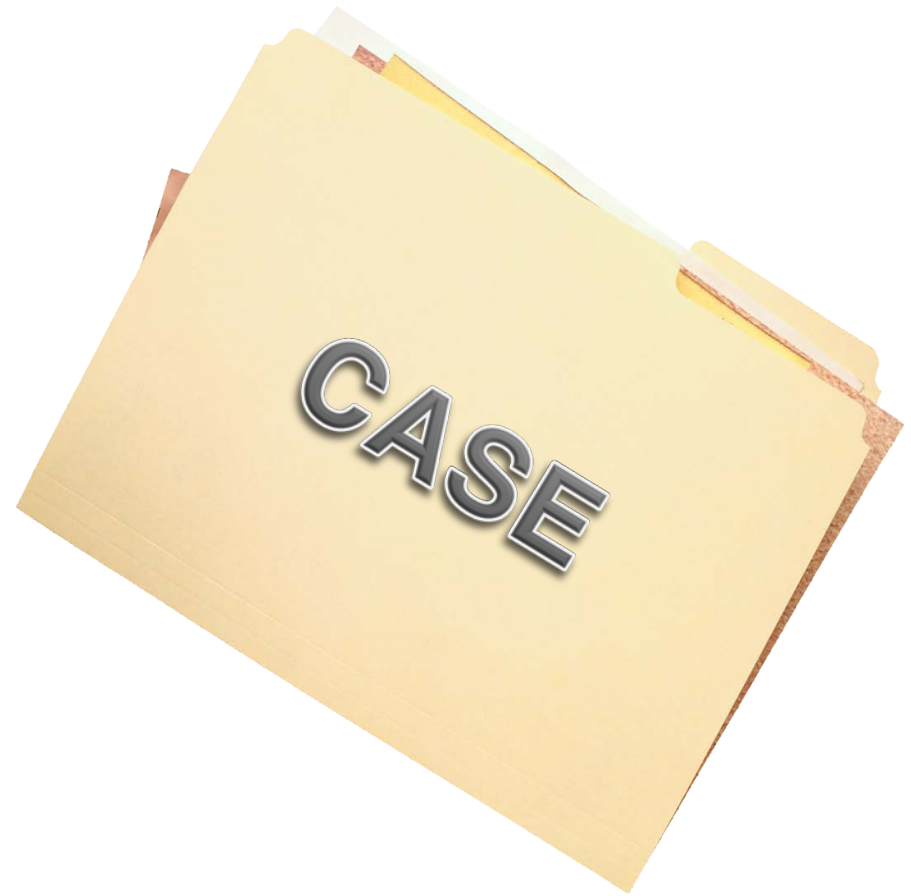
OTHER MISCONDUCT OFFENSES



- 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.

CASE STUDY

Using a case study, attendees should evaluate the available facts, identify evidence (available and still needed), and assess compared to the model of proof.



DIANE



Diane is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. Amaya is a student team-member who has recently announced that she is pregnant.

One morning, Amaya texted Diane that she was going to miss the morning meeting. Diane announced to the group that they should get started because Amaya wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad, her breasts are getting to be GINORMOUS and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

Diane was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.

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.

CONSENT: RULES TO REMEMBER



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

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.)?

Note: The intoxication of the Responding Party can not be used as a reason they did not know of the Reporting Party's incapacity.

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.

- 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.

- 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.



- .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.

- .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.

- These answers should be in the report if the primary consideration is the out of norm behaviors of the Reporting Party as a determination of Incapacity:
 - Did the Responding Party know the Reporting Party previously?
 - If so, was Reporting Party acting very differently from previous similar situations
 - Review what the Responding Party observed the Reporting Party consuming (via the timeline)
 - Determine if Responding Party provided any of the alcohol for the Reporting Party
 - Other relevant behavioral cues

- Evidence of incapacity may be in the report taken from context clues, such as:
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Outrageous or unusual behavior
 - Passing out
 - Throwing up
 - Appearing Disoriented
 - Unconsciousness
 - Known Blackout
 - Although memory is absent in a blackout verbal and motor skills are still functioning.

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).

- 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?

- 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?

- 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 CONSTRUCT



- 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.

OVERVIEW OF THE 3 CONSENT QUESTIONS



You will need to make an assessment if, based on the preponderance of the evidence, the reporting party was more likely than not incapacitated.

1. Was force used by the Responding Party to obtain sexual or intimate access?

If the answer is “No,” then you would proceed to the Consent analysis.

OVERVIEW OF THE 3 CONSENT QUESTIONS



2. Was the Reporting Party *incapacitated*?

- a) If so, could or should the Responding Party have reasonably known that the Reporting Party was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?

Note: The intoxication of the Responding Party can not be used as a reason they did not know of the Reporting Party's incapacity.

If the answer to Question 2 is “yes,” then proceed to an analysis of Question 2a based on your timeline to make your determination.

If the answer to Question 2 is “no,” then proceed to Question 3.

OVERVIEW OF THE 3 CONSENT QUESTIONS



3. What clear *words* or *actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act as it took place?

If there is not sufficient evidence to implicate force or incapacity, focus your analysis on the exchange of mutually understandable words and actions that conveyed consent to the responding party.

Consider constructing the same timeline for the responding party, superimposed on the reporting party's timeline.

TIMELINE EXAMPLE

CREATING A TIMELINE



Use the preponderance of evidence standard.

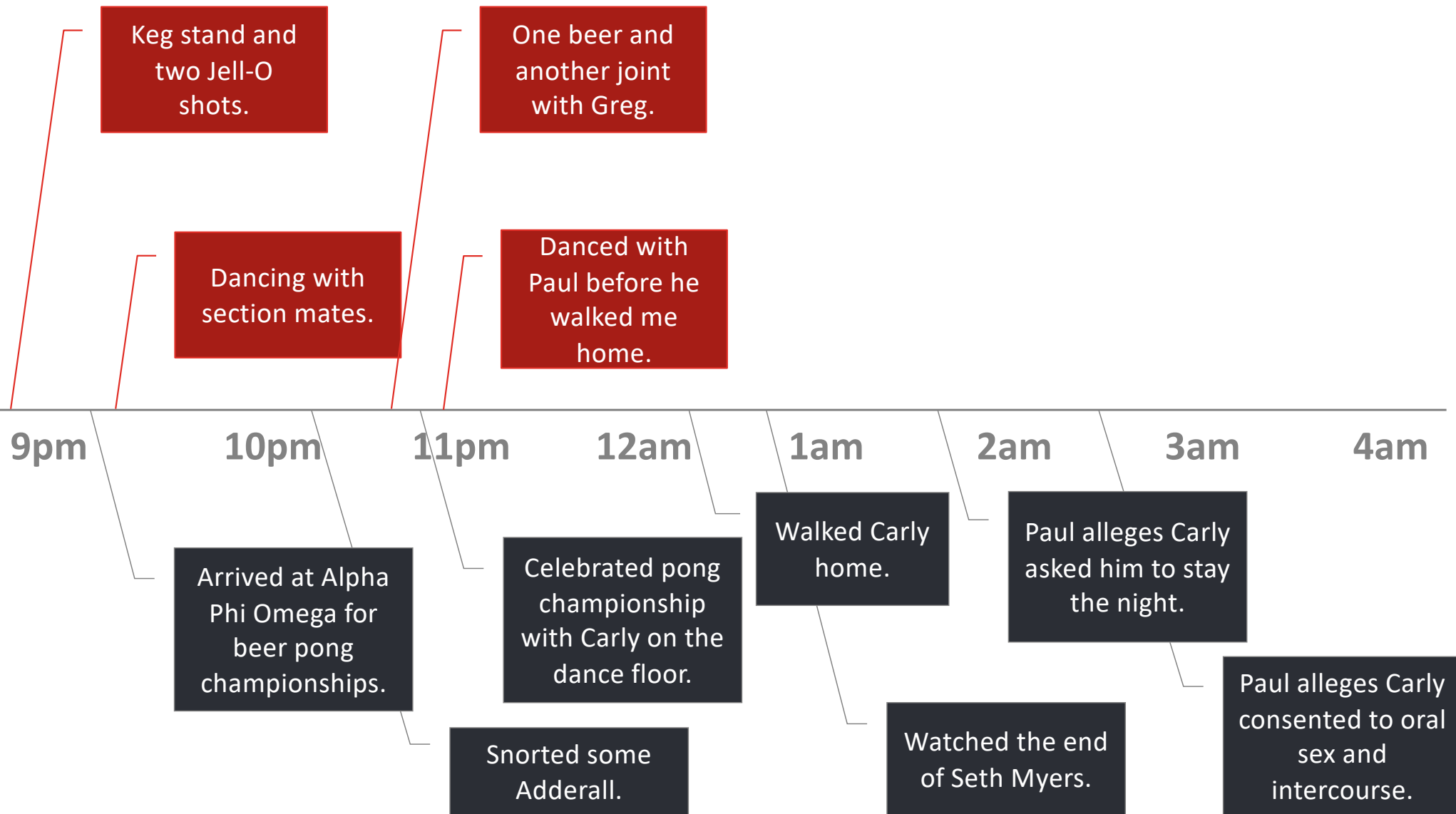
Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

Match up as many times and locations as possible.

What did the other party observe?



CREATING A TIMELINE



INVESTIGATING RETALIATION CLAIMS

- Basic Legal Principles
- Investigating Retaliation Claims



RETALIATION BASIC LEGAL PRINCIPLES



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.

- 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.

CHALLENGING WITNESSES

- Difficult Witnesses
- Lying Witnesses
- Resistant and/or Quiet Witnesses

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.

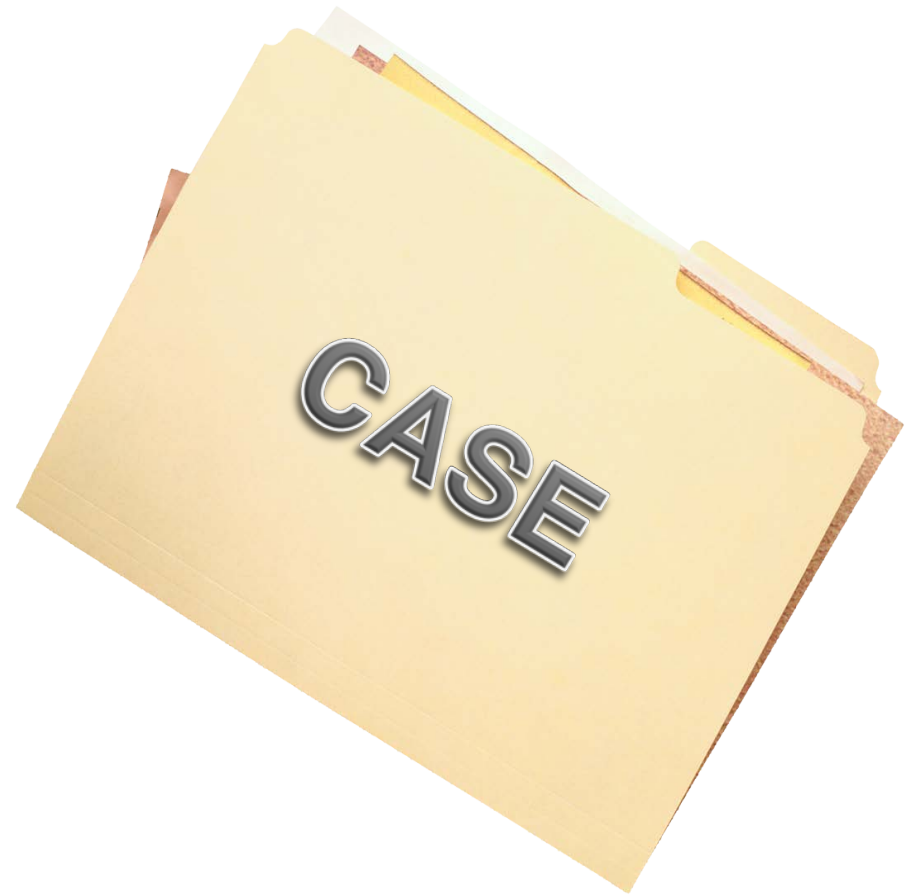
OTHER CONSIDERATIONS



- 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.

CASE STUDY

Using a case study, attendees should evaluate the available facts, identify evidence (available and still needed), and assess compared to the model of proof.



AMY AND TODD

On Friday, April 23, I went to an on-campus party. I was doing a lot of drinking and dancing and getting to know people. I had at least four drinks in the first few hours I was there. Then, I met Todd. I remember that he came up to me on the dance floor and started to dance with me. He was really good-looking, and so was the other guy he was with, Jeff, whom I had met at a different party the week before.

We danced and had a lot of fun, and I remember drinking some more and Todd getting me some Jell-O shots, which were really strong and nasty. I wasn't feeling well and went into the bathroom, thinking I might throw up. The bathroom was really crowded, so I went outside for some fresh air instead. I sat on the stoop, feeling sick. Todd came over and helped me out. I remember walking home with him but nothing else.

When I woke up the next day, his name and number were scrawled on a pad by my sofa, and there was a used condom in the toilet. I got scared and called him to find out what had happened. I remembered most of what he said about the party, but when he told me that we came back to my room and had sex, I started to cry. I didn't remember any of it and was afraid I might be pregnant. Todd assured me that he wore a condom and asked me out again. I hung up and cried.

I told everything to my roommate Sarah, who was sitting on the sofa when I called Todd. She suggested that I call the campus police, but I felt more comfortable talking to you.

On the night of Friday April 23, I went to an on-campus party. There was a band and a lot of alcohol. I got to the party at about 11:00 p.m. and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jeff Kwik for a while, until I noticed Amy Craft dancing. She was really cute, and I had noticed her on campus a few times. I went up to her and we started talking. She seemed a little tipsy and in a pretty loose mood. We talked for a while, and I think I got her about two or three beers over the next hour. I didn't have anything more to drink because the three beers I slammed were doing the trick just fine.

Around 1:00 a.m., somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Amy had a few shots. We danced a lot, and then I got her a few more Jell-O shots. She went off to the bathroom, and after that I couldn't find her, which really bummed me out. I waited around to see if she would show up again, but she didn't. I took off and started to walk back to my residence hall. As I left the party, I looked over and saw Amy. She seemed to be in pretty bad shape. I offered to take her home, and she told me her dorm and leaned on my arm.

When we got to her dorm, I helped her inside, and was about to leave, but she asked me to come up to her room, just to make sure she got there. I took her upstairs, opened the door for her, and let her in. She asked me to get her a glass of water, and I did. I started to take off again, but she asked me not to go. When I turned around, she kissed me, hard. We kissed for a while, but she wasn't feeling well and went into the bathroom again. When she came out, she said she felt better, but tired. She lay down and we kissed some more. I started to massage her back, and she passed out. She came to about 20 minutes later and started to kiss me and fondle me. She took off her shirt, and all of my clothes. I started to kiss her all over, and she said she wanted to lay down again. I asked her if she was OK, and she said she was. I asked her if she had a condom, and she said she had one in her dresser. I went to get it, and when I got back to the couch, she was out again.

She woke up after about 20 minutes, and I suggested that she just go to sleep. But she said she felt much better and started to give me oral sex. After a while, she put the condom on me and we had sex. It was great. She was really wild and liked to be on top. Afterward, we talked until the early morning, and I gave her my number and left. The next day, she called me to ask me why my name was on the pad by her sofa. I told her about meeting her at the party and about our evening together. She seemed to get upset, and said she remembered meeting me at the party, but nothing else. I asked if she ever wanted to get together again, and she hung up on me.

TAKING NOTES

- 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.

- 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.

- 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

- 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 MAKING A DETERMINATION

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

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.

- 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/internal & evidentiary 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.

- 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.
 - Turn your brain off...walk away and do something else
 - Use colleagues: co-investigator and others you can talk to
- 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 DETERMINATION



- Review the institutional policies in play.
- Parse the policy.
 - Specific determination 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



“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 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



- 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



- 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



- 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 determination on whether the policy has been violated, or make the determination.

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



- 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



- 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.
- Determination 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

- **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

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Trauma and Interviewing
- Trauma and Credibility

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
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma.
- The brain does not distinguish between “types” of sexual assault,
 - E.g. stranger or acquaintance, but interprets them equally as threats to survival.
- The brain 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



- 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.
 - Impairs the ability to think rationally.
 - May present as confused, laughing, crying, flat, angry, irritable, or variable.
- Tonic immobility may be induced by the autonomic nervous system causing 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.

ADDITIONAL TRAUMA RESPONSES



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

- 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?

- 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.

- 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 may help explain elements that negatively impact a party's credibility
 - 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

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

- **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).

- **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.

TERMINOLOGY



- **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.

- 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.

QUESTIONS?



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