



HEARING BOARD TRAINING

GANNON UNIVERSITY May 23, 2018



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HEARING BOARD COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Investigation and Resolution Procedures
- Title IX & VAWA requirements
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills
- Weighing Evidence
- Analyzing Policy
- Standards of Proof
- Sexual Misconduct/ Discrimination
- SANE and Police Reports
- Intimate Partner Violence
- Bias/Prejudice/Impartiality
- Stalking/Bullying/Harassment
- Deliberation
- Sanctioning/remedies
- The Appeals Process

THE GOAL



MAKING THE APPROPRIATE DECISION

IMPORTANT STATISTICS



UE Study: “Confronting Campus Sexual Assault”

- 99% of Perpetrators were men
- 94% of Victims were women
- 54% of Victims were first year students
- 96% Involved acquaintances
- 33% Involved incapacitation
- 29% involved physical force
- 18% involved failed consent
- 13% involved coercion

Source: United Educators – “Confronting Campus Sexual Assault” 2017

IMPORTANT STATISTICS



UE Study: “Confronting Campus Sexual Assault”

- Accused brought 54% of claims and accounted for 72% of financial losses (legal fees and payments to claimants)
- 40% of victims delayed reporting following reasons:
 - Victim blamed him/herself because they were intoxicated
 - Victim did not immediately label the incident as a sexual assault
 - The victim and accused were in a romantic relationship
 - The victim (1 in 5) did not want the institution to investigate or take action against the perpetrator

Source: United Educators – “Confronting Campus Sexual Assault” 2017

***Remember, you have no
side other than the
integrity of the process***

OVERVIEW OF TITLE IX

- Important Statistics
- Text of the Law
- Notice: Actual & Constructive
- Title IX Essential Compliance Elements
- Responsible Employees
- The IX Commandments
- Equality v. Equity

Federal Laws Specifically Addressing Sex & Gender Misconduct on Campus



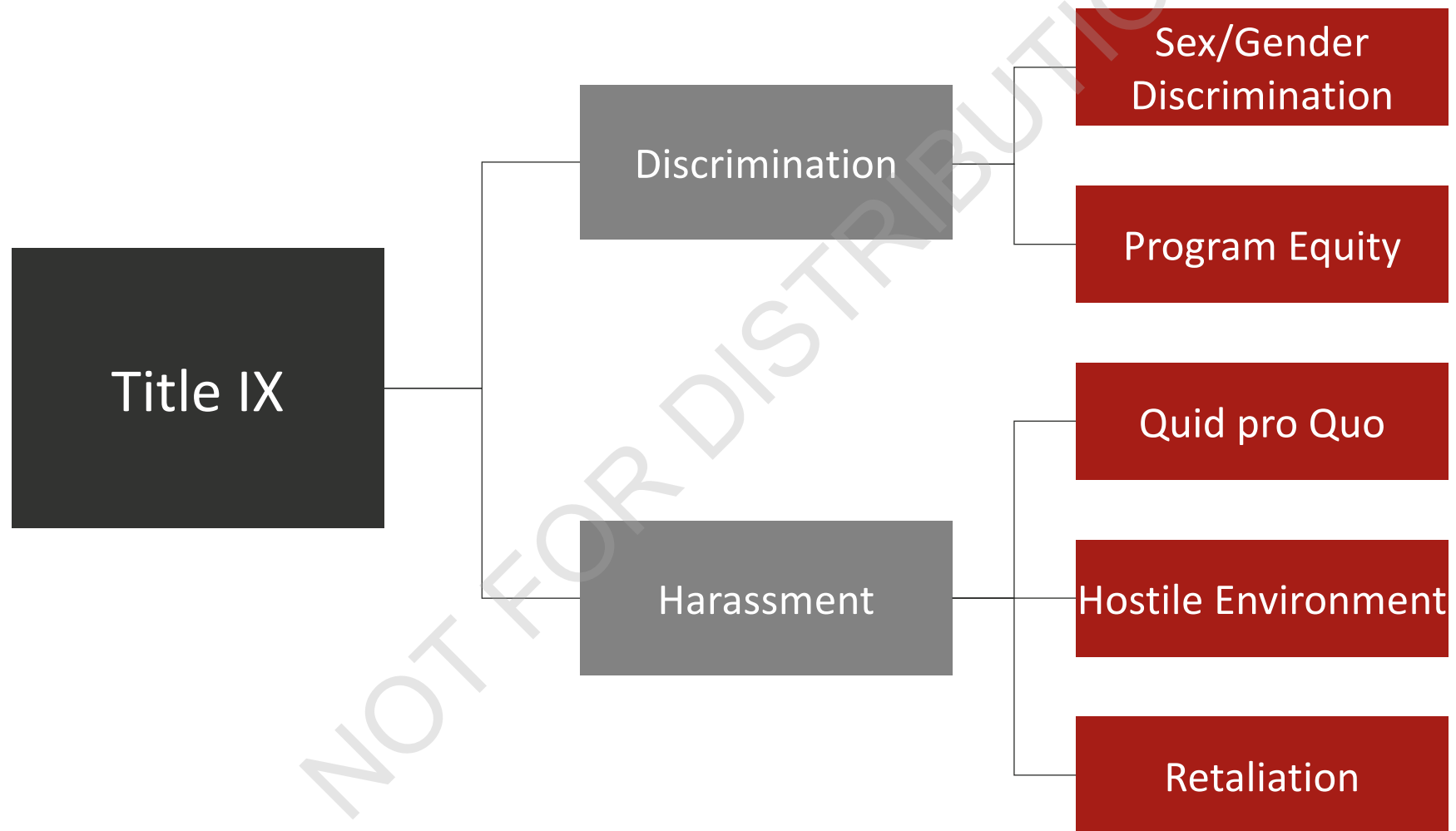
- **Title IX** – Applies to entire campus, covers sex/gender
 - **OCR** Provides compliance guidance
 - **OCR Guidance Document 2001**
 - **OCR DCL** (September 27, 2017)
- **Title VII** – Limited to employment only, covers sex, color, race, religion and national origin
- **Case law**
 - “Gamechanger” cases, North Haven (1982), Franklin (1992), Gebser (1998), Davis (1999)
- **Clery Act/VAWA Sec. 304**
 - “Campus Sexual Assault Victims’ Bill of Rights” (1992)
 - “Violence Against Women (VAWA) Act & SaVE Act (March, 2013)

TITLE IX



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

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



NOTICE – ACTUAL AND CONSTRUCTIVE



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

TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



- Once a “responsible employee” has either actual or constructive notice of sexual harassment/sexual misconduct, the school must:
 - Take immediate and appropriate steps to investigate what occurred
 - Take prompt and effective action to:
 - Stop the harassment
 - Remedy the effects
 - Prevent the recurrence

NOTE: This is regardless of whether or not the Reporting Party makes a complaint or asks the school to take action.

THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

DUE PROCESS: LEGAL FOUNDATIONS

- *Dixon v. Alabama* (1961)
- *Esteban v. Central Missouri State College* (1969)
- *Goss v. Lopez* (1975)

DIXON V. ALABAMA STATE BD. OF ED.

294 F. 2D 150 (5TH CIR., 1961)



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- 5th Cir. Court decision established minimum due process (reiterated by U.S. Supreme Court in Goss v. Lopez (1975))
 - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**
 - Ushered in most campus disciplinary and hearing-based processes

DIXON V. ALABAMA STATE BD. OF ED.

294 F. 2D 150 (5TH CIR., 1961)



- Specifically, the court set forth a number of due process-based guidelines, including:
 - Notice, with an outline of specific charges
 - A fair and impartial hearing
 - Providing names of witnesses to accused
 - Providing the content of witnesses' statements
 - Providing the accused an opportunity to speak in own defense
 - The results and findings of the hearing presented in a report open to the student's inspection

GOSS V. LOPEZ

419 U.S. 565 (1975)



- Nine high school students were suspended for 10 days for non-academic misconduct
- The court held that since K–12 education is a fundamental right, students were entitled to at least a modicum of “due process”
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing

GOSS V. LOPEZ

419 U.S. 565 (1975)



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

DUE PROCESS

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

WHAT IS DUE PROCESS?



- Due Process (public institutions):
 - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment
- “Fundamental Fairness” (private institutions):
 - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures

WHAT IS DUE PROCESS?



- **Due Process in Procedure** - A school's process should include (at a minimum):
 - Notice: of charges and of the hearing/resolution process
 - Right to present witnesses
 - Right to present evidence
 - Opportunity to be heard and address the allegations and evidence
 - Right to decision made based on substantial compliance and adherence to institutional policies and procedures
 - Right to appeal (recommended)

WHAT IS DUE PROCESS?



- **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, or bias)
 - 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 and constitutionally permissible

VAWA SEC. 304: INSTITUTIONAL DISCIPLINARY POLICIES & PROCEDURES: ASR DISCLOSURES

- Disciplinary Procedures
- Annual Training for Officials
- Advisors
- Simultaneous Notification

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 institution's 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



- Proceedings must “be conducted by officials who, at a minimum, 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 ANNUAL TRAINING FOR OFFICIALS



- Institutions must describe the annual training
- The training should be “updated regularly to address the latest issues and techniques for conducting proceedings on these topics from beginning to end”
- Training “should include, but not be limited to:
 - Relevant evidence and how it should be used during a proceeding
 - Proper techniques for questioning witnesses
 - Basic procedural rules for conducting a proceeding
 - Avoiding actual and perceived conflicts of interest”

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

SIMULTANEOUS NOTIFICATION



- 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

SIMULTANEOUS NOTIFICATION



- 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”

HEARING BOARD GUIDELINES



NOT FOR DISTRIBUTION

HEARING BOARD GUIDELINES



- It is essential that you understand and can apply the “preponderance of the evidence” standard. Be aware of “standard creep” when the potential sanction is serious
- Recognize that understanding the question of if someone violated the policy is distinct from factors that would aggravate or mitigate a sanction
- You must learn to police yourself and others when questioning veers into bias or irrelevance (also a critical role for the panel chair)
- Recognize when there are significant issues that calls for either an expert or special training

HEARING BOARD GUIDELINES



- Community standards spell out what constitutes the offense of sexual misconduct within your community
 - The institutional response is impacted by Title IX requirements
- It is not a question of right and wrong, or If Something Happened-it's a question of "Is there a policy violation"
- You may not agree with your policy, but you must be willing to uphold it

CHALLENGES FOR HEARING BOARDS



- The challenge of addressing issues of:
 - Focusing your questions to the Investigators and relying on the Investigation Report
 - Understanding “impaired” v “intoxicated” v “incapacitated”
 - Identifying “knew or should have known”
 - Understanding consent
 - Understanding credibility
 - Being able to apply solid analytical skills
 - Measuring your concerns about consequences appropriately

CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

- Civil Rights Investigation Model
- Traditional Student Conduct/Hearing Panel Model
- The Process
- Ten Steps
- Notice – Actual and Constructive
- Responsible Employee
- When Do You Investigate? Preliminary Inquiry
- Reluctance to Report
- Gatekeeping
- Allegation

STEPS OF A CIVIL RIGHTS INVESTIGATION



1. Receive Notice or Allegation
2. Preliminary Investigation (issue spotting)(PPTV)
3. Gatekeeper Determination (by Title IX Officer)
4. Issue Spotting by Investigators
5. Preliminary Strategy of the Investigation
(Will continue throughout process)
6. Notice of Investigation to Responding Party and Notice of Formal Allegation (“Charge”)
7. Formal Comprehensive Investigation
Witness Interviews
Evidence Gathering
8. Meet with parties to review evidence
9. Analysis of Evidence
10. Finding

CONFIDENTIALITY (PRIVACY)



- It is critical that proceedings and cases remain private.
 - Do not discuss with anyone who is not involved
 - Only discuss cases in a private setting
 - Failure to maintain confidentiality should be grounds for dismissal from Hearing Pool or Appellate role
- FERPA
 - Education Records
 - Student has a right to review their Record
 - Exercise caution with what you put in writing or in your notes

PRE-HEARING CONSIDERATIONS FOR HEARING BOARDS

The Process

Confidentiality

Preparing for the Hearing

Hearing Decorum

Jurisdiction

Standard of Review

PREPARING FOR THE HEARING



SAMPLE PREPARATION PLAN

- Review and understand all charges
- Review all the material carefully and thoroughly – get a general overview of the complaint
- Review it a second time and note all areas of consistency of information
- You don't need additional verification or questioning on these issues, assuming the accuracy of consistent information – but beware of suspiciously consistent stories
- Read it a third time to identify inconsistencies in the information
- This is the area you will need to concentrate your questions

PREPARING FOR THE HEARING



- Appropriate Dress
- Dress professionally – Jeans, t-shirts, shorts or sandals are not appropriate
- Arrive prepared and early
- Bring something to drink (non-alcoholic...)
- Turn off your phone!
- Bring a pen and paper
- Clear calendar after the hearing – it could take 30 minutes or it could take the entire afternoon
- Note-writing tips
 - Less is better

PREPARING QUESTIONS



- Have the Code section at the top of your note page
- Write down the following as a reminder to you:
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?
 - Am I the best person to ask the question?
- When dealing with conflicting testimony apply a credibility analysis (we will talk about it later)

INTERVIEW SKILLS & QUESTIONING

- Pre-Interview Elements General Questioning Skills
- Interviewing the Reporting Party
- Interviewing the Responding Party
- Interviewing Witnesses

DEMEANOR DURING QUESTIONING



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

THE ART OF QUESTIONING



- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers.
 - E.g.: that's too bad, I'm glad you said that.
- Do not moralize.
- Do not blame the reporting party (often called "victim-blaming").
 - E.g.: Why didn't you hit him? Why didn't you leave? Why did you get so drunk?
 - Reporting parties' responses to trauma are quite varied.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," and "had a few drinks."

QUESTIONING



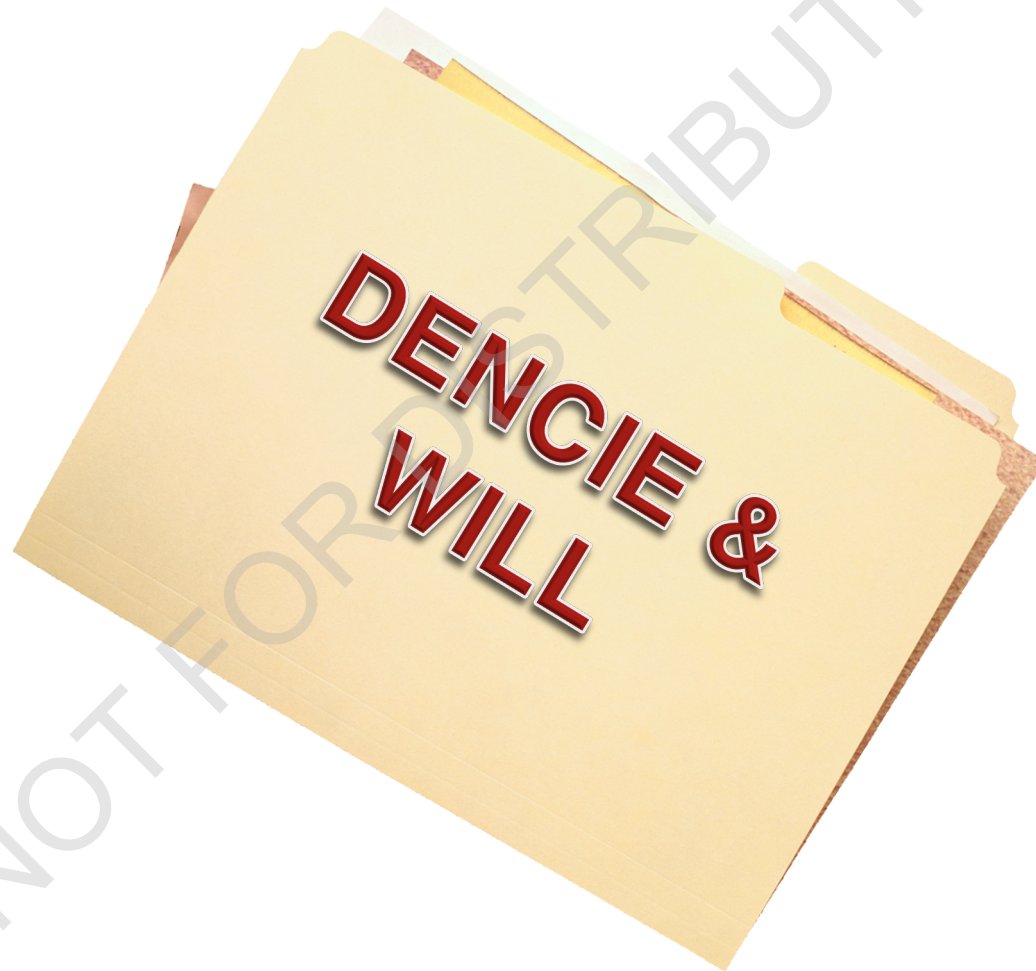
- Have a purpose for asking every question
- Try to frame questions neutrally
- Don't make questions too long or confusing
- Don't suggest an answer in your question
- Note discrepancies and ask questions based on them
- Be on the lookout for “cued” responses or rehearsed or memorized answers
- Handle emotions sensitively and tactfully
- Observe body language of the person you're interviewing
 - But don't read too much into it
- Be cognizant of your own body language

QUESTIONING ACTIVITY

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QUESTIONING EXERCISE



Dencie's Statement



- I met Will Washington in February at the campus bus stop and on March 15th, he raped me in his room. I knew Will was on the football team and he seemed nice enough, so I gave him my number. He started coming over to my room, just hanging out with me and my roommate, Kim and some of his friends from the team.
- I liked Will as a friend, but I knew I didn't want a relationship with him. I kissed him a few times and we made out a little, but I kept telling him that was as far as it was going to go. I usually made sure there were a lot of people around like my roommate Kim and some of his teammates. I was a little afraid of him because he is such a big guy and I heard he has a pretty bad temper.

Dencie's Statement



- The last time we were together before the rape, we were in my room watching videos. It was getting late and everyone had left except Will and Kim. Will was getting pissed that Kim was still there, so I asked her if she would step out for a bit, but not to go too far or for too long. So after Kim left, Will turned out the lights and started taking his clothes off. I kept telling him not to, but he wasn't listening to me. He said he wasn't going to bother me, but since it was late, he was staying over and he wanted to get comfortable. I had been sitting up in my bed, when he got onto the bed, and he wanted me to lay down with him. I said no, but he began to raise his voice and insist, so I did lay down.

Dencie's Statement



- I felt him reach over and try to touch me, but I kept moving away. I kept telling him not to, but he kept on trying to touch my breasts. He told me he didn't want to have sex, that he just wanted to rub against me. I was scared to death, so I just lay there. He got on top of me and pinned me down and started rubbing against me; but just then, Kim came back in the room. He got off me, but stayed in bed and went to sleep. The next day, he was gone when I woke up.

Dencie's Statement



- A couple days later, he called to invite me to his room. I wanted to see his dorm since I wanted to live there next year. I told him nothing was going to happen between us if I came over and he swore that he wouldn't touch me if I didn't want him to. I took the campus bus, and went over to his place. No one else was in the suite. He offered me a drink and gave me a pair of his boxers to change into..."to get more comfy." His voice was raised when he told me he wanted me to change clothes, so I did, but I felt really uncomfortable.

Dencie's Statement



- We started to watch the video and he was good for about an hour, then he started to bite my neck. I told him to stop, that nothing was going to happen; he said ok, but he kept trying. Then he penetrated me with his finger and even though I tried, I couldn't stop him. Eventually he wanted to have intercourse.
- I kept saying no....many times, but he kept going on. I was hitting him and saying no, but he kept on 'til he was done. Then he rolled over and went to sleep. I cried a little and went to sleep too because it was too late to catch the bus.

Dencie's Statement



- When his alarm went off at 5:30, I woke up too. Will said he had to go to practice, so I had to leave. The buses weren't running yet and it was cold outside, so I asked if I could stay there 'til 7, but he said no. He said he didn't know me well enough to leave me in his room with all his stuff. That's also when he told me that we could never do this again because he had a serious girlfriend at home.
- I left when he did and waited until the bus came. I went back to my room, cried a little and took a shower. I felt so ashamed about what happened and I needed to wash this whole thing away.

Dencie's Statement



- I called my sister the next day and told her what happened, and she told me to call the police. I just couldn't do it. I knew Will was in school on an athletic scholarship. He's one of the best players on the team and I thought everyone would know what happened if he got suspended from the team. I was also scared about what he might do to me or my friends if I reported this. I just wanted to forget the whole thing.
- Eventually I connected with the Sexual Assault Office because everything went pretty bad for me for the rest of the term. It was only after I had been working with the SAO for a while that I got my confidence back and reported this. That's why I am here today.

Will's Statement



- I really don't know what this is all about. I got called into my dean's office just as school started. The dean asked me if I knew Dencie Smith and at first I said I didn't. Her name didn't mean anything to me because I date a lot of women and it had been a long time since I had been with her.
- I didn't realize who she was until the dean showed me her picture. Then the dean told me that she said I raped her sometime last semester! That bitch is crazy, because nothing happened between us that she didn't want to happen. I'm telling you the truth! We had sex only one time, but it didn't happen the way she said. I met her at the campus bus stop and we talked and she gave me her number. The first time I went to her room, she even pulled out this album of pictures of her posing in sexy lingerie.

Will's Statement



- I asked her for one of the pictures and she gave it to me. We made out and she was into it as much as I was, but we didn't have sex that night. The next time I came over to Dencie's room to watch videos, I stayed overnight because she asked me to. Her roommate was in the room working on the computer and Dencie asked her to leave, I guess so we could be alone. She was laying on her bed, so I took most of my clothes off, except my boxers and got into bed with her. We were fooling around and I could tell, she was into it. I started to rub up against her, and the only reason we didn't "do it" was because her damn roommate came back into the room. She wouldn't have sex with me with her roommate in the next bed, so I just rolled over and went to sleep.

Will's Statement



- On the night she says I raped her, she called me at my apartment and asked if she could come over. It was late, but I said ok. I figured maybe this was her way of picking up where we left off last time without her roommate being around. She got here and was all dressed up and I offered her a pair of my boxers and a tee shirt to get comfortable. She changed and got onto my bed to watch a video. We were cuddling the whole time, so when the tape was over, we started kissing; one thing led to another and we had sex that night. I didn't do anything to her she didn't want me to do.

Will's Statement



- I think she's just pissed with me because, the next morning, I told her we couldn't do that again, because I have a girl friend at home I'm real serious with. Also, I asked her to leave the room when I did, because I had practice to go to and I didn't know her well enough to leave her in my apartment with all my stuff. I didn't have time to drive her back across campus, so she had to wait for the bus and it was pretty cold outside. I think I saw her maybe one more time after that. I think she's just pissed and is trying to get back at me. I have no idea why she waited so long to do this; but I'm telling you, she's making this stuff up.

QUESTIONING ACTIVITY FOR CASE STUDY



- As a group identify a couple of questions you want to ask Dencie
- CONSIDER:
 - What do I want to know?
 - Why do I want to know it?
 - What is the best way to ask the question?
- Pose the question to the group-get feedback
- Engage in the same set of questioning exercises for Will.

TRAUMA INFORMED INTERVIEWING

- Sexual Assault as Trauma
- Considerations for Interviewing

THE BRAIN'S RESPONSE TO TRAUMA



In response to the anticipated trauma of sexual assault, hormones are released into body which impact:

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

This is a neurobiological response, not a choice.

INTERVIEWING CONSIDERATIONS



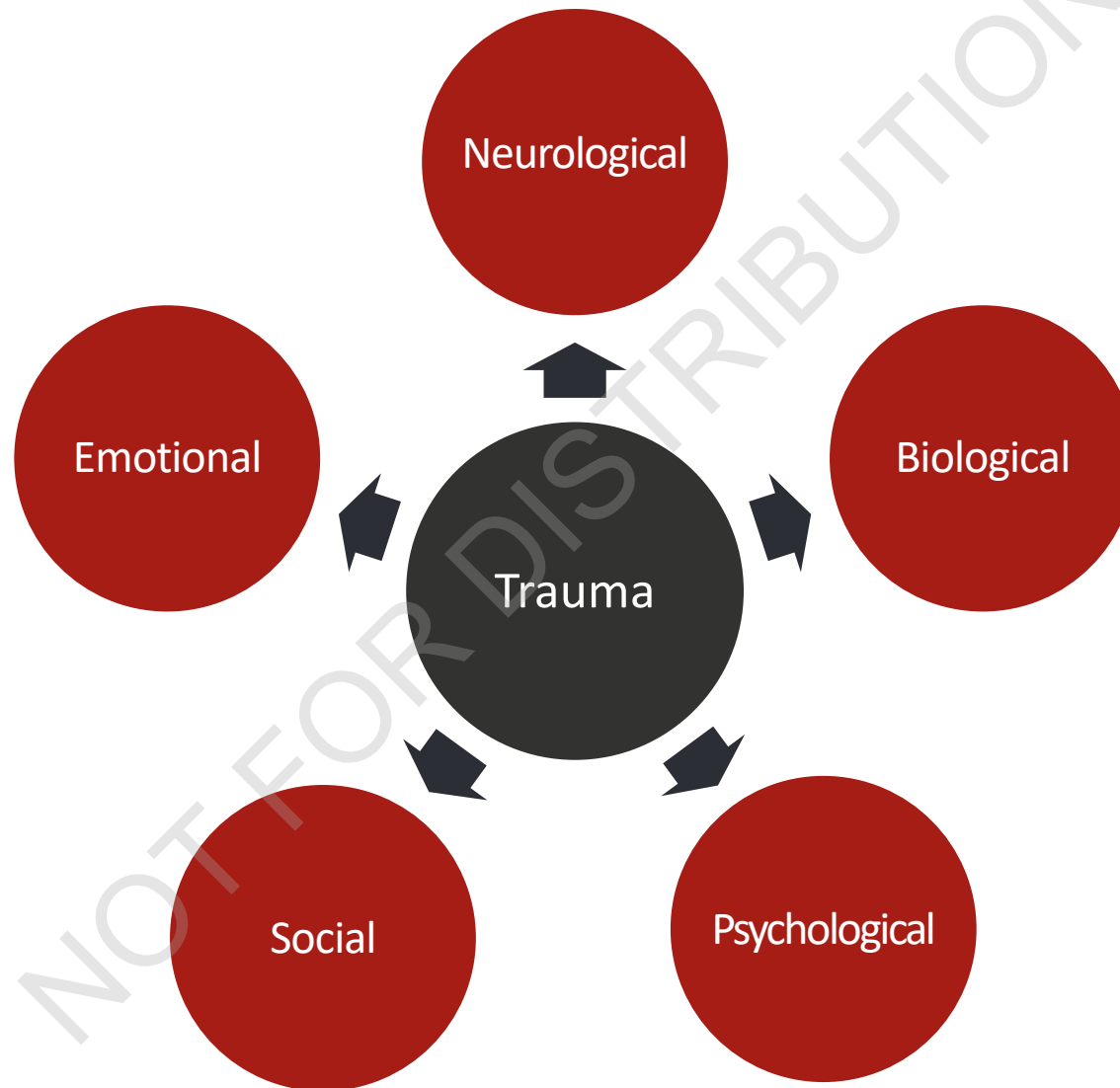
- Be cognizant of why someone may have responded in a “counterintuitive” manner.
- Be mindful that recall is often difficult and slow following trauma.
- Use non judgmental/non-blaming language.
- Avoid re-traumatization (but must still ask necessary questions).
- Prioritize developing rapport and building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

WHAT MIGHT SHUT A REPORTING PARTY DOWN



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

IMPACT OF TRAUMA ON FUNCTIONING



CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

OVERVIEW OF THE 3 CONSENT 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?

There are four types of force to consider:

- **Physical violence** -- hitting, restraint, pushing, kicking, etc.
- **Threats** -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** -- an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an unreasonable amount of pressure for sexual access.
 - Consider:
 - Isolation
 - Frequency
 - Intensity
 - Duration
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

- 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, blacked out, or under the influence
 - Incapacity = an extreme form of intoxication (alcohol)
 - Administered voluntarily or without reporting party's knowledge
 - Rape drugs
- Mental/cognitive impairment
- Injury
- Asleep or unconscious

INCAPACITATION

- To better understand and determine the relationship between the use of alcohol and capacity it's important to understand there are multiple levels of effect of alcohol, along a continuum
 - The lowest level is impairment, which occurs with the ingestion of any alcohol. A synonym for impairment is “under the influence”
 - The next level is intoxication, also called drunkenness, similar to the state’s drunk driving limit
- A person can be drunk but still have the capacity to give consent

INCAPACITATION

- Incapacity is a level of alcohol consumption in which an individual is incapable of understanding information presented, appreciating the consequences of acting or not acting on that information and making an informed choice
 - Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional.
- “Too intoxicated to consent” or “unable to consent as a result of AOD” are too limiting as policy standards, because they cannot cover the blackout situation where **someone does consent to sex, but does not know that they are.**

INCAPACITATION

- In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why and How with respect to that sexual activity.
- This is another way of stating the law's expectation that consent be knowing or informed, and any time it is not, consent cannot be effective.
- To be more precise, an incapacitated person cannot give a valid consent.

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)?

- 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.



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



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

BEHAVIOR CUES

- Evidence of incapacity will come from context clues, such as:
 - Did the accused may know how much the other party has consumed?
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Outrageous or unusual behavior (not making sense, appearing drunk)
 - Falling asleep
 - Throwing up
 - Disoriented
 - Unconsciousness (including Blackout)
 - Although memory is absent in a blackout verbal and motor skills are still functioning.

FINAL 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.

CONSENT



Question 3 is the Consent question:

- What clear words or actions by the complainant gave the accused individual 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.).
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."

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 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.

QUESTIONING EXERCISE



Kyle & Bob



- Bob Thompson, the respondent, a second-year student;
- Kyle O'Neil, the complainant, a first-year student;

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Kyle O'Neil's Statement



It was Friday night and man it had been a long week. I was invited to an off-campus party and was ready to blow off steam. My adjustment to college has been a challenging one. Frankly, I'm struggling with feelings that I had not recognized before and it's scaring me. I just wanted to forget all the stress of school and my personal life and have a good time.

I was dancing and doing some drinking and a guy came up to me and started dancing. I'd seen him on campus and thought he was really good looking. No one seemed to be paring off so it didn't feel awkward.

Kyle O'Neil's Statement



Over the next couple hours I had a blast, Bob got me some more beers and then they started passing out Jello shots. I'd never had them before and they were great. I think I had a bunch.

I started feeling really nauseous and hit the can cause I knew I was going to be sick. I got sick and decided it was time to head home. I only made it as far as the outside door and got sick again, right there in the bushes. I didn't realize anyone was around, but Bob came up to me and asked if I needed help. I was so glad for someone to help me get back to my dorm.

Kyle O'Neil's Statement



I remember us coming in my room and I remember hugging Bob (I don't know why-I think I was just so glad to be back). Then I got sick again. Bob was still there when I came back from the bathroom and he encouraged me to lay down. I must have. The rest of the night is a blur. I remember someone rubbing my back, it must have been Bob.

Kyle O'Neil's Statement



When I woke up I was naked and had a terrible hangover and then I saw a note from Bob. I didn't realize he left me one. I also saw a used condom in the trash. I was so confused and didn't know what had happened. I called him to find out just what went on last night and he asked me out! I'm so upset! What did I do? What did he do? I don't know if I want to find out, but I know it's bad. He did this to me and I want him held responsible. This whole thing is messing with my mind.

Bob Thompson's Statement



STATEMENT OF BOB THOMPSON

On the night of Friday, September 13th, I went to an off-campus party. There was a band, and a lot of alcohol. I got to the party at about 11:00 pm, 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 Jami Warren for a while, until I noticed Kyle O'Neil dancing. He was really hot, and I had noticed him on campus a few times. I didn't know if he was into guys but I was willing to find out. I went up to him and we started talking

Bob Thompson's Statement



He seemed a little tipsy and in a pretty loose mood. We talked for a while, and he asked me to get us some more drinks I think I got him 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 am, somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Kyle had a few shots.

We danced a lot, and he had a few more Jell-O shots. He went off to the bathroom, and after that I couldn't find him, and that really bummed me out. I waited around to see if he would show up again, but he didn't. I took off and started to walk back to my residence hall.

Bob Thompson's Statement



As I left the party, I heard someone vomiting. I looked over and saw Kyle in the bushes, throwing up. I went over to help him, and he seemed to be in pretty bad shape. I offered to take him home, and he told me where his dorm was and leaned on my arm. When we got to his dorm, I helped him inside, and was about to leave, but he asked me to come up to his room, just to make sure he got there. I took him upstairs, opened the door for him, and let him in.

He asked me to get him a glass of water, and I did. I started to take off again, but he asked me not to go. When I turned around, he hugged me. We hugged for a while, but he wasn't feeling well, and went into the bathroom. When he came out, he said he felt better, but tired.

Bob Thompson's Statement



We crashed on the couch and then started kissing. I started to massage his back, and he fell asleep. He woke up about 20 minutes later, and he started to kiss me, and fondle me. He took off my shirt, and I took off his, eventually we were both naked. I started to give him oral sex, and he said he needed some rest. I asked him if this was OK and if he was OK, and he said he was, he just needed to rest some more. I asked him if he had a condom, and he said he had one in his dresser. I went to get it, and when I got back to the couch, he was asleep again. He woke up after about 20-30 minutes, and I suggested that he just go to sleep. But, he said he felt much better, and started to give me oral sex.

Bob Thompson's Statement



After a while, he put the condom on and we had sex. It was great. Afterward I gave him my number and left. The next day, he called me to ask me why my name and number was on the pad by his sofa. I told him about meeting him at the party, and about our evening together. He seemed to get upset, and said he remembered meeting me at the party, and me helping him back to his dorm but almost nothing else. I asked if he wanted to go out sometime, and he said "I'm not gay" and hung up on me. Two days later, I was notified by the Dean that Kyle filed a complaint against me, and here I am.

Group Discussion



- First determine if you believe Kyle was incapacitated.
 - State your reasoning.
- If you believe Kyle was incapacitated, do you believe Bob actually knew (or planned it) or reasonably should have known?
 - State your reasoning.
- What other issues do you see here?
- What do you want to ask Kyle?
- What do you want to ask Bob?
- Who else do you want to talk to?
- What other information should you look for?

CREDIBILITY, EVIDENCE AND ANALYSIS

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CREDIBILITY

- “To assess credibility is to assess the extent to which you can rely on a witnesses’ testimony to be accurate and helpful in your understanding of the case”
 - Credible is not synonymous with truthful – but may involve lack of truthfulness
 - Memory errors do not necessarily destroy a witness’ credibility
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Pay attention to the following factors...

FACTORS TO CONSIDER FOR CREDIBILITY

- Is the description of the incident plausible?
 - Logic/Consistency/Reasons to Avoid Specific Response
 - Ask “Does this make sense?”
- Is the description corroborated? Corroborating evidence is important
- Did the witness report his/her account to anyone close to the time of the events?
- Does the witness have a reason or motive to lie or falsify information about the account?
- Does the witness have a past record of behavior that would either substantiate or refute his/her account?

MAKING CREDIBILITY DETERMINATIONS

- Look at consistency of story – substance and chronology of statements also if there are other exact stories
- 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 (i.e., does the person seem to be telling the truth), but don't read too much into it

EVIDENTIARY STANDARD

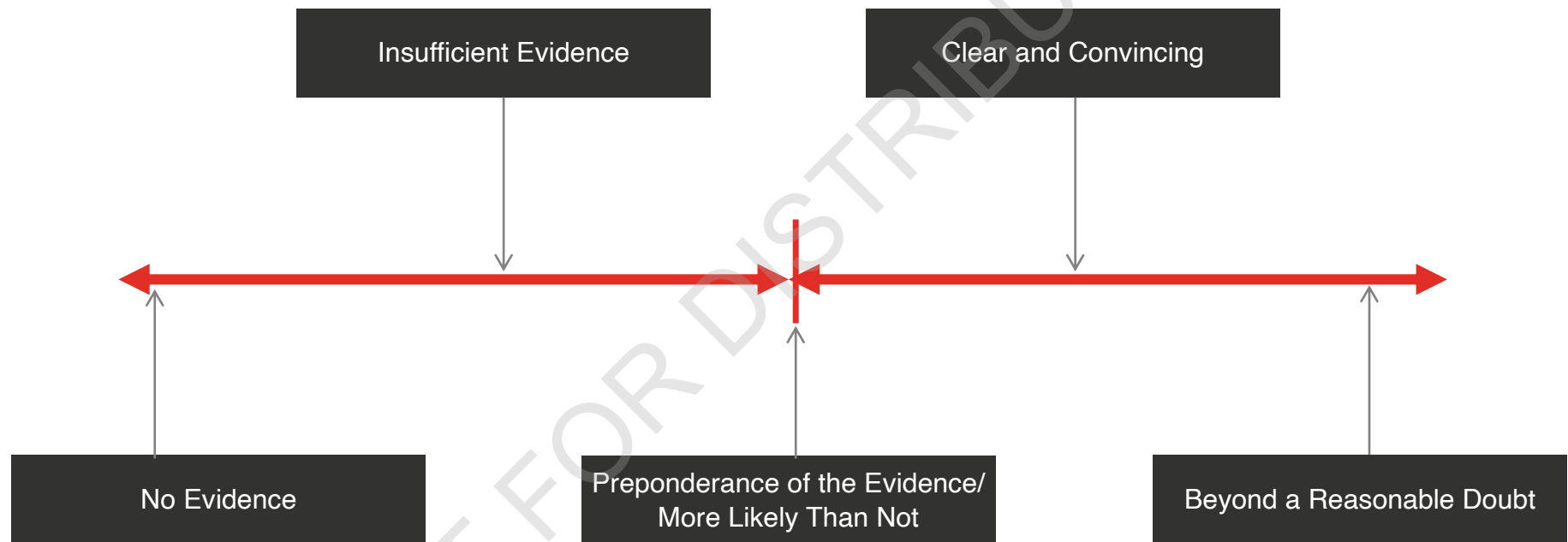


- Different Standards: What do they mean? Why do they exist?
 - Beyond a reasonable doubt
 - Clear and convincing
 - **Preponderance of the evidence.**
 - **The only equitable standard**
- Use language the community understands.
 - 50.1% (50% plus a feather)
 - “More likely than not”
 - The “tipped scale”

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



PREPONDERANCE OF THE EVIDENCE



CLEAR AND CONVINCING EVIDENCE



PROOF BEYOND A REASONABLE DOUBT



PROOF BEYOND A
REASONABLE DOUBT

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

UNDERSTANDING EVIDENCE (CONT.)

- You may **assign weight** to evidence based on:
 - Direct or testimonial evidence (e.g., personal observation or experience).
 - Documentary evidence (e.g., supportive writings or documents).
 - Electronic evidence (e.g., photos, text messages, and videos).
 - Real evidence (i.e., physical object).
 - Circumstantial evidence (i.e., not eyewitness – but compelling)
 - Hearsay evidence (i.e., statement made outside the hearing but presented as important information).
 - Character evidence (generally not relevant or acceptable).
 - Impact statements (should only be reviewed after a finding).

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ANALYZING THE INFORMATION



Withhold judgment until all the evidence has been considered.

ANALYZING THE INFORMATION

- Use your Policies in play to begin your analysis.
- 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 issues:
 - Force, incapacity, and consent.
 - Credibility
- Analyze the most serious violations first and make a determination of each and every violation alleged, element by element.

REVIEW OF PROCESS IF 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.

EXAMPLE: PARSING THE POLICY

NON-CONSENSUAL SEXUAL CONTACT



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

EXAMPLE: PARSING THE POLICY

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

EXAMPLE: PARSING THE POLICY

NON-CONSENSUAL SEXUAL CONTACT



1. Was there sexual contact by one person upon another, no matter how slight, as defined in the policy? If yes →
2. Was it intentional? If yes →
3. Was it by force, as defined in policy? If yes, policy was violated. If no →
4. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation. If no, there is no policy violation.

THE HEARING



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THE HEARING



General logistics

- Recording – how, by whom, etc.
- Attendance by parties and witnesses
- Location and Room set-up
- Seating arrangements
- Materials
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V
- Waiting for a decision

THE HEARING



Immediately prior to the hearing

- Gather at least 30 minutes in advance as a hearing board to review the investigation report and evidentiary materials
 - Hearing board should have already received and thoroughly reviewed all relevant information
- Chair answers any procedural questions by board members
- Review key questions pertaining to the allegations
- Determine key questions for the parties and witnesses
- Determine witness order (Chair has final discretion)
- Chair may greet parties and Advisors and answers any procedural questions prior to the hearing

THE HEARING



Beginning the Hearing

- Start recording
- Welcome and introductions
- State the allegations (citing each alleged policy violation) and whether the Accused agrees or disagrees with each of the allegations
- Indicate, on the record, that all members of the hearing board have reviewed the investigation report and all relevant evidence provided by the investigator(s)
- Discuss Breaks
- Remind all parties and witnesses of expectation of honesty
- Discuss role of Advisors

THE HEARING



Beginning the hearing

- Ask parties about any additional procedural questions and provide answers as appropriate
- Provide an overview of the proceedings
 - Who will testify when
 - Who will ask questions and when; indicate possible need to ask additional questions of witnesses or parties
 - Deliberations
 - Finding
 - Impact Statements
 - Sanction
 - Opportunities to appeal

Hearing Testimony

- Investigator(s) summarize their investigation and report first
 - Review of report & evidence provided
 - Questions from the hearing board
 - Questions from the parties (typically reporting party first)
- May allow reporting party and responding party provide brief opening statements
- Reporting Party provides information (typically)
 - Questions from the hearing board
 - Questions from the responding party – either through the Chair, or directly (if both parties agree to allow for direct questioning)

****Order thereafter depends on the situation****

THE HEARING



Hearing Testimony

- Responding Party provides information
 - Questions from the hearing board
 - Questions from the reporting party – either through the Chair, or directly
- Witnesses provide information
 - Questions from the hearing board
 - Questions from the reporting party
 - Questions from the responding party
- If desired and consistent with your procedures, may provide both parties opportunity to provide closing statements – often provide a short break to prepare (e.g.: 10 minutes)
 - Reporting Party typically goes first, followed by Responding Party
- Deliberations

THE HEARING



Hearing Testimony: The Role of the Chair

- Run the proceedings
- Ensure institutional procedures are substantively and materially followed
- Manage breaks
- Greet each witness, thank them for their participation, and ask them to share information
- Ensure board members and the parties are able to ask all relevant and appropriate questions
- Ensure hearing board, parties and witnesses apply appropriate policies and definitions in questioning
- Facilitate questioning between the parties (where applicable)

Hearing Testimony: The Role of the Chair

- Determine the relevance and appropriateness of questions
- When necessary, provide directives to the board to disregard a question or information deemed unfair or highly prejudicial
- Manage advisors as necessary
- Make determinations of the relevance of information
- Maintain the professionalism of the hearing board and its members
- Recognize your positional authority

DELIBERATIONS

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DELIBERATIONS



General Information

- Should be only board members present – witnesses, investigator and others excused
- Do not record deliberations; recommend board members to not take notes
- Chair can be voting or non-voting
- Typically, there is no specific order in which allegations must be addressed, so board can decide what makes sense in each case
- Recommend the Chair first obtain a sense as to where board members stand on each allegation
- Decisions must be based on the specific policy alleged to have been violated

DELIBERATION INITIAL DECISION



- Consider what model of deliberation you want to use:
 - Hierarchical – Chair or prominent member of the panel leads discussion; often shown deference (is that good?)
 - Consensus – build to a shared, often unanimous conclusion (avoid negotiating or compromise, though)
 - Adversarial – opposing viewpoints argued until a majority is clear (argue issues, but don't make it personal)

The Role of the Chair

- Ensure all viewpoints of board members are addressed
- Ensure board members apply appropriate standards and applicable policies
- Address and make findings for each alleged policy violation individually and parse the policies.
 - Can only address the policies with which the responding party was charged.
- Do not allow board members to consider evidence or allegations/charges not provided by investigators or during the hearing
- Draft a rationale for the decision with the input of board members

Findings, Impact Information, and Sanctions

- Be sure to separate the “Finding” from the “Sanction.”
 - Do not use impact-based rationales for findings (e.g.: intent; impact on the reporting party; impact on the responding party, etc.)
 - Use impact-based rationales for sanctions only.
- Reporting Party and Responding Party should be allowed to deliver an impact statement only if and after the Responding Party is found in violation
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful about not heightening the standard for a finding because the sanctions may be more severe

Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing
- Decisions must be based on the specific policy alleged to have been violated
- Issue Spotting
 - Look at each element to be assessed in the policy (e.g., intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that component is more likely than not.

RENDERING A FINDING



- Sec. 304 of VAWA mandates that all findings be accompanied by a clearly articulated rationale for all cases involving sexual assault, dating/domestic violence or stalking.
- OCR has repeatedly stressed the need for institutions to provide the parties with the finding, the sanction and the rationale
- It is no longer acceptable to state, “based on a preponderance of the evidence” we find.....
- When assessing evidence and credibility it is essential to articulate why certain evidence carries more weight or why one party is more credible than another

QUESTIONS?



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