



2019 ATIxa CIVIL RIGHTS INVESTIGATOR CERTIFICATION COURSE

West Virginia School of Osteopathic Medicine

September 16 – 17, 2019

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.

Title IX of the Education Amendments of 1972

Implementing Regulations at:

20 U.S.C. § 1681 & 34 C.F.R. Part 106

IX

THE IX COMMANDMENTS



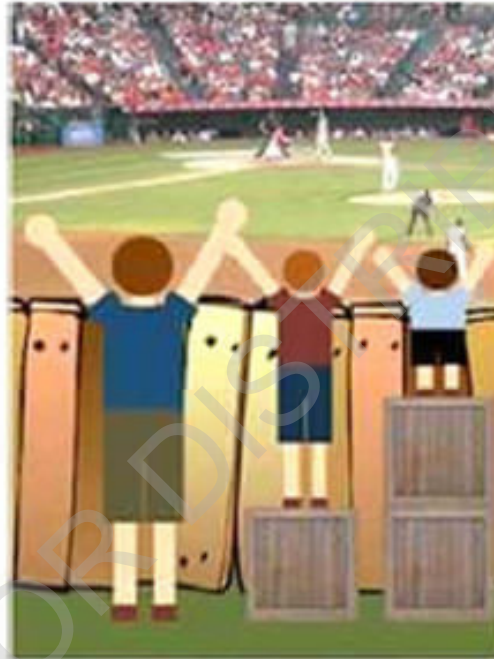
Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

EQUALITY V. EQUITY

EQUALITY VERSUS EQUITY



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

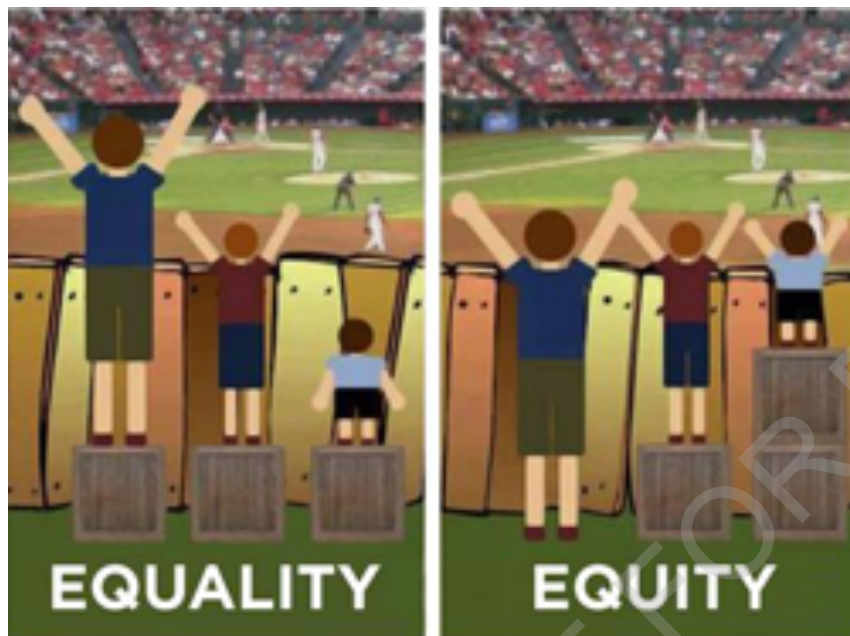


In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



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

EQUITY BY AND THROUGH THE PROCESS



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

SIGNIFICANT CASES



- *Franklin v. Gwinnett Public Schools*
 - Sexual harassment constitutes sex discrimination under Title IX
 - Private right for recovery of monetary damages under Title IX
- *Gebser v. Lago Vista*
 - Liability contingent on actual notice to a individual with authority who acts with deliberate indifference
- *Davis v. Monroe County Bd. of Education*
 - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” victim is deprived of educational opportunities or services
- *Jackson v. Birmingham Bd. of Education*
 - Retaliation in Title IX process is sex discrimination
- *Fitzgerald et al., v. Barnstable School Committee et al.*
 - Title IX is not the exclusive mechanism for addressing gender discrimination
 - Hold individuals personally liable, awards damages, injunctive relief, and attorney fees

SIGNIFICANT CASES



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

INTERSECTION OF TITLE VII AND TITLE IX



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



DUE PROCESS FOUNDATIONS

DIXON V. ALABAMA



Dixon v. Alabama State Board of Education

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

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

DUE PROCESS: CURRENT ISSUES



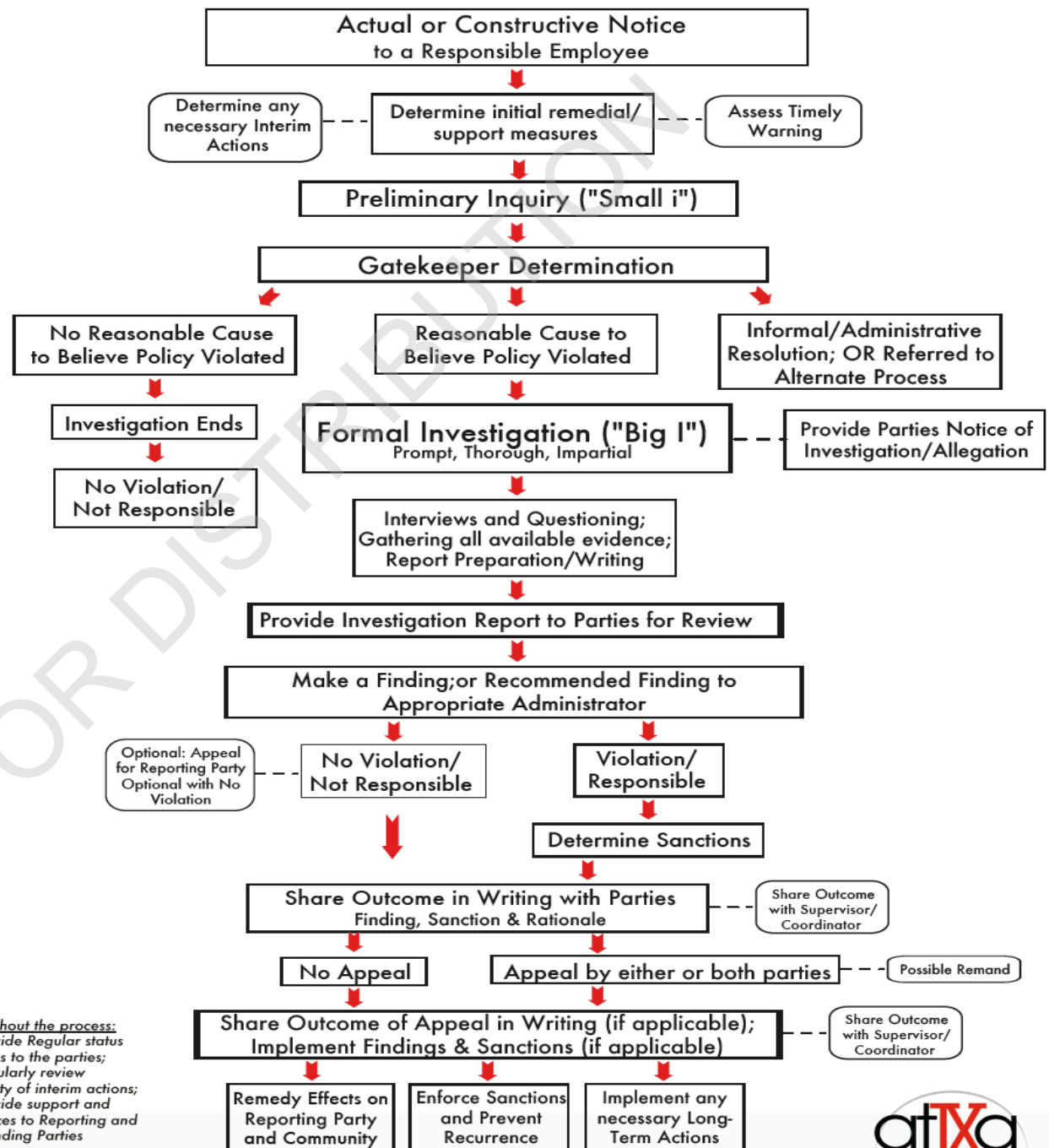
- Due Process is at the heart of current litigation and OCR regulatory guidance. Processes are becoming increasingly complex
- Current key issues:
 - Standard of Proof
 - Detailed Notice of Allegations/Investigation
 - Hearings & Investigations
 - Cross-examination
 - Attorney involvement
 - Providing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

CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

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

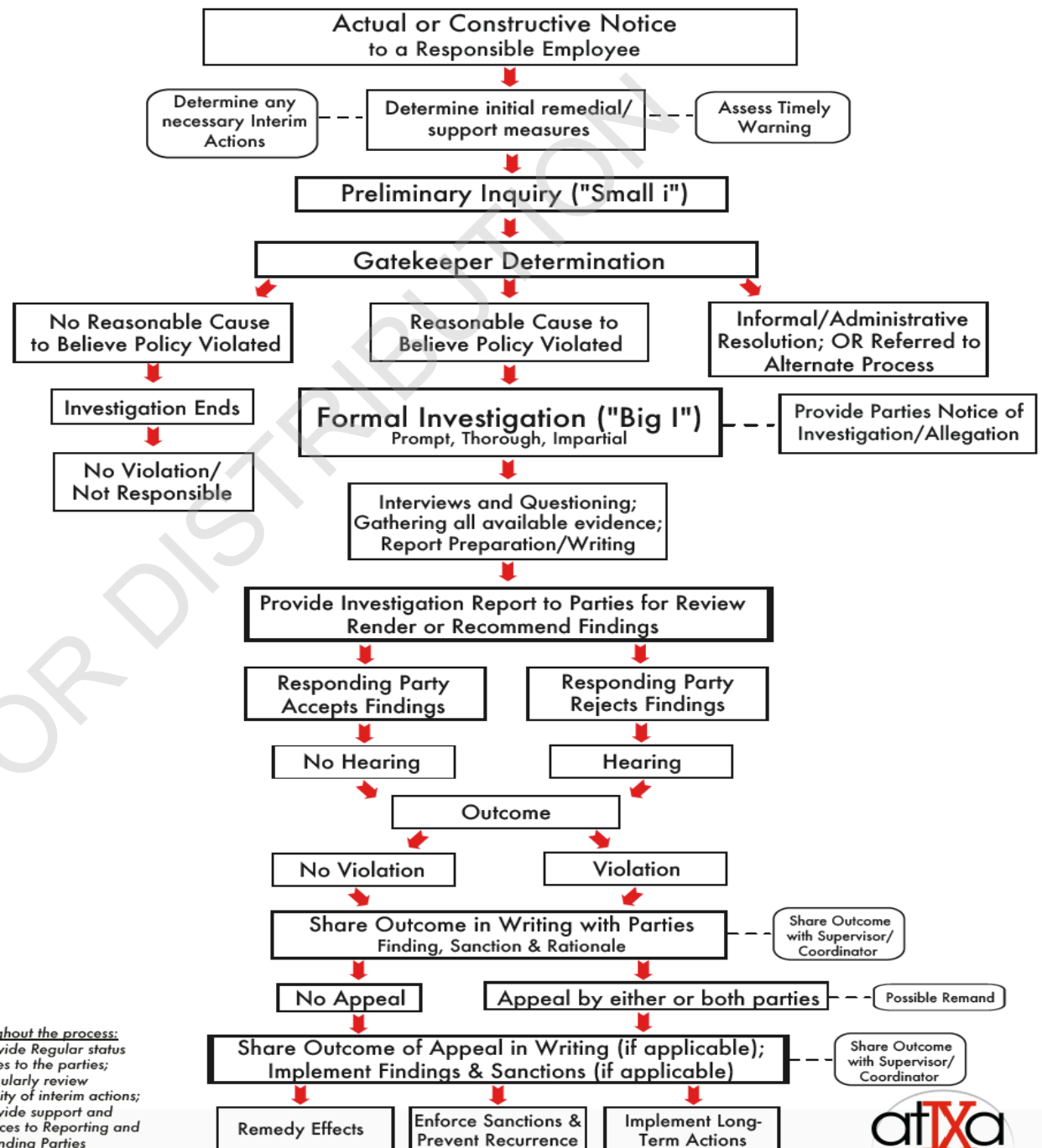
CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



THE PROCESS



CIVIL RIGHTS INVESTIGATION PROCESS IN 10 STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation to the parties (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Interviews of parties and witnesses.
8. Evidence gathering.
9. Report Writing (including a review of the report by parties).
10. Finding (followed by resolution and remedies).

**provide support and resources to the parties throughout*

WHEN DOES TITLE IX APPLY?



Jurisdiction

- Covered Programs (all programs)
- Jurisdictional Limitations.
 - Geographic.
 - Temporal.
- When is a student a “student”?
 - Application-Admission-Registration-Attendance-Breaks.
- When is an employee and employee?
 - Hourly vs. salaried?

WHEN DOES TITLE IX APPLY?



Jurisdiction for Off-Campus Incidents:

- For Sexual Harassment and Discrimination cases.
 - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus.”
- If Title IX jurisdiction is not present, the behavior could still violate:
 - Institutional harassment/discrimination policies.
 - Student Handbook/Conduct policies.
 - Technology/Acceptable Use policies.
 - Employee Handbook/Policies.
 - Professionalism standards.

WHEN DOES TITLE IX APPLY?



Jurisdiction for Off-Campus Incidents:

- This means you will be taking discretionary jurisdiction over incidents off-campus or on non-school property.
 - See, e.g. *Simpson v. Colorado*.
- When?
 - Whenever your policy says.
 - Nexus.
 - When the behavior occurs on property you own or control.
 - When the behavior occurs in programs/events you sponsor.
 - When the downstream effects of purely off-site conduct cause a discriminatory impact at school/on campus.

NOTICE TO THE INSTITUTION

- Responsible Employee
- Notice to the Institution
- When do you Investigate?

ACTUAL NOTICE



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

RESPONSIBLE EMPLOYEE



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



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

WHEN DO YOU INVESTIGATE?




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

PRELIMINARY INQUIRY

- Preliminary Inquiry
- Gatekeeping
- Interim Actions


PRELIMINARY INQUIRY



- 
- A large, stylized red number '1' is positioned on the left side of the slide, serving as a visual indicator for the first point in the list.
- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary.
 - Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
 - Push one Domino™ over at a time.
 - How much involvement does reporting party want?
 - Can we remedy informally or without discipline?
 - Give reporting party as much control as possible in the process.
 - May help to determine if there is reasonable cause to move process forward, and what policy violations should the responding party be noticed on.

PRELIMINARY INQUIRY



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

GATEKEEPING IN INVESTIGATIONS



- The Gatekeeper of the process determines the extent and development of the investigation, moving it from preliminary to full investigation and identifying timing for charges and strategy development.
 - Equity, due process, essential fairness, and equal dignity all demand substantiating evidence before dragging a reporting party through the entire process.
 - A charge (complaint) must be supported by reasonable cause to permit its **full** pursuit.

MAJOR GATEKEEPING GUIDEPOSTS



Notice.

Preliminary investigation.

Comprehensive investigation.

Charge/allegation.

Finding.

Sanction.

Appeal.

ALLEGATIONS



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

INTERIM ACTIONS AND REMEDIES



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

COMMON INTERIM ACTIONS



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

INFORMAL AND FORMAL RESOLUTION PROCESS



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

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

FORMAL COMPREHENSIVE INVESTIGATION



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

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

NOTICE TO THE PARTIES



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

WHEN TO INTERVIEW PARTIES AND WITNESSES



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

WITNESS INTERVIEWS



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

*Every case is different

EVIDENCE GATHERING



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



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.

BIAS & PREJUDICE



Key Issues

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

NOT FOR DISTRIBUTION

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?

TRAUMA AND INVESTIGATIONS

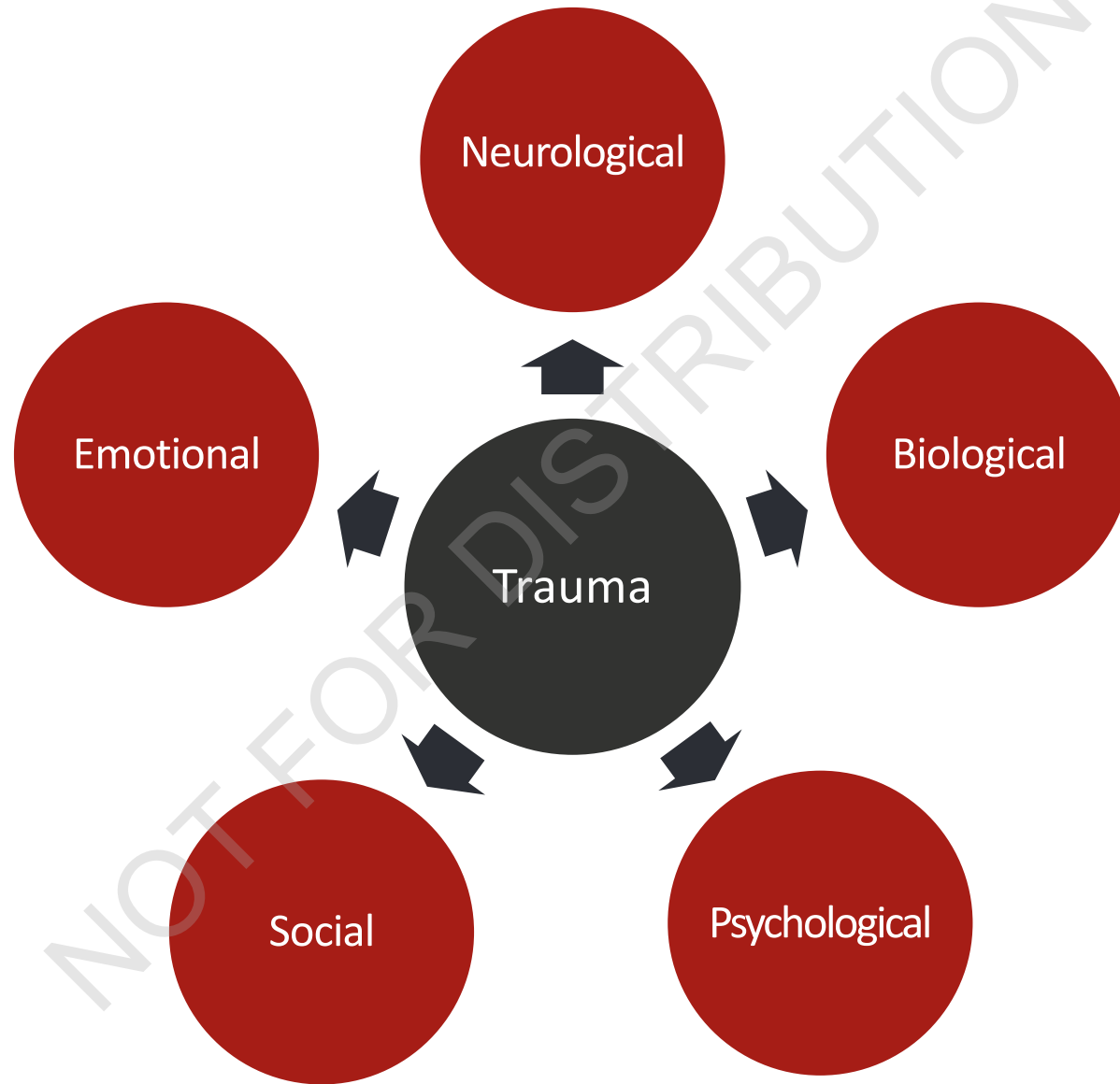
- Introduction to Trauma
- Neurobiological Impact of Trauma
- Trauma and Interviewing
- Trauma and Credibility

WHAT IS TRAUMA?



- Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.
- May result from war, natural disasters, severely distressing events
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma.
- The brain does not distinguish between “types” of sexual assault,
 - E.g. stranger or acquaintance, but interprets them equally as threats to survival.
- The brain also does not typically differentiate between an actual threat and a perceived or subjective threat.
 - Sometimes also a function of prior experiences, rather than the immediate situation.

IMPACT OF TRAUMA ON FUNCTIONING



THE BRAIN'S RESPONSE TO TRAUMA



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

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

This is a neurobiological response, not a choice.

MEMORY AND TRAUMA



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

ADDITIONAL TRAUMA RESPONSES



- Personality.
- Coping strategies.
- Available support systems and resources.
- General resilience.
- Past history of traumatic experiences.
- Cultural differences in the perception and expression of trauma.
- Normalization/Adaptation.
- Physical toll on body: headaches, body ache, and GI issues.
- Compromised decision-making.
- Emotional swings.
- Self-medicating behaviors.

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?

TRAUMA & INTERVIEWING



- 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.

TRAUMA & INTERVIEWING



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

TRAUMA & INTERVIEWING



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

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.

TRAUMA-INFORMED RESPONSE



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

TRAUMA-INFORMED INTERVIEWING



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

THE START OF THE MEETING



- The Environment
- Managing Expectations
- The Process Explanation
- Questioning Guidelines

THE ENVIRONMENT



- Where will you do the interview?
 - Your office?
 - Conference room?
 - Do you have an option?
- Skype, phone, and email interviews.
- Important aspects:
 - You need a neutral environment.
 - Minimize distractions.
 - Sit in their chair. Literally.
 - Check your lobby/waiting area for distractions and hidden messages.

OTHER CONSIDERATIONS



- Consider who should conduct the interview and who should be note-taking.
- Ask open-ended questions first.
- Allow time.
 - What if you don't have enough?
- Use breaks strategically.
- Remain calm and professional.

THE INVESTIGATORS



- Maintain professionalism, but balance with relaxed atmosphere.
 - Attire.
 - Demeanor.
- You are an extension of the environment.
 - So what do I do about distractions?
- Your neutrality is key, but should be balanced with compassion.
- Maintain good eye contact and comfortable, open body language.

MANAGING EXPECTATIONS



- No one is happy at the end of these cases; you are helping manage their frustration.
- People who conduct investigations with skill rest secure in the knowledge that all involved, including witnesses, are treated objectively and fairly.
- Provide ample opportunity for interviewee – especially the complainant and the respondent – to ask questions.
- Be sure complainant and accused understand parameters of the policy, what it does and does not cover, how the process may play out, and what the process can and cannot accomplish through outcomes.

EXPLANATION OF ROLES



- Explanation as to **your role** in the process.
 - Neutral fact finder.
- Explanation of others' roles in the process.
 - Hearing officers/panelists.
 - Appellate officers.
 - Advisors (for all parties).
- A few comments about advisors:
 - Who can they have?
 - Lawyers, faculty, parents, victim's advocates, coaches, friends, roommates, etc.
 - How many?

9 STEPS



1. Complaint or notice
2. Preliminary investigation (initial strategy)
3. Gatekeeper determination
4. Notice of allegation
5. Strategize investigation
6. Formal comprehensive investigation
 - a) Witness interviews
 - b) Evidence gathering
 - c) Analysis
7. Determination – post-determination meeting
8. Prehearing meeting
9. Hearing and appeal

THE PROCESS (SIMPLIFIED)

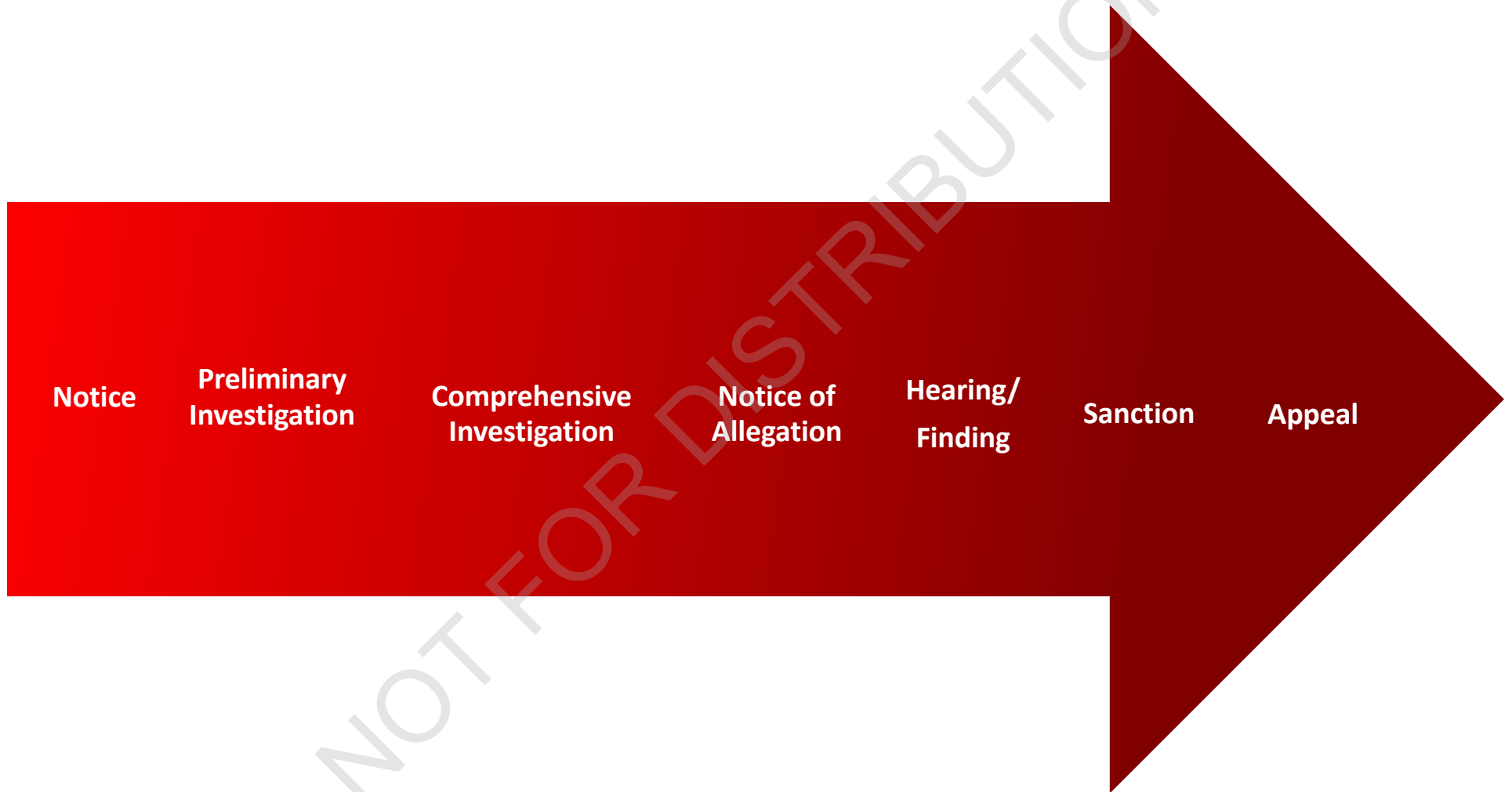


- Incident
 - Notice to Title IX officer, strategy development
- Investigation
 - Possible Outcomes: Informal resolution, administrative resolution, or formal resolution?
- Investigation and Report
- Hearing (if needed)
 - Finding
 - Sanction
- Appeal (if appropriate)

THE PROCESS (SIMPLIFIED)



MAJOR GATEKEEPING GUIDEPOSTS



EXPLANATION OF PROCESS



- What happens next.
 - Strategy, more meetings with others, etc.
 - Interim actions (supporting, preventing, etc.).
 - How long this may take.
 - Other options they have (criminal, other processes, etc.).
- Gatekeeping determination.
 - Note: The process may end before a hearing and the case may no longer be pursued.
- First draft of Final Report.
 - Review and Comment Period.
- First sharing of the Draft Final Report with panel.
 - Possibility of additional meetings.

EXPLANATION OF PROCESS CONT.



- Determination/Findings
 - This may be the end of the process in certain processes that allow for informal administrative resolution.
 - In others, this may be the pre-hearing determinations.
- Pre-Hearing Meetings:
 - With both parties.
 - This is the last opportunity for noting additional statements, new witnesses, etc.
 - Note that you will go over the entire Final Report in this meeting.

EXPLANATION OF PROCESS CONT.

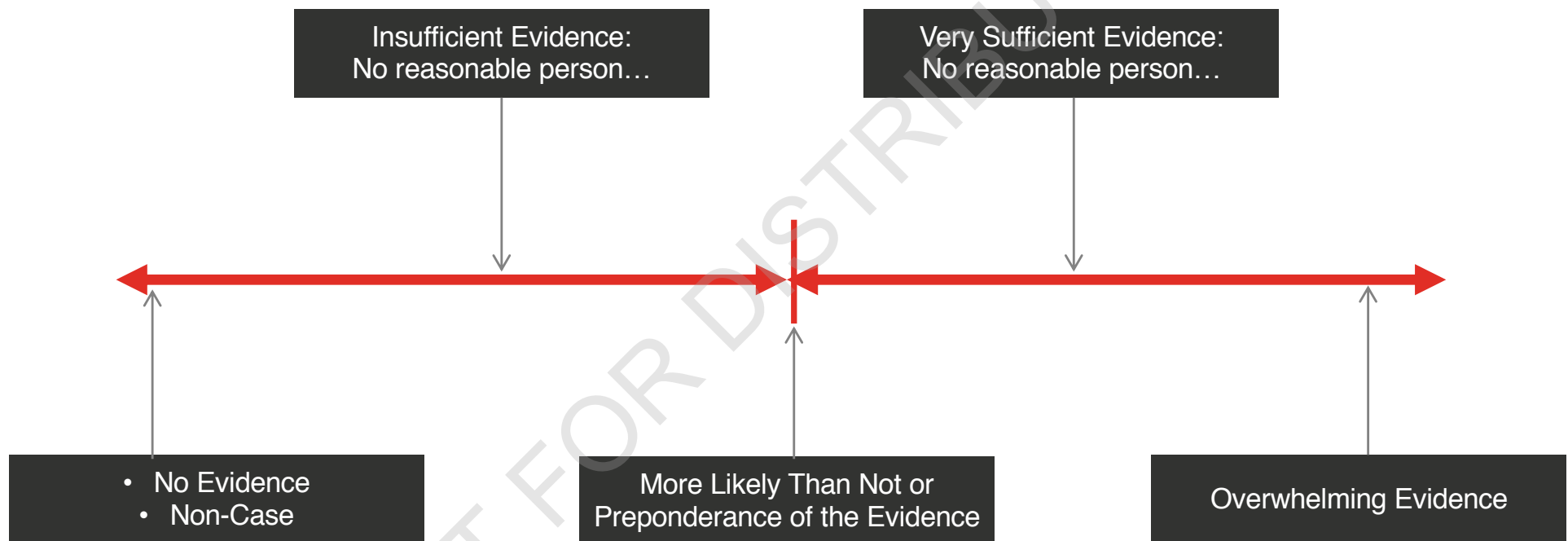


- The Hearing:
 - What it looks like.
 - Who will be there.
 - The process/procedures.
 - Possible sanctions and other outcomes.
- The Appeal:
 - Grounds.
 - Requests.
 - Timelines.
- Explanation of the standard of proof.

EXPLAINING EVIDENCE THRESHOLDS/STANDARDS



“HOW WE MAKE DECISIONS”
Use words they can understand



PRACTICE EXERCISE

- Break into small groups of 3-4 and have 1 or 2 of you practice the opening spiel – explain your process, what will happen, etc.



INTERVIEWING THE REPORTING PARTY



- Elements of Interview
- Conducting the Interview
- Large Group Exercise
- Small Group Exercise



ELEMENTS OF THE INTERVIEW



- Greeting – first opportunity to establish rapport and tone:
 - Thank them for coming in.
 - Acknowledge difficulty of situation.
- Explanation of process:
 - Go through all steps and what happens in each.
 - Share the timeline requirements.
 - Start with this meeting (not “interview”).
 - Options after this meeting is over.

CONDUCTING INTERVIEWS



- Ask if the reporting party has any questions about the process or the procedure.
 - Provide a copy of the brochure.
- Let the reporting party know that thoroughness is key and address the need for completeness.
- Make sure parties don't leave facts out because they are afraid of getting into trouble.
 - Discuss the amnesty provisions (if applicable).
- Create comfort with language and sensitive subjects.
 - Let them know they will not offend or surprise you.

CONDUCTING INTERVIEWS CONT.



- Explain that you will be taking notes or recording and why.
 - Writing vs. Typing vs. Recording
- Acknowledge that they may have told others what happened multiple times already.
 - Ask who else they have talked to about the incident.
- Ask if they have written about this in any fashion:
 - Blog.
 - Facebook/Twitter/Other Social Media.
 - Journals or other writings or video journals.
 - Texts/Calls.

CONDUCTING INTERVIEWS CONT.



- Now begin getting their statement
 - Let them talk.
 - Give them a starting point if they don't have one.
 - Drill down later.
 - Interrupt for questions only when you must.
 - Note: Some strategies may change based on the party's demeanour.
 - Expressive.
 - Flat affect
 - Resistant.
 - Hesitant.

CONDUCTING INTERVIEWS CONT.



- When they are finished giving the initial statement:
 - Get clarifications —
 - Use open ended questions.
 - Give reminders.
 - Speak clearly.
 - Ask simple questions.
 - Cue with time reminders when you go back to assist recall.
 - Do not suggest an answer.
 - Do not appear to give direction to the “right” or “best” answer.

CONDUCTING INTERVIEWS CONT.



- Watch victim-blaming!
 - Lack of physical resistance.
 - Role of alcohol/drugs.
 - Inconsistencies/memory loss.
 - Delayed reporting.
 - Prior relationships.
 - Pre-consent/flirting.
 - Pre-desired outcomes.
 - Post-incident consensual acts.
 - “What were you thinking?” (vs. “feeling”)?

CONDUCTING INTERVIEWS CONT.



- Things not to say to them in an attempt to communicate empathy include:
 - Everything is going to be all right.
 - Don't cry.
 - You shouldn't feel that way.
 - You must get on with your life.
 - Time heals all wounds.
 - It could have been worse.
 - At least you're not injured.
- Think about the car wreck victim...

CONDUCTING INTERVIEWS CONT.



- To conclude (some investigators do this earlier to assist with empathy/rapport):
 - Find out if academics and/or work have been affected.
 - Ask how this has affected them emotionally and/or physically.
 - Discuss counseling options if not already connected.
 - Challenges that this may provide when there is not an victim advocate and/or advisor.

CONDUCTING INTERVIEWS CONT.



- Discuss interim remedies that may be (or have already been) implemented:
 - No contact orders.
 - Class changes.
 - Living arrangements.
- Discuss non-retaliation.
 - Give examples of retaliation, and to whom it should be reported immediately.

CONDUCTING INTERVIEWS CONT.



- At the end:
 - What else do you think might be important for us to know?
 - What other questions are there that you thought we might ask that we didn't?
- Is there anything you want me to ask the other party (or any witness)?
 - **THIS IS CRITICAL WITH THE PARTIES!**
 - Document this extensively!
- If you have not ascertained this, ask what complainant's motivation is for reporting and what complainant hopes to see as a result – **BE CAREFUL HERE.**

CONDUCTING INTERVIEWS CONT.



- Let them know next steps and when they will hear from you, and that they can contact you anytime with questions or problems.
- Get their contact information.
 - Voicemail?
 - Email?
 - Text?
 - Safety considerations?
- Be as specific as possible about timelines for contact and appointments.

QUESTIONING GUIDELINES



- What are the goals of questioning?
 - Learn the facts.
 - Establish timeline(s).
 - Understand each party's perception.
 - Of both the incident(s), relationships and the process.
 - Gather enough information to determine facts and their relative importance and relevance.
 - Try to learn what is *more likely than not* what happened.
 - Use questions to elicit details, eliminate vagueness, and fill gaps where information seems to be missing.

QUESTIONING GUIDELINES



- **WHAT DO I WANT TO KNOW?**
- **WHY DO I WANT TO KNOW IT?**
- **WHAT IS THE BEST WAY TO ASK IT?**
- **AM I THE BEST PERSON TO ASK IT?**
(if there is a 2nd Investigator)

RESTATE/REFRAME



- Restate/summarize what is said.
- Launder the language.
 - Remove negative or inflammatory language and emotions.
- Helps validate that you are listening.
- Helps ensure you understand what is being said.
- “So it sounds like...”
- “Tell me more...”

QUESTIONING EXERCISE

- Using a case study, the presenter will play the role of complainant and allow the participants to practice their questioning techniques.



RELUCTANT REPORTING PARTIES



- Requests Not to Investigate
- Notifying Parties
- Confidentiality Requests
- Pattern, Predation, Threat, or Violence
- Exercise and Discussion



RELUCTANT REPORTING PARTIES



- When a reporting party is reluctant to make a formal complaint, or returns to withdraw a formal complaint, Investigators **should honor that request.**
 - Unless...
- You **MUST** determine the reason for reconsideration.
 - The investigation or hearing process is too hard?
 - Retaliation?
 - Just not ready?
- Using advocate or advisor to assist in determination.

RELUCTANT REPORTING PARTIES



Reporting parties **MUST** be notified:

1. That the process will still be available to them, *regardless of how long they wait.*
 - a) Pros and cons of “statutes of limitations.”
2. That the institution will support them in any way it can (e.g., housing, classes, no contacts, etc.)
3. That, if there is a threat to the community, the institution may be forced to proceed with an investigation, **BUT** that they will be notified of this process before we move forward.

RELUCTANT REPORTING PARTIES



- If reporting parties request their names not be used:
 - The institution should take all reasonable steps to respond and investigate consistent with request.
 - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students or reporting parties.
 - PPTV – Pattern, Predation, Threat, and Violence.

PPTV CONSIDERATIONS: MUST WE PROCEED?



- Pattern, Predation, Threat, or Violence:
 - Additional complaints of sexual violence involving the same perpetrator.
 - Whether committed by multiple perpetrators.
 - Whether the perpetrator has a history of arrests or records from a prior school indicating history of violence.
 - Whether report reveals a pattern of perpetration at a given location or by a particular group.

PPTV CONSIDERATIONS: MUST WE PROCEED?



- Pattern, Predation, Threat, or Violence (cont.)
 - Whether alleged perpetrator threatened further violence or violence against the student or others.
 - Whether violence was perpetrated with a weapon.
 - Age of the alleged victim.
 - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence, etc.).
- If institution proceeds, it should notify reporting party and use appropriate interim measures to protect party.

EXPLAINING RATIONALE



- Explain to reporting parties that:
 - Its responsive action may be limited based on the level of privacy requested by them.
 - It cannot guarantee privacy if doing so would jeopardize the safety of the complainant or others.
- Emphasize that only those with a need to know will be informed.
 - Train those who will be informed about confidentiality expectations.

PPTV SCENARIO



- A female student confides in the director of the Sexual Health and Violence Prevention Center (also a faculty member) that they were sexually assaulted by another student and asked that the institution not investigate the matter. The Director notifies the Title IX Coordinator, but indicates that the reporting student does not want the matter investigated.
- The TIX Coordinator reviews the identified potential respondent's student's file and notes that he received probation for pushing a female security guard and calling her a "stupid bitch" 11 months ago and a reprimand for an alcohol violation 15 months ago.
- The female reporting student agrees to meet with the Title IX Deputy Coordinator/Investigator.

SMALL GROUP EXERCISE (TIME PERMITTING)



- Break into small groups.
- First, would your institution have even known this?
 - Would the director/faculty member have told the TIXA/TIXI? How sure are you? What are the thresholds you think exist for your faculty/staff to tell you?
 - What would they have told you?
 - What would you tell them?
- Does the prior behavior warrant a meeting?
 - Does it cross the PPTV thresholds to move forward without consent?
- Strategize what you will discuss with the student
 - What will/can you tell the female student?

LARGE GROUP DISCUSSION



- The Female student makes these requests; can you do or not do the following :
 - That the institution not investigate the incident.
 - That a no-contact order be issued between them.
 - The male student be removed from the residence hall (same as hers).
 - She be allowed to withdraw from two of her courses without financial penalty.
 - You do not tell her parents/partner.

INTERVIEWING THE RESPONDENT



- Elements of Interview
- Gatekeeping Posts
- Explanation of Process
- Preponderance Standard
- Explanation of Roles
- Conducting the Interview
- Small Group Exercise



ELEMENTS OF INTERVIEW



- Greeting – first opportunity to establish rapport and tone.
 - Thank them for coming in.
 - Acknowledge difficulty of the situation.
- Explanation of the process:
 - Go through all of the steps and what happens in each step.
 - Share the timeline requirements.
 - Start with this meeting (not “interview”).
 - Options after this meeting is over.

CONDUCTING INTERVIEWS – RESPONDING PARTY

- Ask if they have any questions about the process or the procedure.
 - Provide a copy of the brochure.
- Let them know that thoroughness is key and address the need for completeness.
- Make sure they don't leave facts out because they are afraid of getting into trouble.
 - Discuss the amnesty provisions (if applicable).
- Create comfort with language and sensitive subjects.
 - Let them know they will not offend or surprise you.

EXPLANATION OF ROLES



- Explanation as to **your role** in the process.
 - Neutral fact finder.
- Explanation of others' roles in the process.
 - Hearing officers/panelists
 - Advisors (for all parties).
 - Appellate officers.
- A few comments about advisors – dealing with theirs.
 - The “pre-meeting meeting.”
 - Who – lawyers, faculty, parents, victim’s advocates, coaches, friends, roommates, etc.
 - How many?

CONDUCTING INTERVIEW CONT.



- Discuss interim remedies that may be taken or already implemented:
 - No-contact orders.
 - Interim restrictions or suspensions.
 - What this means – academics and timelines.
 - Class changes.
 - Living arrangements.

EXPLANATION OF PROCESS



- What happens next.
 - Strategy, more meetings with others, etc.
 - Interim actions (supporting, preventing, etc.).
 - How long this may take.
 - Other options they may be subject to.
- Gatekeeping determination.
 - Note: This may be the end of the process.
- First Draft of Final Report.
 - Final report meetings.
- First Sharing of the Draft Final Report with panel.
 - Possibility of additional meetings.

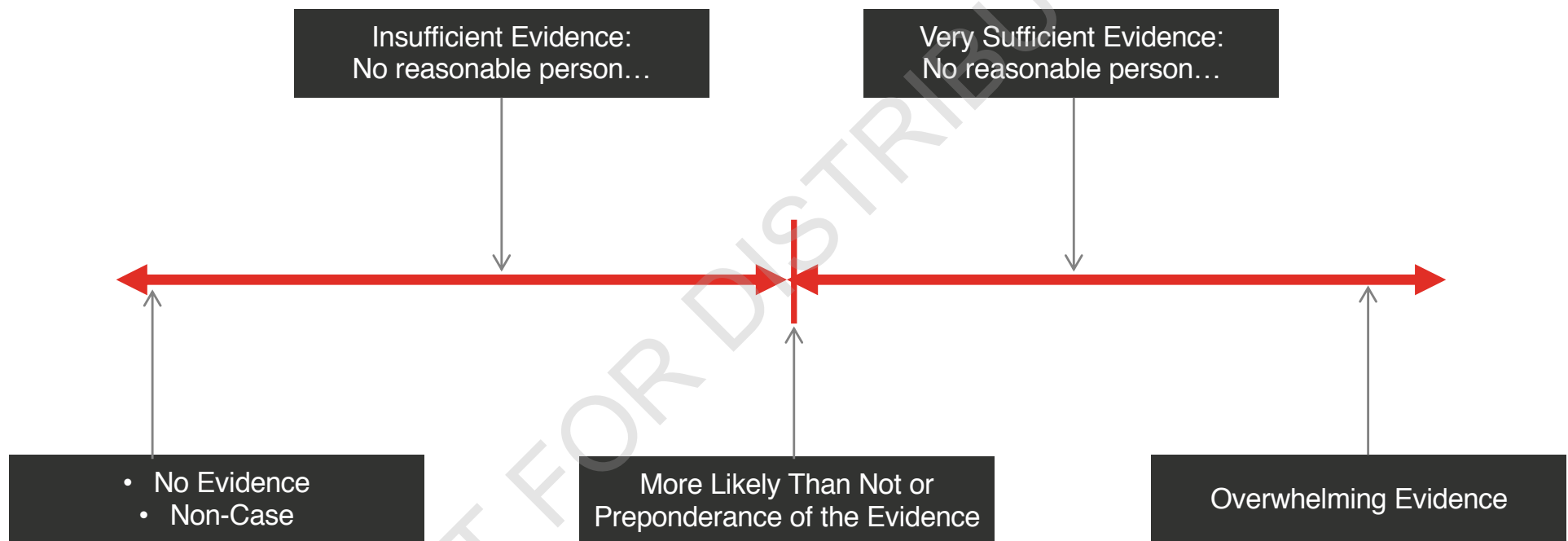
THE PROCESS (SIMPLIFIED)



EXPLAINING EVIDENCE THRESHOLDS/STANDARDS



“HOW WE MAKE DECISIONS”
Use words they can understand



CONDUCTING INTERVIEWS CONT.



- Explain that you will be taking notes or recording and why.
 - Writing vs. Typing vs. Recording
- Acknowledge that they may have told others what happened multiple times already.
 - Ask who else they have talked to about the incident.
- Ask if they have written about this in any fashion:
 - Blog.
 - Facebook/Twitter/Other Social Media.
 - Journals or other writings or video journals.
 - Texts/Calls.

CONDUCTING INTERVIEW CONT.



- Now begin the meeting.
 - Let them talk.
 - Give them a starting point if they don't have one.
 - Drill down later.
 - Interrupt for questions only when you must.
 - **Note:** Some strategies may change based on their demeanor.
 - Expressive.
 - Angry.
 - Resistant.
 - Hesitant.

CONDUCTING INTERVIEW CONT.



- When they are finished giving the initial statement:
 - Get clarifications.
 - Lots of open ended questions.
 - Used closed questions when resistant or necessary.
 - Give reminders – may want to use visualization to assist with recall. This can be done without giving complainant's statement to them.
 - Cue with time reminders when going back to assist recall.
 - Speak clearly.
 - Ask simple questions.
 - Do not suggest an answer or appear to give direction to the “right” or “best” answer.

CONDUCTING INTERVIEW CONT.



- To conclude (some investigators do this earlier or at the beginning to assist with empathy/neutrality):
 - Find out if academics and/or work have been affected
 - Ask how this has affected them emotionally and/or physically.
 - Discuss counseling options if not already connected.
 - **NOTE:** Challenges that this may provide when there is not an advocate.

CONDUCTING INTERVIEW CONT.



- Discuss non-retaliation.
 - Give examples of retaliation, and to whom it should be immediately reported.
 - “Accidental” Retaliation

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CONDUCTING INTERVIEWS CONT.



- At the end:
 - What else do you think might be important for us to know?
 - What other questions are there that you thought we might ask that we didn't?
- Is there anything you want me to ask the other party (or any witness)?
 - THIS IS CRITICAL WITH THE PARTIES!
 - Document this extensively!
- What do you think the motivation for this complaint is? (Only ask if you have already not been told this information.)

CONDUCTING INTERVIEW CONT.



- Let the Responding Party know next steps and when they will hear from you, and that they can contact you anytime with questions or problems.
 - Get their contact information.
 - Voicemail?
 - Email?
 - Text?
 - Be as specific as possible about timelines.

QUESTIONING EXERCISE

- Using a case study, presenter will play role of respondent and allow participants to practice their questioning techniques.



WITNESSES

- Managing Witness Expectations
- Conducting the Interview
- Lying Witnesses
- Resistant & Quiet Witnesses



MANAGING WITNESS EXPECTATIONS



- 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.
 - Restate/reframe.

MANAGING WITNESS EXPECTATIONS



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

CONDUCTING THE INTERVIEW



- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to private investigators.
- Ask if there is anything you should know that was not been covered or if there is anyone else they think that should be contacted.
- Discuss non-retaliation and give examples of it; as some people only see retaliation as personal threats.
- Discuss privacy, and execute FERPA release.

CONDUCTING THE INTERVIEW CONT.



- Ascertain their relation to the other parties in the case.
- Ask for their opinion of the other parties .
- Did they see any change in behaviors?
- Social media?
- Phone records/Texts
- Ask all interviewees to contact you if they remember anything else or want to add to their interview

LYING WITNESSES



- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witnesses 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 them directly (firm, yet polite) and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open and follow up.

RESISTANT & 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 the expectations of the school and rationale for the duty to participate.
- If appropriate, appeal to their humanity.
- Advance preparation will help when open-ended questions don't work.
- Restate/reframe.
- Revealing information to put them at ease.

INTERVIEW EXERCISE



TIME PERMITTING

- What are the steps – before and during – telling a reporting party and/or a respondent that a NCSI case has been determined not to have sufficient evidence to move forward and/or a Not Responsible Finding has been made.

APPLYING INSTITUTIONAL POLICIES: ATIXA MODEL POLICIES

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

SEXUAL HARASSMENT



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:*
 - 1. Quid Pro Quo harassment; and/or*
 - 2. Retaliatory harassment; and/or*
 - 3. Creates a hostile environment.*

QUID PRO QUO SEXUAL HARASSMENT



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

RETALIATORY HARASSMENT



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

HOSTILE ENVIRONMENT



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

TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



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

TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



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

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



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

SEXUAL EXPLOITATION



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

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



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

THE INVESTIGATION REPORT



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

THE INVESTIGATION REPORT



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

ELEMENTS OF AN INVESTIGATION REPORT



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

ELEMENTS OF AN INVESTIGATION REPORT



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

ELEMENTS OF AN INVESTIGATION REPORT



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

QUESTIONS?

