



CIVIL RIGHTS INVESTIGATOR TRAINING & CERTIFICATION LEVEL TWO COURSE

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YOUR FACULTY



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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

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

A photograph of a desk with a yellow folder, a pen, and a document titled 'Policies'. The folder is yellow with a white label that says 'Policies' in large black letters. A silver pen with a black grip is lying on a white document in front of the folder. The background is a light-colored wall.

Policies

SEXUAL HARASSMENT



Sexual harassment is:

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

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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.

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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.

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SEXUAL EXPLOITATION



- **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.

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HAZING



- **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

-
- Civil Rights Investigation Model Hallmarks
 - Brainstorming Session

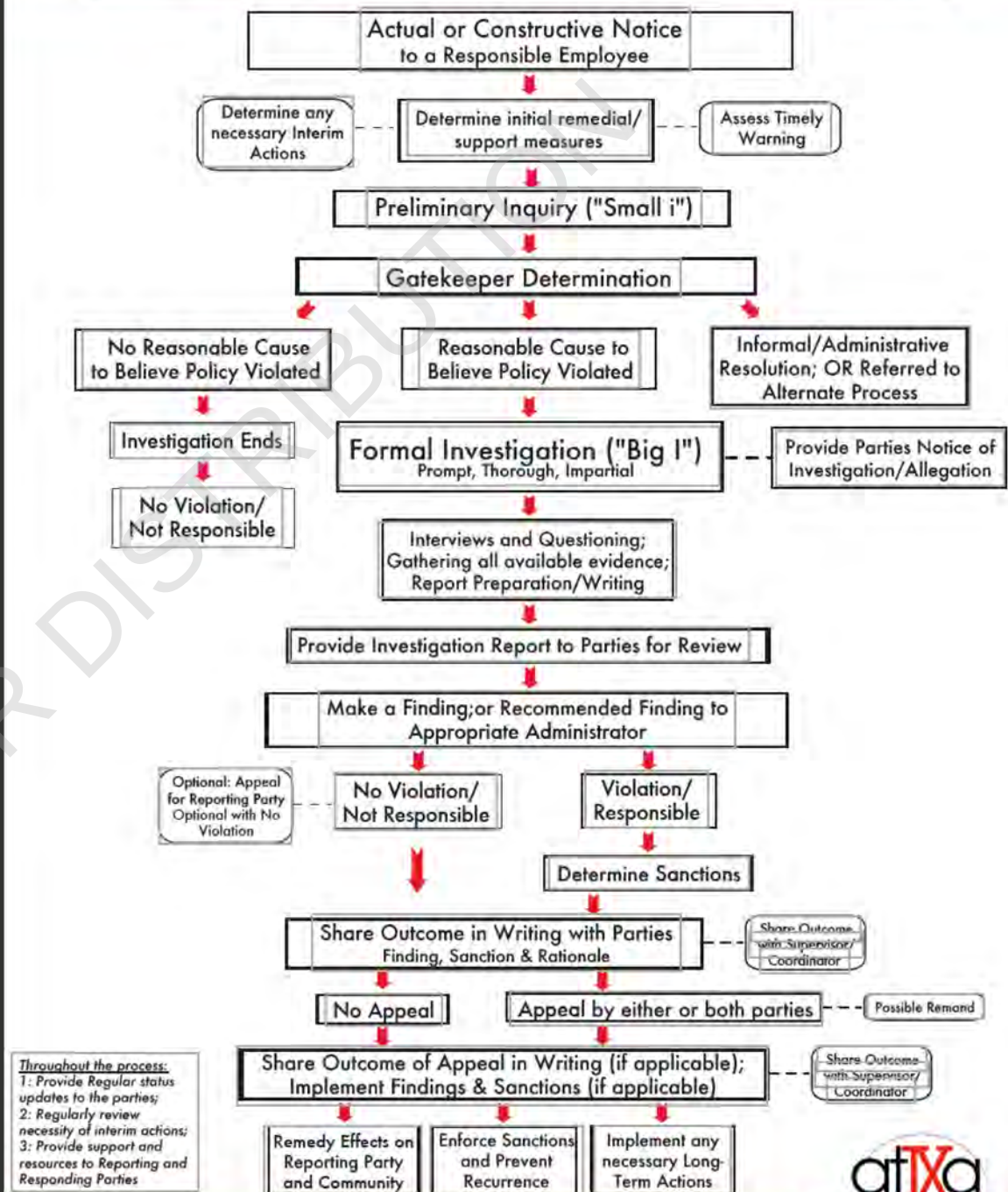
CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS



- 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.

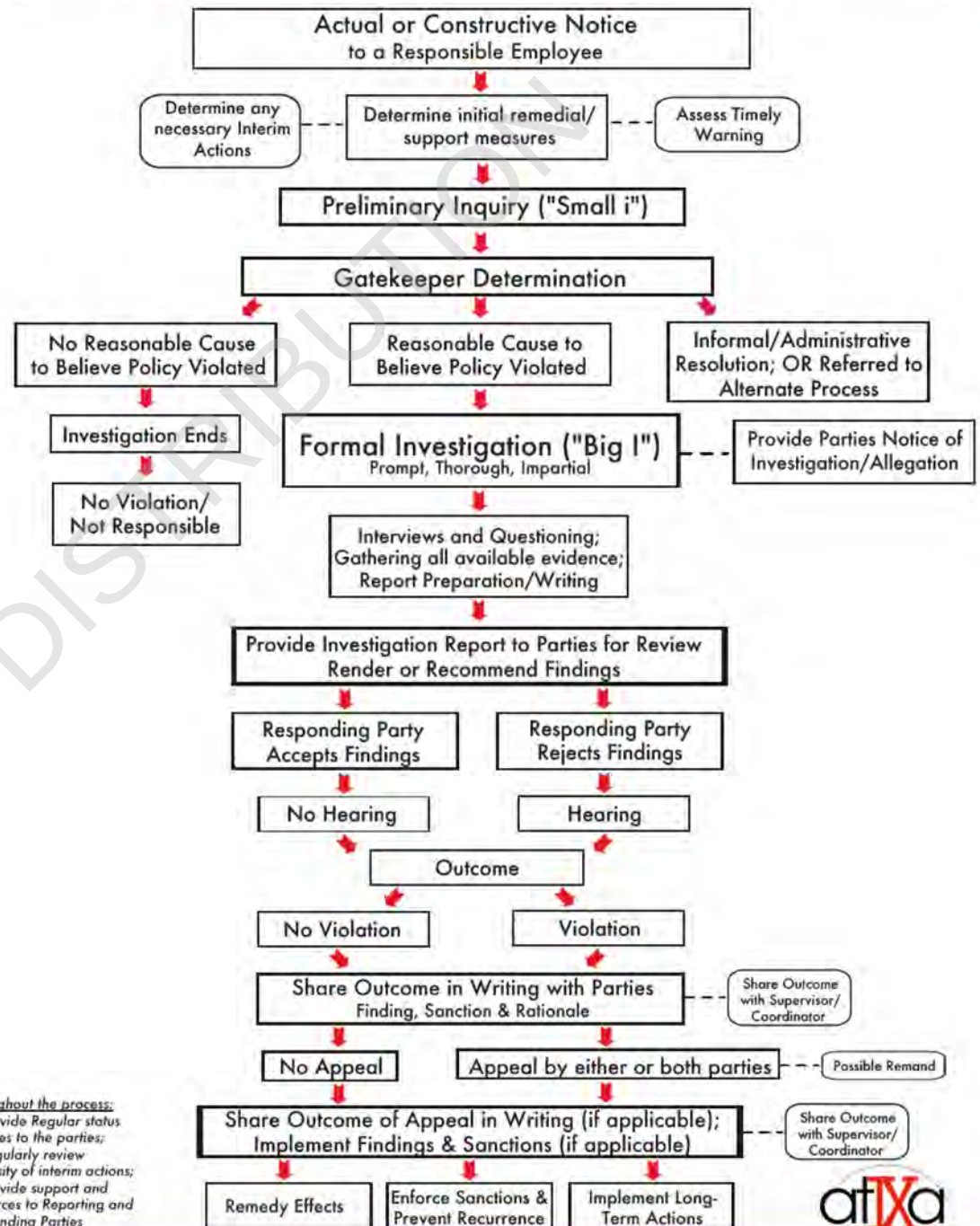
CIVIL RIGHTS INVESTIGATION MODEL

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

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



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 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

- 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

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



QUESTIONING ACTIVITY WITH PARTICIPANTS



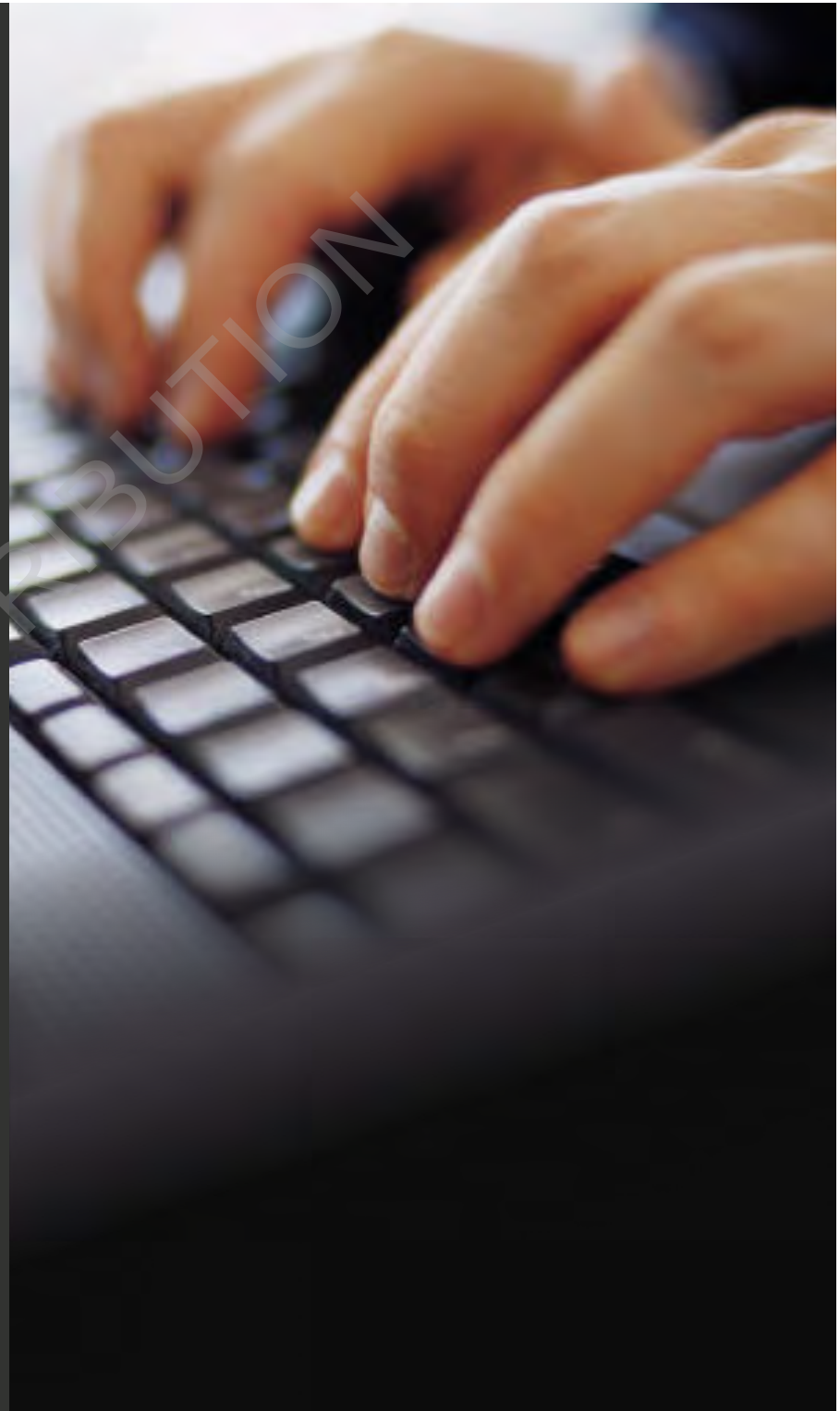
SCENARIO



- 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

- 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

- 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 your 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 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



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

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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

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

WHAT IS TRAUMA?

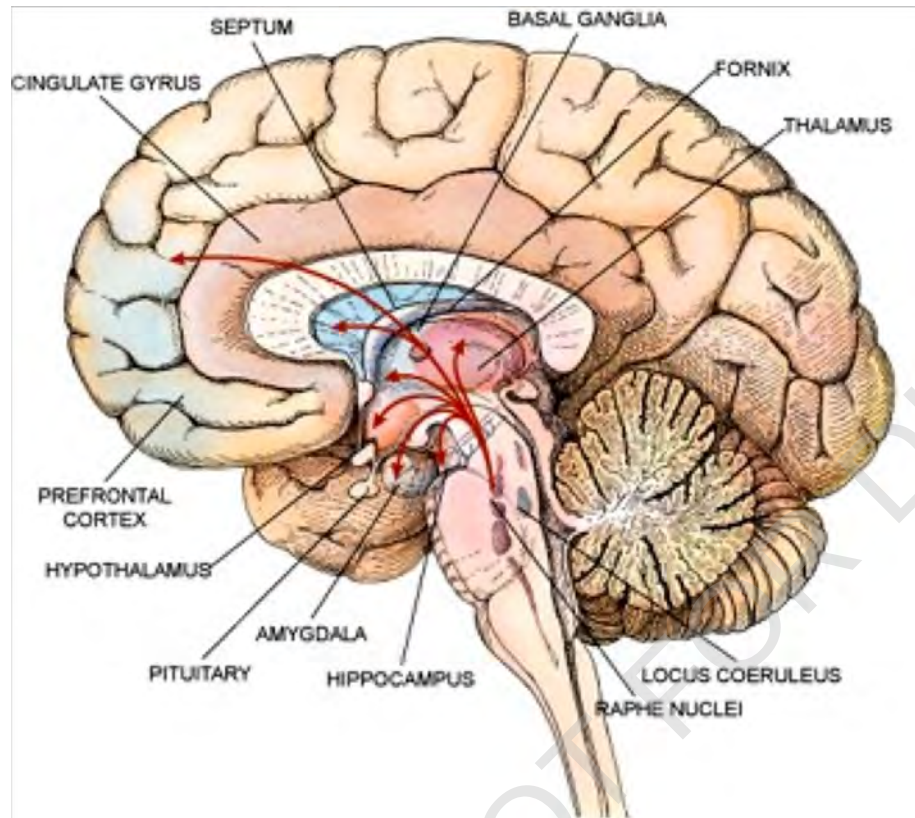


Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.

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.

NOT FOR DISTRIBUTION

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 & CREDIBILITY



- 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.

TRAUMA & CREDIBILITY



- 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

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

- 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

- 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

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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.

VAWA 2013 SEC. 304 TRAINING



- 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.

VAWA 2013 SEC. 304

WRITTEN MATERIALS PROVIDED TO VICTIMS



- 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

- 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

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

CREATING A TIMELINE

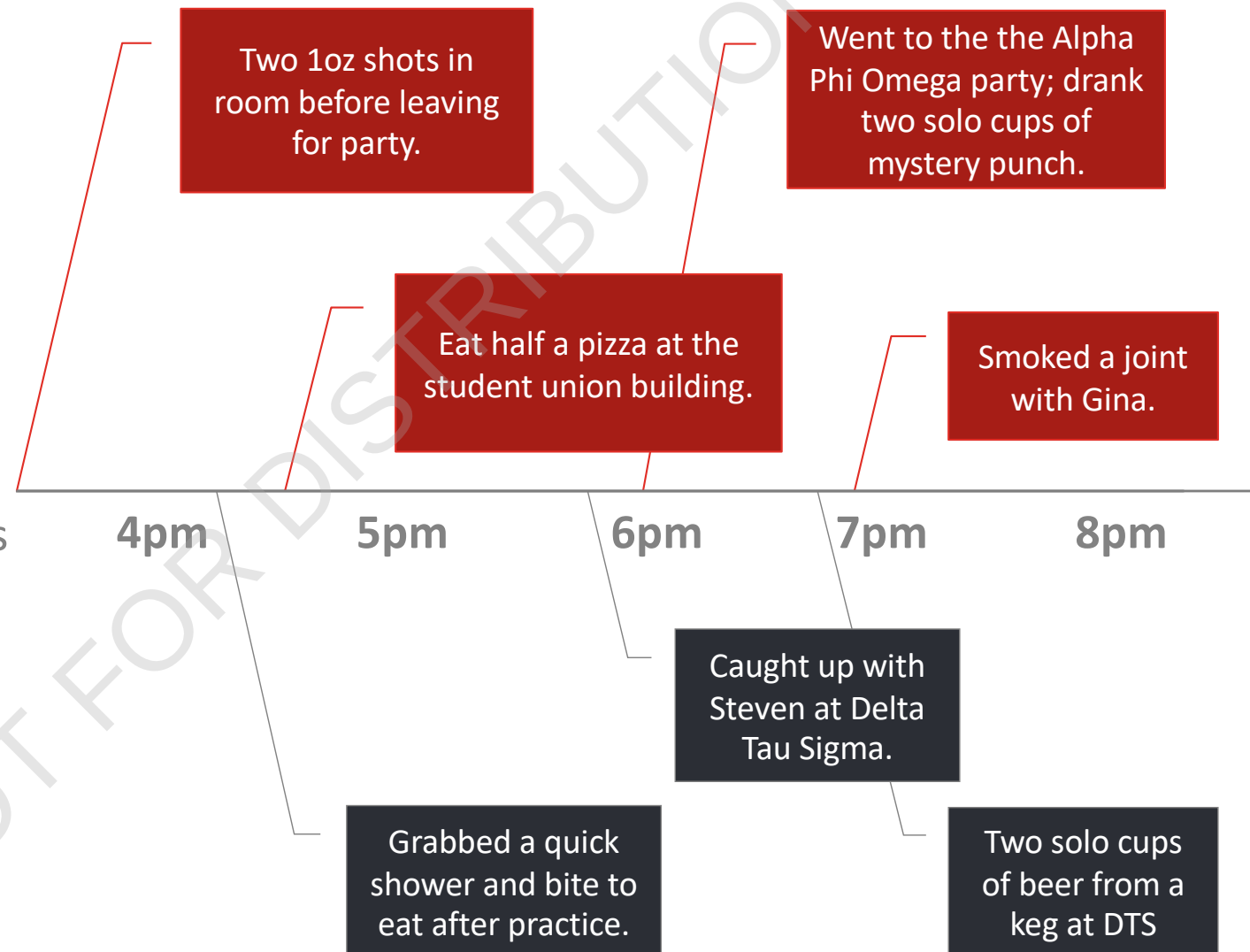


Use the preponderance of evidence standard.

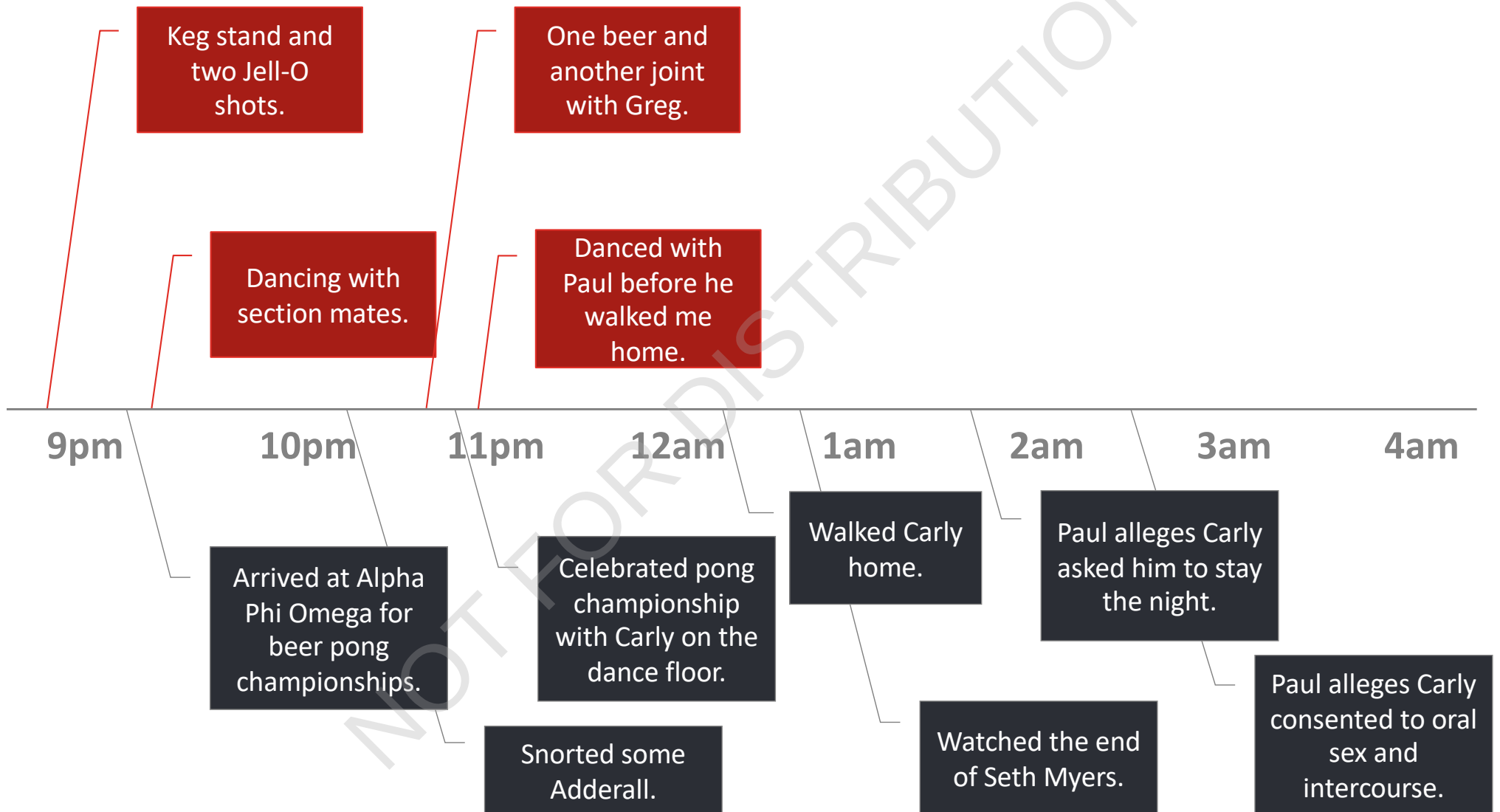
Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

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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