



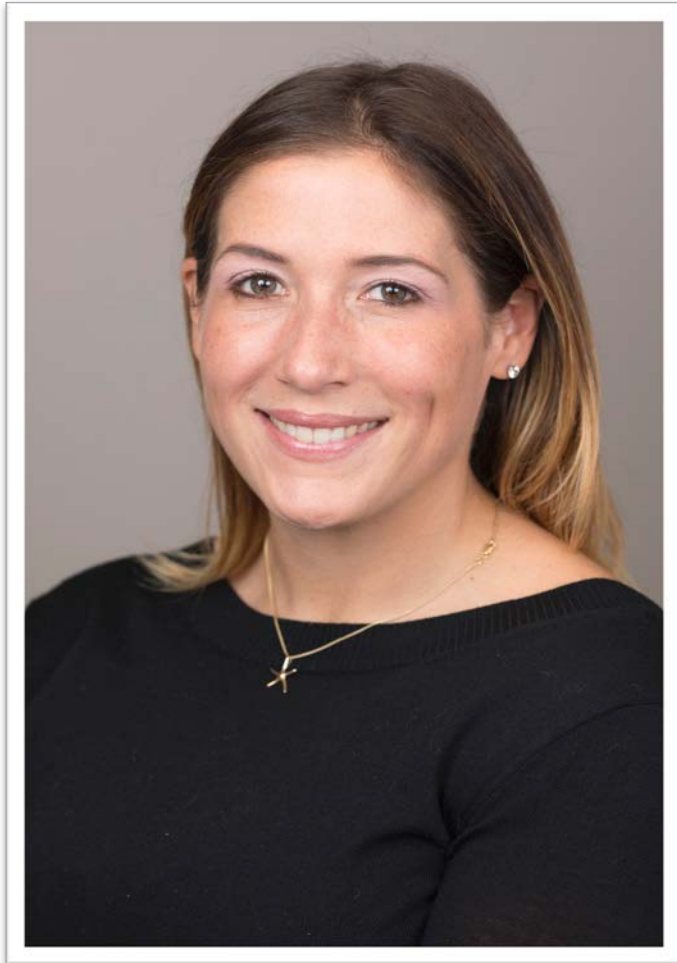
GRAND RIVER | SOLUTIONS

Title IX in a Post Regulatory World

Day One

Chantelle Cleary

Meet Your Facilitators



Chantelle Cleary, J.D.
Senior Consultant

Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.



About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

Today's Agenda

01

A Whole New Word: The Post
Regulatory Application of Title IX

05

Conducting the Investigation

02

Reports of Misconduct and
the Post-Regulatory
Requirements for Response

06

Evidence

03

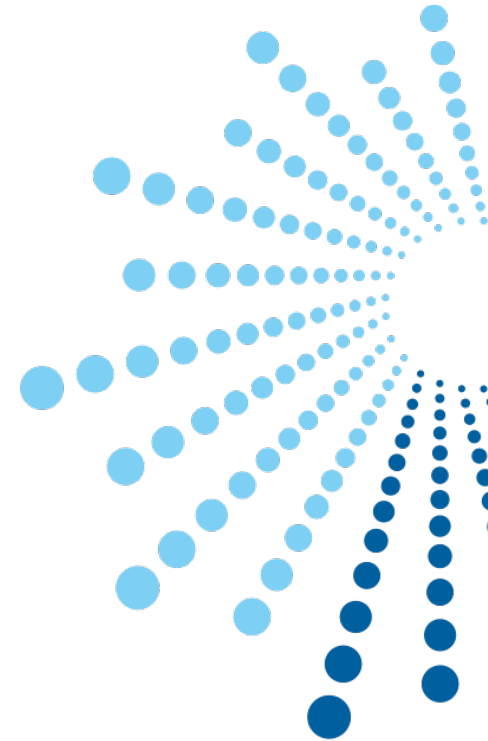
Investigations Post
Regulations

07

The Investigation Report

04

The Investigator





A Whole New Word: The Post Regulatory Application of Title IX

Narrowed jurisdiction and expansive procedural requirements

01

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Title IX of the Education Amendments Act of 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 education program or activity receiving Federal financial assistance."

Title IX Applies to All Forms of Sex Discrimination

- o Sexual Harassment
- o Achievement Awards
- o Athletics
- o Benefits
- o Financial Aid
- o Leaves of absence and re-entry policies
- o Opportunities to join groups
- o Pay rates
- o Recruitment
- o Retention Rates
- o Safety
- o Screening Exams
- o Sign-on Bonuses
- o Student and Employee Benefits
- o Thesis Approvals
- o Vocational or College Counseling
- o Research opportunities

The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- o Sexual Harassment
- o Achievement Awards
- o Athletics
- o Benefits
- o Financial Aid
- o Leaves of absence and re-entry policies
- o Opportunities to join groups
- o Pay rates
- o Recruitment

**Conduct Constituting
Sexual Harassment
as Defined in
Section 106.30**

Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

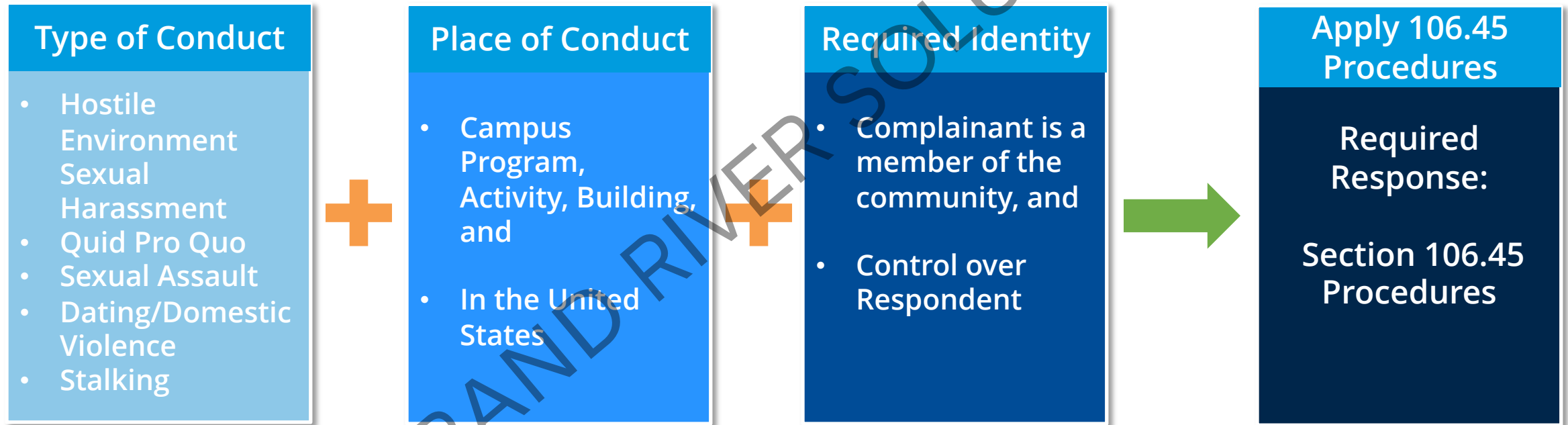
Title IX Application Post May 2020 Regulations

All Forms of Sex
Discrimination, Retaliation

106.30 Sexual Harassment:

- Hostile Environment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

Title IX Application Post May 2020 Regulations



First Question

What Happened?

Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
3. A complaint of quid pro quo sexual harassment by an employee respondent against a student.



Second Question

Where Did the Conduct
Occur?

Did the conduct occur:

1. The incident(s) occurred at school, within the United States;
2. The incident(s) occurred as part of a recognized program in a building under the school's control, and within the United States;
3. The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.



Third Question

Who Experienced the
Conduct?

Is the Complainant:

1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still accessing or attempting to access a university program or activity, within the United States.



Fourth Question

Is the Respondent:

1. A student (whether applicant, admitted, or currently enrolled), or
2. An employee (applicant, hired but not yet working, or employed).
3. Someone else that the institution may have control over (ie, a contractor, an alum, or a vendor)

Who is the Accused?





Apply the 106.45
Procedures

**What do we do
about misconduct
that does not fall
within this narrow
scope?**

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**Apply other applicable
institutional policy or
procedures.**



Reports of Misconduct and the Post-Regulatory Requirements for Response

Actual Knowledge, Report Response, Initial Assessments, and Supportive Measures

02

First
Thing's
First...

Notice to College/University

Outreach/Response from Title IX Coordinator

Support Measures, whether or not Formal Complaint is
filed

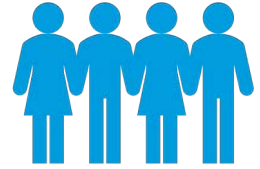
How to File

Options for Resolution

Actual Notice: A Narrowed Scope of Institutional Responsibility

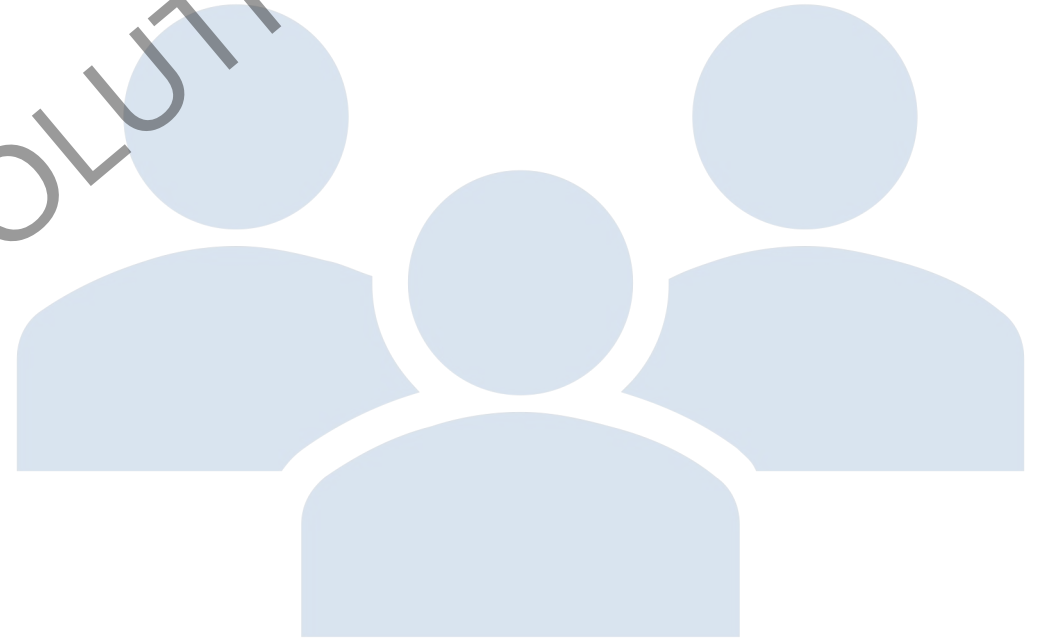
Institution must respond when it has:

- **“Actual knowledge”**
 - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
- **of “sexual harassment” (as newly defined)**
- **that occurred within the school’s “education program or activity”**
 - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
 - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
- **against a “person in the United States” (so, not in study abroad context)**



Responsible Employees

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Mandatory Response

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file

How to Proceed?



Supportive Measures

Interim, not
forever

Interim also
includes “before
investigation”

Equitable ≠
Equal



Not Punitive?

- No default, always case-by-case
- Right to challenge

Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



Mandatory Investigation

Complaint filed,
SIGNED, requests
investigation

Coordinator files,
SIGNS, starts
investigation



But Do You **START** the Investigation?

Does it meet the
elements? If not,
DISMISS

Trying to do some
pre-investigation
to identify
respondent

Dismissing Complaints

MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

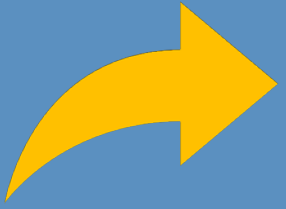
Complaint Resolution

Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation
- No appeal

Formal Resolution

- Investigation and Adjudication process in compliance with Section 106.45



Investigations Post Regulations

03

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Procedural requirements for Investigations

Notice to both parties

Equal opportunity to
present evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to prepare

Opportunity to review all
evidence, and 10 days to
submit a written response
to the evidence prior to
completion of the report

Report summarizing
relevant evidence and 10
day review of report prior
to hearing



Notice Requirements

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
 - the identities of the parties involved in the incident, if known,
 - the conduct allegedly constituting sexual harassment under § 106.30,
 - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



Advisor of Choice

- The advisor can be anyone, including an attorney;
- Institutions cannot place restrictions on who can serve
- No training required
- Institution must provide advisor for the purposes of cross examination, only.



Written Notification Meetings and Sufficient Time to Prepare

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Equal Opportunity to Present Evidence

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Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- 10 days to provide a written response

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Investigative Report and Review

- After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.
- That report will be shared with the parties and they will have 10 more days to comment

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“Directly Related” and “Relevant Evidence”

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Directly Related Evidence

- Regulations do not define “Directly Related” Evidence
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source

“Relevant” Evidence

- The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
 - “Evidence is relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.”

Evidence That is Not “Relevant”

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
 - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

Who Decides?

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
 - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
 - Each party's right to argue their case, and
 - Fact that decisions regarding responsibility will be made at hearing, not investigation stage



The Investigator

04

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The Investigator



Can be the Title IX Coordinator, although that is disfavored



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

Impartiality: Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

Impartiality: Avoiding Prejudgment and Bias

Practical
application of
these
concepts in
investigations

Do not rely on cultural “rape myths” that essentially blame complainants

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Bias

Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience

"Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE

"exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Impartiality: Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party



05

Conducting the Investigation

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Essential steps of an investigation



Notice of formal investigation



Initial Interviews



Evidence Collection



Report writing

The Process: Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties
- Of the Parties

Alleged Assault

- Consent
- Type of Contact

Pre Alleged Assault

- Pre-Meditation
- Manipulation
- Attempt to Isolate

Post Alleged Assault

- Behaviors
- Communications

Identify and Interview Parties/Witnesses

Interview Objectives



Connect

- Build rapport
- Build trust
- Empower
- Listen



Safety Assessment

- Physical and Emotional Safety of the Victim
- Safety of the Community
- Safety of the Accused



Services

- Advocates
- Police/Campus
- Medical care
- Interim action



Evidence Preservation

- Text Messages
- Photographs
- Names and contact info for witnesses

Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



Prepare yourself for the meeting



If interviewing a party, inform them of their right to have an advisor present.

Set Expectations

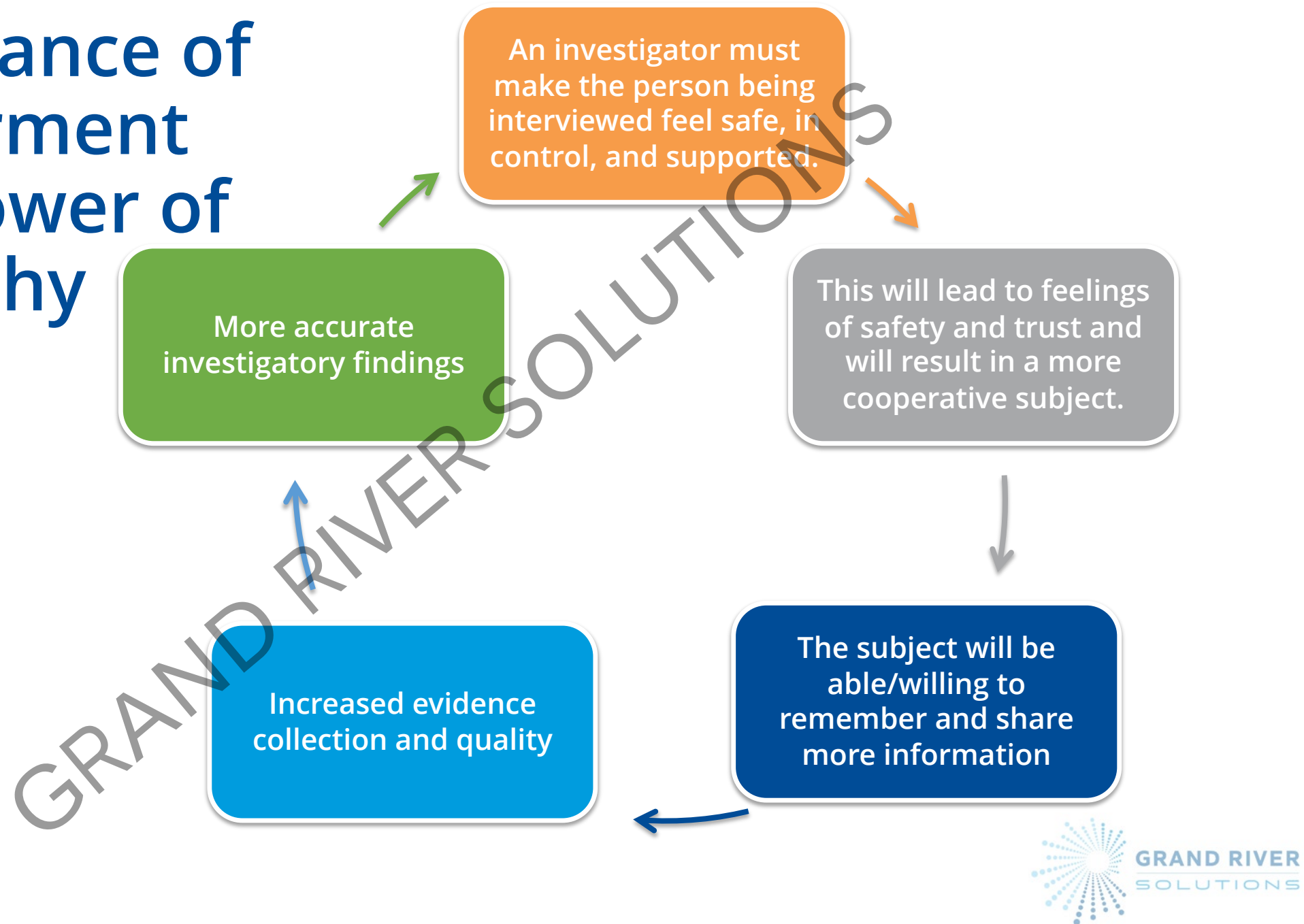
What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation

What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

The importance of empowerment and the power of empathy



Investigative Interviews





Evidence

06

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Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Types of Evidence

Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows

Non-Testimonial Evidence

Text Messages

Social Media
posts

Social Media
Communications

Emails

Surveillance

Videos

Photographs

Police Body
Camera
Footage

Swipe Records

Medical
Records

Phone Records

Audio
Recordings

A Thorough Investigation

Is more than evidence collection

A Thorough Investigation Permits the Decision Maker to Assess



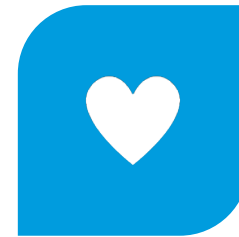
RELEVANCE



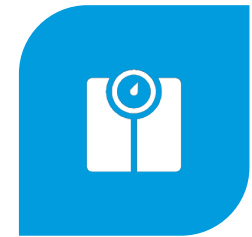
CREDIBILITY



RELIABILITY



AUTHENTICITY



WEIGHT

“Relevant” Evidence

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- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

Assessing Authenticity

Investigating the products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.

Assessing Credibility and Reliability

No formula exists, but consider the following:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- Your own bias and limited experience

Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

EVIDENCE



The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements



07

At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.



Relevancy Standard

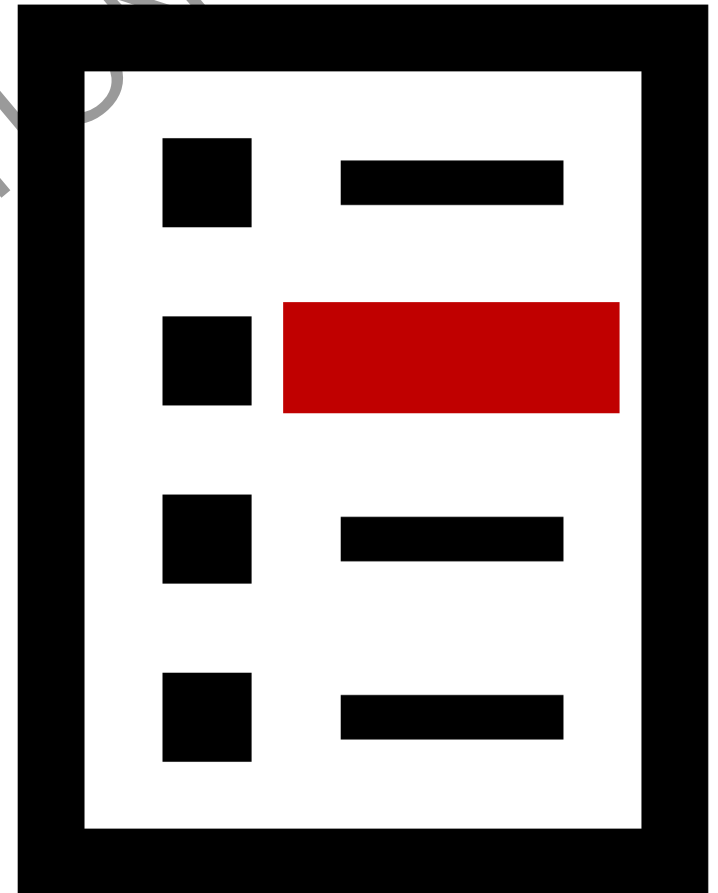
Relevant

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Per se Irrelevant

- Prior sexual history of complainant, with two exceptions
- Legally recognized and unwaived privilege.
- Records related to medical, psychiatric, psychological treatment

Redactions



Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



At least 10 days prior to the hearing



The Importance of a Quality Report

7a

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The Purpose of the Report

To allow for advance review

To allow for advance preparation

- By the decision maker
- By the parties

Reduce likelihood of bias in final outcome

Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

Other Recipients?

Friends of
the parties

Parents

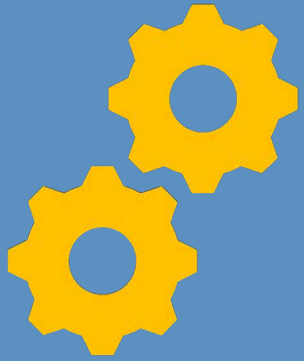
Law
enforcement

Attorneys

Judges

Media

Social Media



Essential Elements of a Quality Report

7b

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Essential Elements

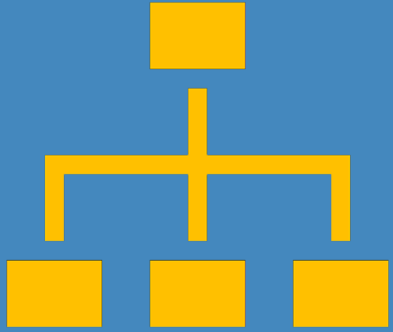
Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format



Structure of the Report

7c

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Report and Record



Summary of the
Evidence



Compilation of the
Evidence

The Record



Compilation of the evidence.



Organized intentionally and consistently.



Divided into appendices.



Is attached to the report.



Includes a procedural timeline.

Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.);

Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.);

Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint;

Appendix D: the procedural timeline.

Structure of the Report

- Overview of the Investigation
- Statement of Jurisdiction
- Identity of Investigators
- Objective of the Investigation and the Investigation Report
- Prohibited Conduct Alleged
- Witnesses
- Evidence Collected
- Summary of Evidence
- Conclusion





Report Structure Overview

In this section, provide a very brief overview of the case.

Include:

the names of the parties

the applicable policy(ies)

the prohibited conduct alleged

the date, time, and location of the conduct

a brief description of the alleged misconduct



Report Structure Statement of Jurisdiction

1. Cite Jurisdictional Elements
2. State all grounds for Jurisdiction

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Report Structure

Identify Investigators

1. Identify the investigators by name
2. State that they have been properly trained
3. List trainings, or cite documents in the record that detail investigators prior training



Report Structure

Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.



Report Structure

Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.
2. Include definitions of prohibited conduct from institution's policy/procedures.



Report Structure

List Witnesses

- List those witnesses that were interviewed
- List witnesses that were identified, but not interviewed
- Simple List
- Detailed List

Example of a Detailed List

Witness Name	Witness Identified By	Information Offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.



Report Structure

Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices



Report Structure

Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.



Report Structure Conclusion

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.

Questions?

For More Information:

info@grandriversolutions.com



@GrandRiverSols

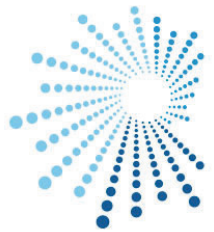


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Title IX in a Post Regulatory World

Day Two

Chantelle Cleary

Today's Agenda

01

Hearings in a Post Regulatory World

04

Conducting the Hearing

02

Roles and Responsibilities

05

Evidentiary Issues

03

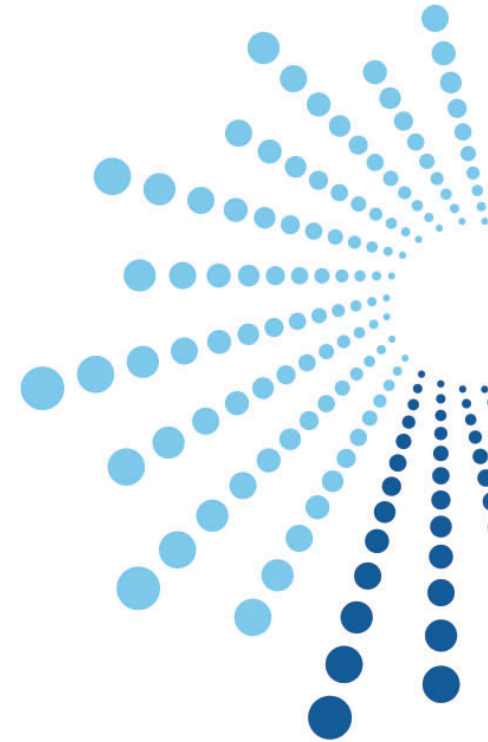
The Hearing

06

Post-Hearing

3A

Pre-Hearing Tasks





Hearings in a Post Regulatory World

Procedural Requirements, Practical Requirements, and so much more



01

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Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction

**What do we
need to do all
of this?**



Space



Technology



Clear & Comprehensive Procedures

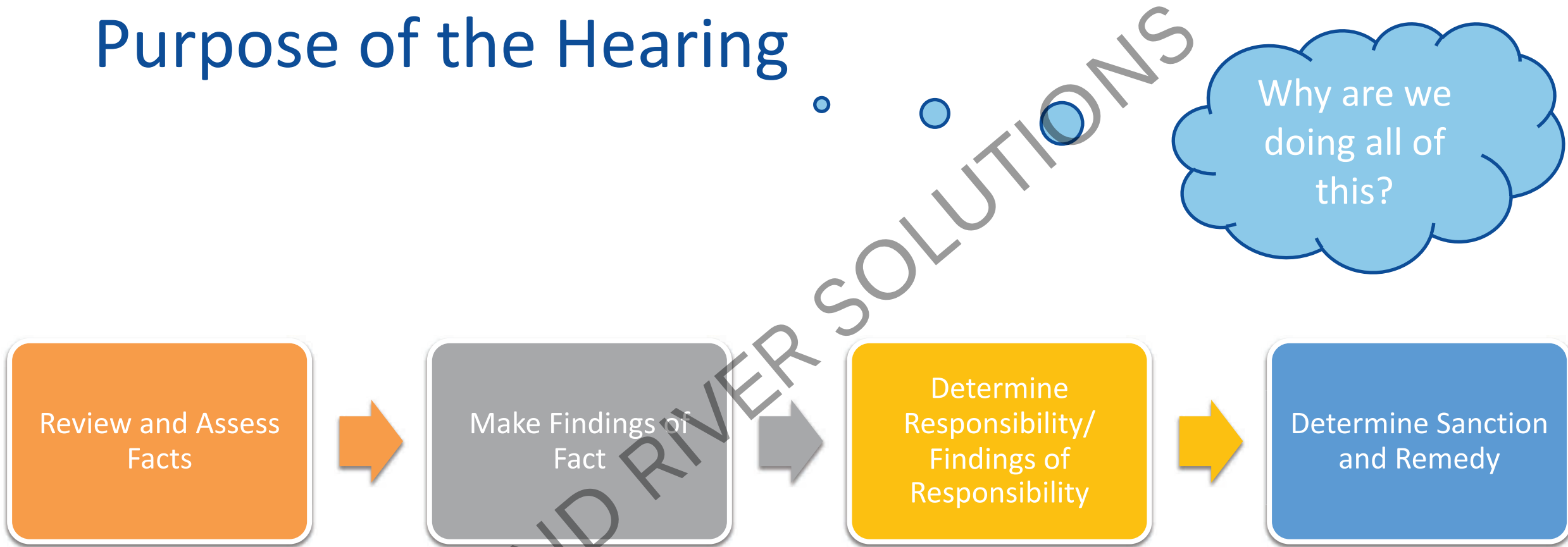


Staff



Expertise and Confidence

Purpose of the Hearing



The Essential Elements of All Hearings

Clear Procedures

Due/Fair Process

Fair, Equitable, and Neutral

Consistency

Trauma Informed

Well Trained Personnel



Clear Procedures

The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

The Players

- The roles of all participants

The Evidence

- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

The Outcome

- Deliberations; Notice; manner and method communicated.

Rules of Decorum

- Optional
- Must apply to all participants, equally and consistently
- Expectations should be clear
- Rules should be provided and explained in advance
- Consequences for violating rules should be explicit
- Violations should be addressed and enforced consistently and equally

Rules of Decorum: Examples

All participants at the live hearing are expected to treat each other and the decision-maker with respect.

Parties and advisors will refer to other parties, witnesses, advisors, and institutional staff using the name and gender used by the person and shall not intentionally mis-name or mis-gender another during when communicating or questioning.

Abusive behavior will not be tolerated and may be grounds for the participant to be removed from the hearing.

Parties and advisors may take no action at the hearing that a reasonable person in the shoes of the affected party would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

Rules of Decorum: Examples

Advisors may not speak on behalf of a party except as necessary to perform direct or cross-examinations.

Advisors may not interrupt the proceedings repeatedly to ask questions or interject; advisors may only participate consistent with the advisor expectations outlined in the procedures.

Rules of Decorum: Examples

If the decision-maker determines that these rules have been violated, they will provide the participant with one opportunity to correct their behavior. If the decision-maker determines that the participant continues to violate these rules, the decision-maker may either limit their participation moving forward or remove them from the hearing. For repeated violations and/or egregious behavior, an advisor may be prohibited from serving as an advisor in University processes.

Rules of Decorum: Examples

If an advisor is removed from the hearing, the affected party may either select a new advisor or the University will provide an advisor to the party for the remainder of the hearing. In this case, the hearing, or rest of the hearing may be postponed if necessary to allow for the selection or provision of a new advisor.

Any actions taken by the decision-maker regarding violation of these rules or removal of participants, will be documented as part of the record made available upon appeal.



Roles and Responsibilities

People, Functions, and Impartiality



02

Hearing Participants

Complainant

the person bringing the complaint

Respondent

the person against whom the complaint has been filed

Advisor

will conduct cross examination; role varies depending on school

Investigator

summarizes the investigation, answers questions

Witnesses

present in the room only when answering questions

Hearing Coordinator/Officer

coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants

Decision-Maker

makes decision as to whether policy was violated

Administrative Staff

assists with the logistical coordination of the people, the space, technology, etc.

Who is NOT
in the
Hearing?

General Counsel

Spectators

Student newspaper

Interested faculty

Title IX Coordinator

The Players

Hearing Advisors

- Will conduct examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Compliance with the role



The Players

The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Voting or non-voting
- Writes the decision
- Trained

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The Players

The Decision Maker

- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be Investigator, Title IX Coordinator, or Appeals Officer



The Players

A Panel?

- Number of panelists?
- Composition?
- Makes the finding
- Unanimous?
- Pool?
- Recruitment and retention



Impartiality

WHAT DOES THIS *REALLY* MEAN?



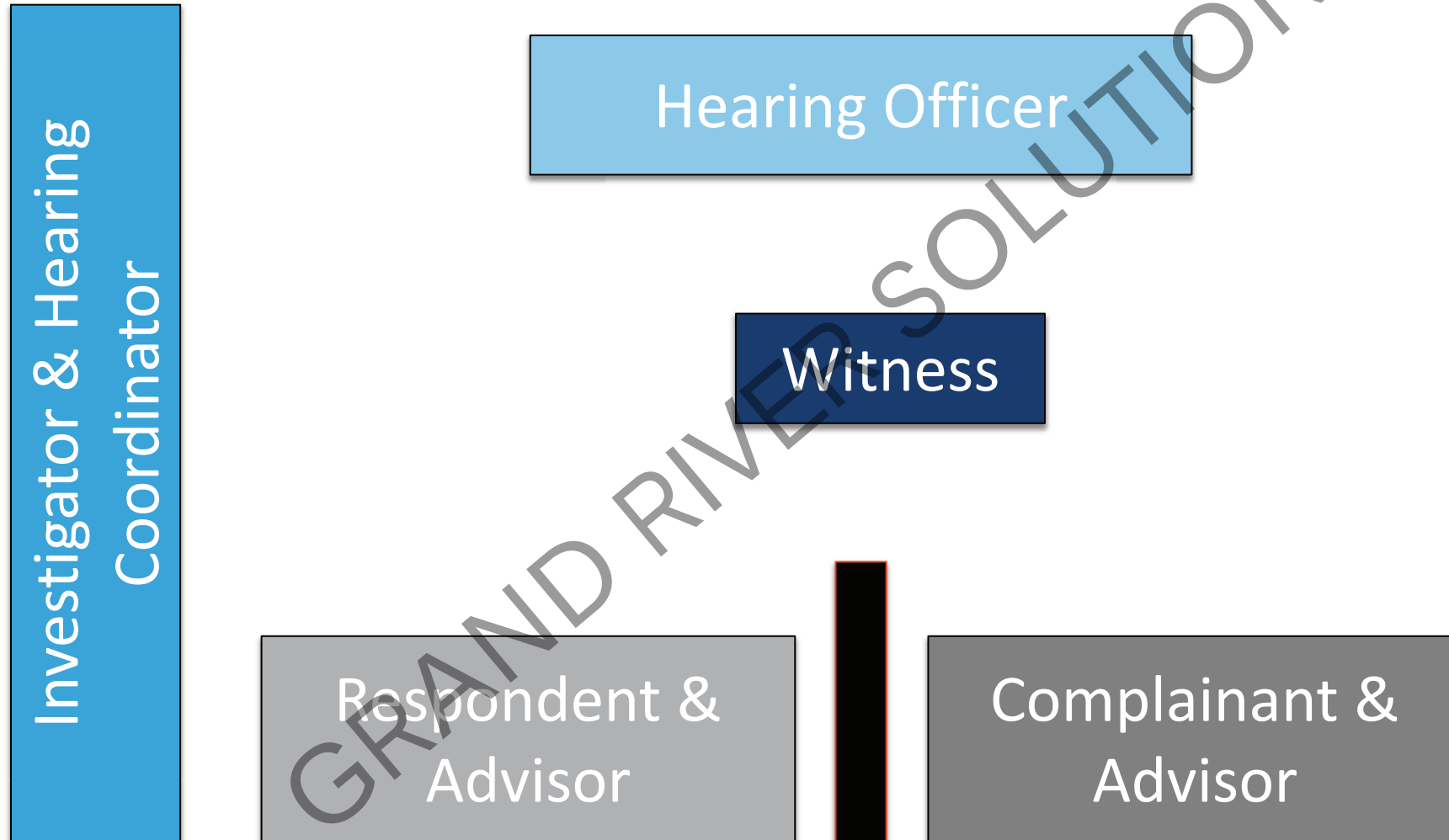
Logistics of a Hearing



Considerations for the Physical Space

- Room location and set-up
 - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors

Hearing Room Configuration



Remote Participation

- In whole or in part?
- Communication considerations
 - Chat function or emails
- Private consultation between parties and advisors
 - Use of breakout rooms
 - Communication considerations
- Practice runs
- Connectivity Considerations

Other Considerations

Time Limits

Breaks

Formality, Order
and Gate-Keeping

Handling
disruptions and
interruptions

Poor behavior?

Recording



The Hearing

03

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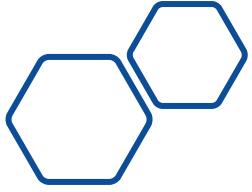




Pre-Hearing Tasks

What should be done in advance of the hearing

3A



Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments

The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

- Via conference or meeting
- In writing

Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules

The Decision Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues



Conducting the Hearing

04

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Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

This should be scripted and used consistently.



Opening Statements

Permitted, but not required

Policy should include purpose and scope

If permitted, consider...

- Requiring submission prior to hearing
- Word limit
- Time limit

Testimony

Procedures should be clear

Order of/parties and witnesses

- Could simply leave this up to the decision maker

Order of examination

- Questioning by the decision maker
- Cross examination by the advisor
- Will the advisor be permitted to question their own party?
- Will there be a second round of questioning?

Consistency is essential. Consider putting this all in your procedures.

Cross Examination

Who does it?

Must be
conducted by the
advisor.

If party does not
appear or does
not participate,
advisor can
appear and cross.

If party does not
have an advisor,
institution must
provide one.

Cross Examination

Permissible Questions

Questions must be relevant

Not relevant

- Duplicative questions
- Questions that attempt to elicit information about
 - Complainants prior sexual history
 - Privileged information
 - Mental health

Cross Examination

Role of the Decision Maker

Rulings by Decision Maker required

Explanation only required where question
not permitted

Cross Examination

Impact of Not Appearing

Exclusion of all statements of that party

Exception - DOE Blog

What if a party or witness appears, but does not answer all questions?

Closing Statements

Permitted, but not required

Policy should include purpose and scope

If permitted, consider

- Time limit
- Submission in writing after the hearing

Common Challenges

Non-appearance by a party or witness

Non-appearance by an advisor

Party or witness appears but declines to answer some (or all) questions

Disruptions

Maintaining decorum

Tips for Increasing Efficiency

01

Be prepared

02

Have an experienced chair

03

Have back up plans for technology issues

04

Require pre-hearing written submissions

- of opening statements
- of questions in advance



Evidentiary Issues

05

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Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible?

Is it convincing?

Is it reliable?

Can you trust it or really on it?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

Evaluating this evidence

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

EVIDENCE

Assessing Authenticity

Investigating the products of the investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.

Assessing Credibility and Reliability

No formula exists, but consider the following:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- Your own bias and limited experience

Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability

Credibility Versus Reliability

Reliable Evidence

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

Being Convinced

It Is True, or Biased Conclusion?

A credible witness may give
unreliable testimony





After the Hearing

06

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Deliberations

Weighing the Evidence & Making A Determination

- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply Standard of Proof



Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and Remedies
- Procedure for appeal



Appeals

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Appeals: Mandatory Grounds

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Appealing sanctions?

Other grounds for appeal?

YOUR DISCRETION

Questions?



Email Us

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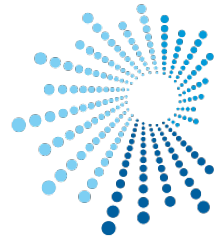


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GRAND RIVER | SOLUTIONS

Conducting Fair and Thorough Trauma- Informed Investigations

August 2022

Chantelle Cleary Botticelli, J.D.

About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

Meet Your Facilitators



Chantelle Cleary Botticelli, J.D.

She/Her/Hers

Director of Strategic Partnerships
and Client Relations

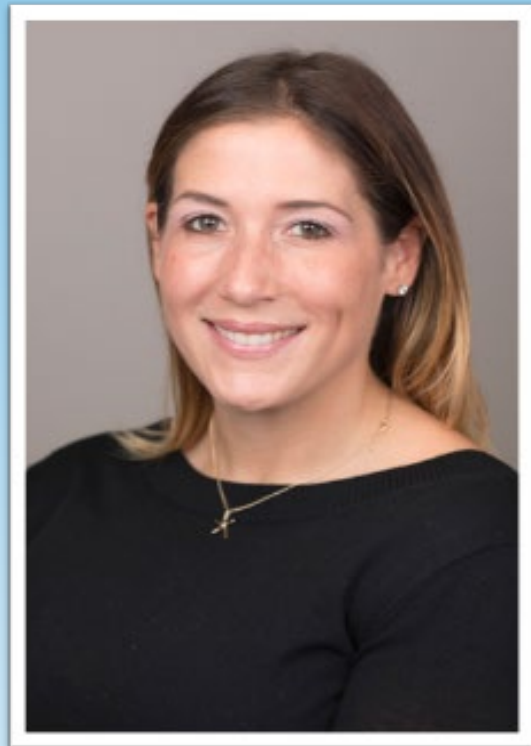


Pari Le Golchehreh

She/Her/Hers

Senior Solutions Specialist

Meet Your Facilitator



Chantelle Cleary Botticelli, J.D.

She/her/hers

Director of Strategic
Partnerships and Client Relations

Meet Your Facilitator

Chantelle Cleary Botticelli is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 15 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.



Day One Agenda

1

Title IX's Requirements

2

**The Proper Application of
Trauma Informed Practices**

3

**The Importance of Understanding
the Potential Impact of Trauma**

4

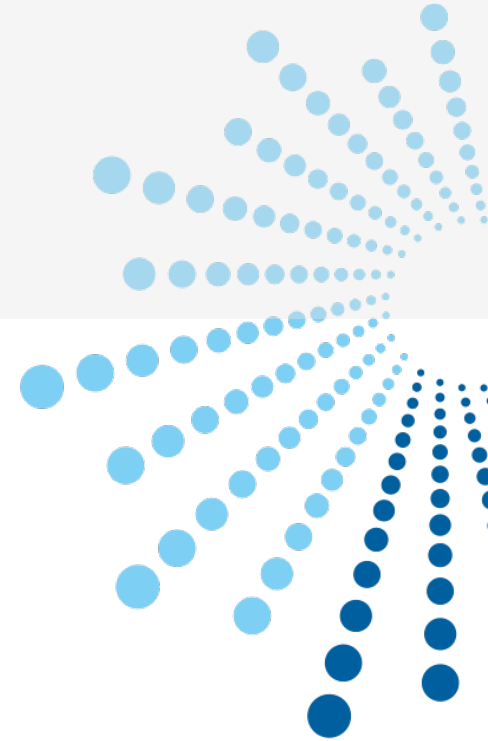
**Developing an Investigative
Strategy**

5

Investigative Interviews: Part 1

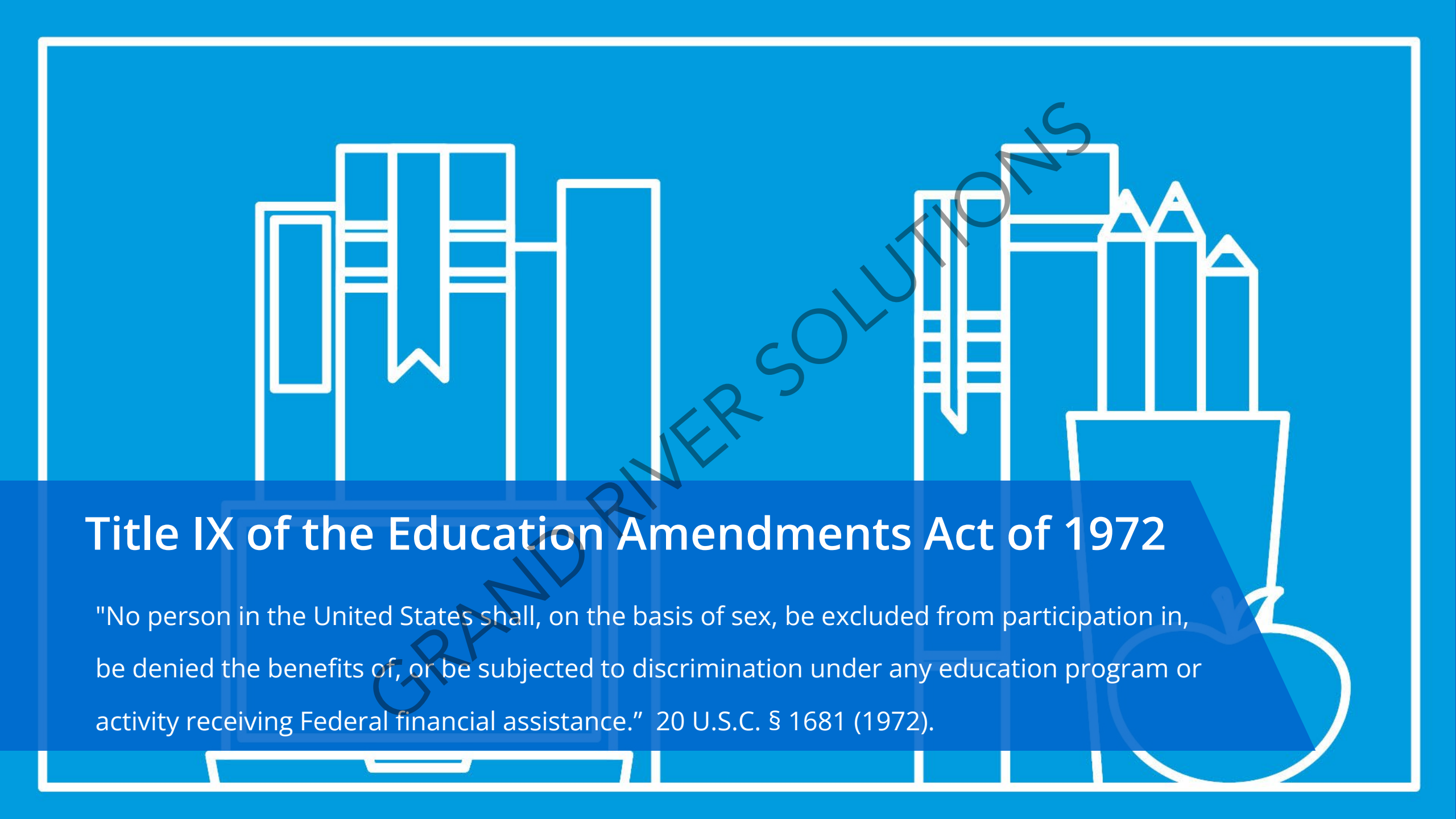


Title IX's Requirements



01

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Title IX of the Education Amendments Act of 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 education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1972).

The Title IX Regulations

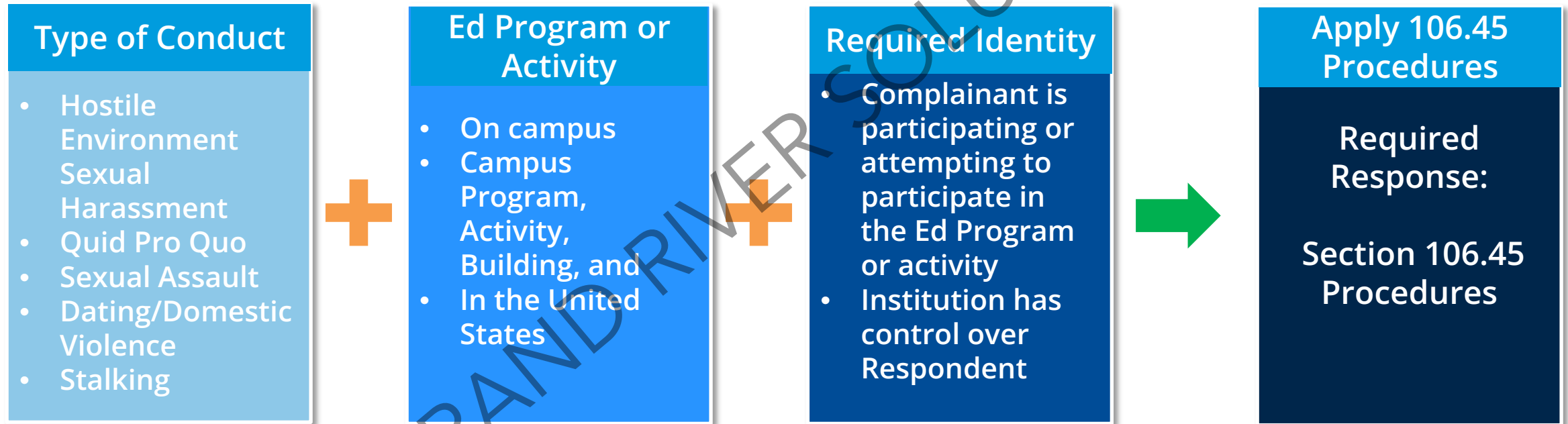
Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.



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Title IX Application Post May 2020 Regulations



Procedural Requirements for Investigations



Notice TO BOTH
PARTIES



Equal opportunity
to present evidence



An advisor of
choice



Written notification
of meetings, etc.,
and sufficient time
to prepare



Opportunity to
review all directly
related evidence,
and 10 days to
submit a written
response to the
evidence prior to
completion of the
report



Report
summarizing
relevant evidence
and 10 day review
of report prior to
hearing



Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

the identities of the parties involved in the incident, if known,

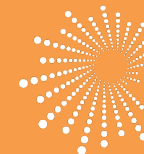
the conduct allegedly constituting sexual harassment under § 106.30,

and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



Advisor of Choice During the Investigation

The advisor can be anyone, including an attorney or a witness.

Institutions cannot place restrictions on who can serve.

Institutions can create rules and guidelines for participation in the investigation.

No specific training required.



Written Notification of Meetings and Sufficient Time to Prepare





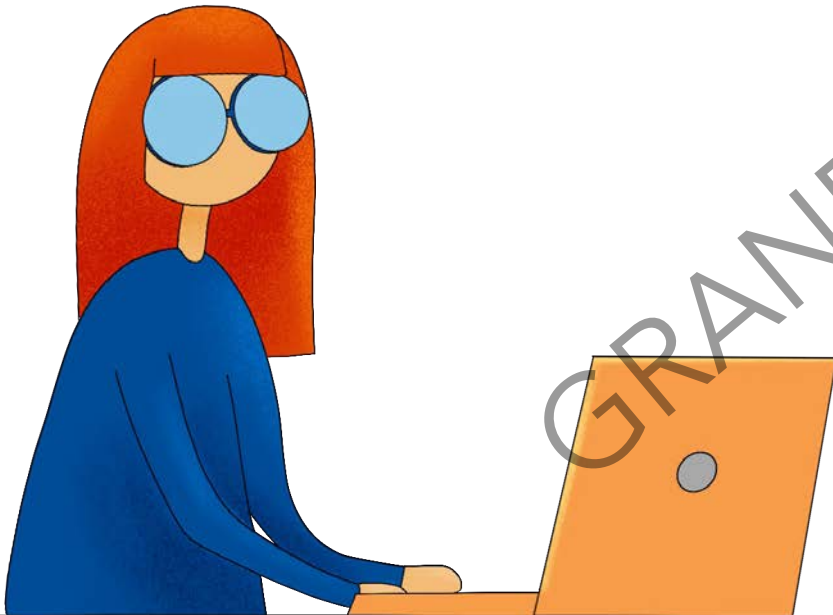
Equal Opportunity to Present Evidence

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Evidence Review

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

10 days to provide a written response.



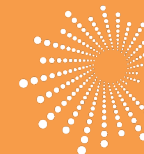
Investigative Report and Review



After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

That report will be shared with the parties and the parties will have another opportunity to respond in writing.

The hearing must occur at least 10 days after the release of the final report.





“Directly
Related” and
“Relevant
Evidence”

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Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

“Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence
401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance at this stage of the process.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.





The Investigator



Can be the Title IX Coordinator, although that is disfavored.



The Investigator may not be a decision maker.



Must be trained in accordance with the requirements in the regulations.



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.

The Requirement of Impartiality



Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

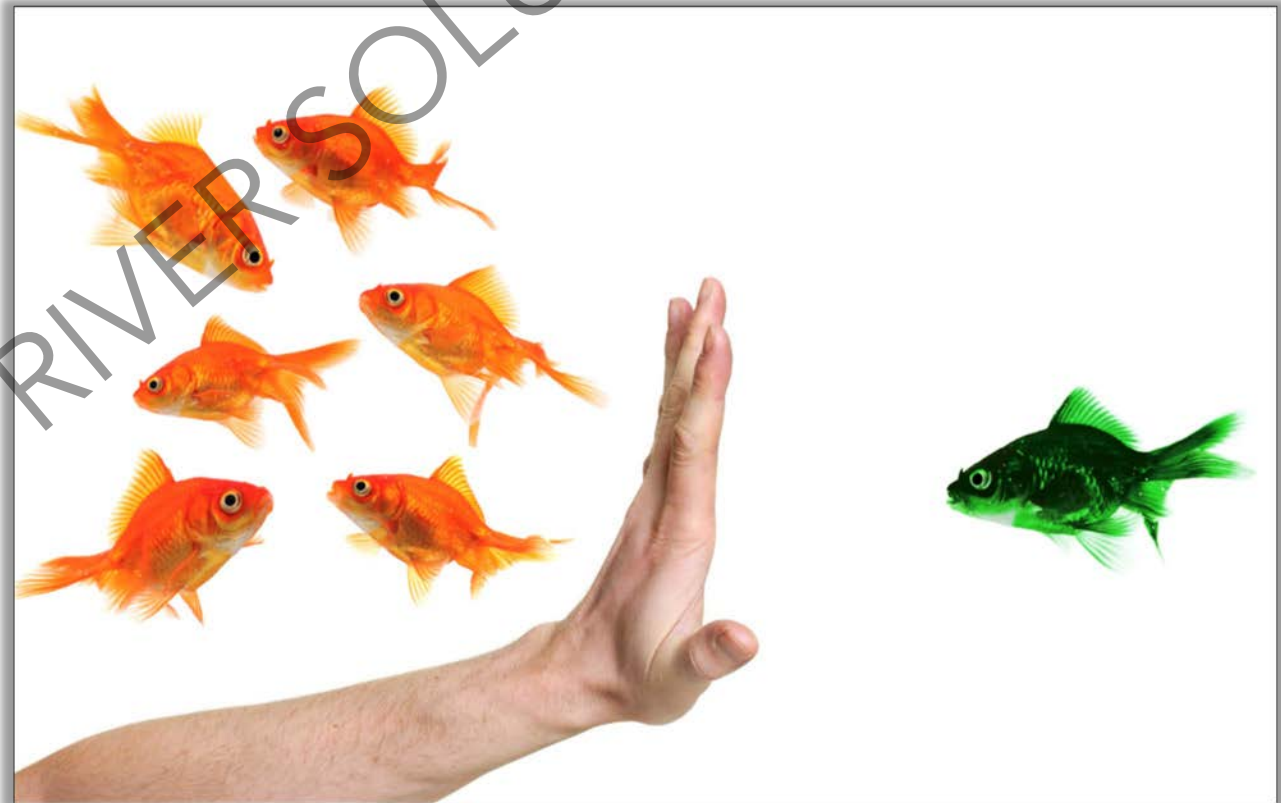
1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts



Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

A close-up photograph of a wooden Scrabble board. A row of tiles spells out the word 'CONFLICT' in capital letters. The tiles are light-colored wood with dark blue lettering. The letters and their point values are: C (3), O (1), N (1), F (4), L (1), I (1), C (3), and T (1). Several other tiles are scattered on the board, including S (1), A (1), G (2), C (3), E (1), R (1), and Z (10). A large, semi-transparent watermark reading 'GRAND RIVER SOLUTIONS' is diagonally across the image. At the bottom, there is a solid orange horizontal bar.

Conflict of Interest



Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

An Impartial Investigation is...

Not influenced by bias or conflict of interest.

Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve.

Truth seeking, not "your truth" confirming.

Trauma Informed Practices

In the preamble, the Department permits the use of trauma informed practices and recognizes that trauma informed practices can be used in an impartial and non-biased manner.

Trauma informed practices must be applied equally to all genders.



The Proper Application of Trauma Informed Practices

02

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Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Interview



Format of Questions



Approach to Clarification

Trauma Informed Practices are Designed to:

01

Encourage thorough and complete investigations

02

Assist with recollection

03

Assist with recounting

04

Reduce potential for false information

05

Minimize unnecessary re-traumatization

06

Reduce Bias

Misapplication of Trauma Informed Practices

It is a misapplication of trauma informed principles to allow potential evidence of trauma to:

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.



The Importance of Understanding the Potential Impact of Trauma

03

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Trauma

An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.

Examples of Events that Might Trigger a Traumatic Response

Sexual Assault

Physical Assault
by a Stranger

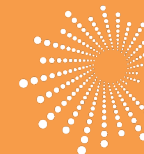
Physical Assault
by an Intimate
Partner

A Car Accident

Accident that
causes serious
injury or death

Robbery

Significant
medical event



When trauma occurs, there are very real changes in brain function that may affect a person's ability to make memory and to recount their experience.

Common Characteristics of Disclosures by a Trauma Brain

Inconsistent

Non-linear

Fragmented

Lack of detail

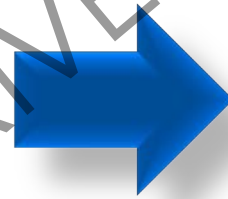
New information

Affect is unexpected

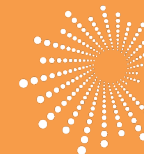
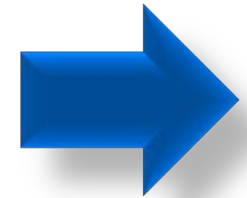


Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.

Inconsistencies
Lack of Detail
Non-Linear
Fragmented
New Information

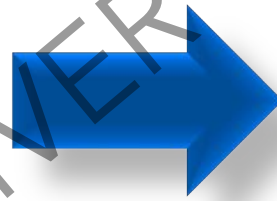


Not Credible

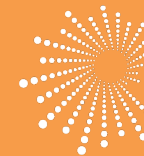


The Historical Conclusion...

False Report
Regretted Sex
Not Provable



Investigation
CLOSED



When an investigator uses “trauma informed” tools, they are less likely to:



CONCLUDE, WITHOUT A THOROUGH INVESTIGATION, THAT THE REPORTING INDIVIDUAL IS NOT CREDIBLE



ASK QUESTIONS OR MAKE DECISIONS FOUNDED IN BIAS



CAUSE ADDITIONAL HARM



JEOPARDIZE FUTURE REPORTING



The Future

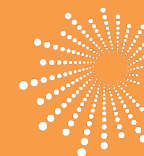
An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.

When presented with the following characteristics in a disclosure,

Inconsistencies
Lack of Detail
Non-Linear
Fragmented
New Information

An investigator who understands trauma will....





**Continue their
investigation.**



Developing an Investigative Strategy

04

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Essential Steps of an Investigation



Review Notice of Allegations and Formal Complaint



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow Up Interviews



Report Writing

Understand the Scope of the Investigation



Review the Notice of Allegations
and the Formal Complaint



Ask questions if unsure

Identify the Claims and What Needs to be Proven

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?

Rape. The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?
 1. What is the ground for lack of consent
 1. Did respondent fail to seek and obtain Complainant's affirmative consent?
 2. Did Respondent force Complainant?
 3. Did Respondent coerce Complainant?
 4. Was Complainant incapacitated and therefore incapable of consent?

Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person's safety or the safety of others; or
Suffer substantial emotional distress.

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
 1. Fear for their safety or the safety of others, or
 2. Suffer substantial emotional distress

The Process

Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties?
- Of the Parties?

Incident

- Consent?
- Type of Contact?
- Injuries?

Pre-Incident

- Communications?
- Interactions?
- Conduct?

Post Incident

- Behaviors?
- Communications?



The Importance of Organization

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05

Investigative Interviews

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Interview Objectives



Connect

Build rapport
Build trust
Empower



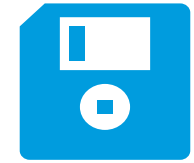
Listen

Allow interviewee to
share their experience



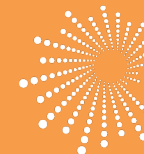
Clarify

Understand what you
have heard
Seek additional
information



Evidence Preservation

Text Messages
Photographs
Names and contact info
for witnesses



Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



If interviewing a party, inform them of their right to have an advisor present.



Prepare for the meeting

Areas of focus?

Other evidence?

Go back review what you have



Provide Written Notice of the Meeting

Advise the parties/witnesses that you will be collecting evidence

Set Expectations

What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you
- Prepare the parties for follow up interviews and the "shift"

What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

How do we...



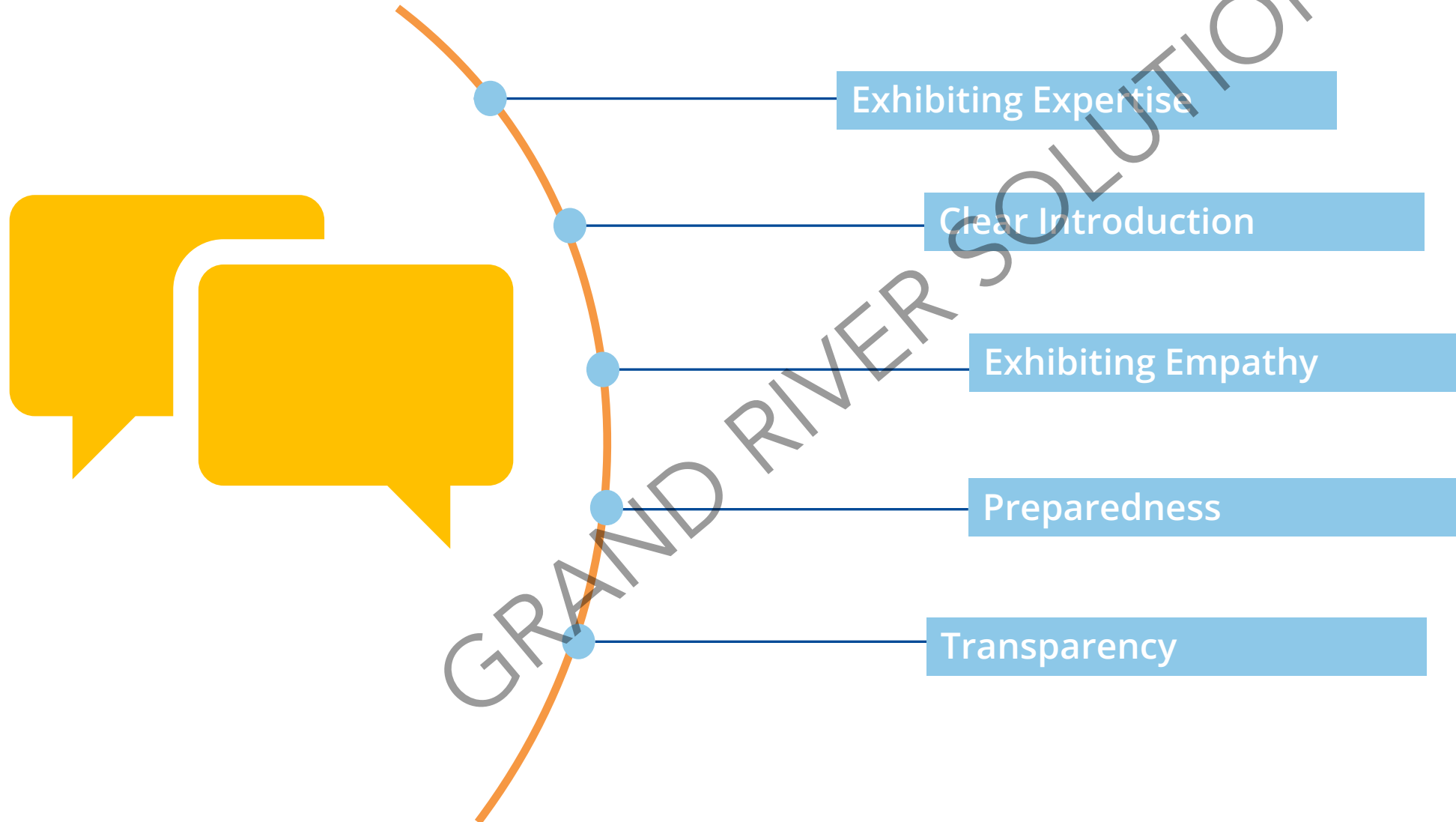
Build Rapport
and Trust?



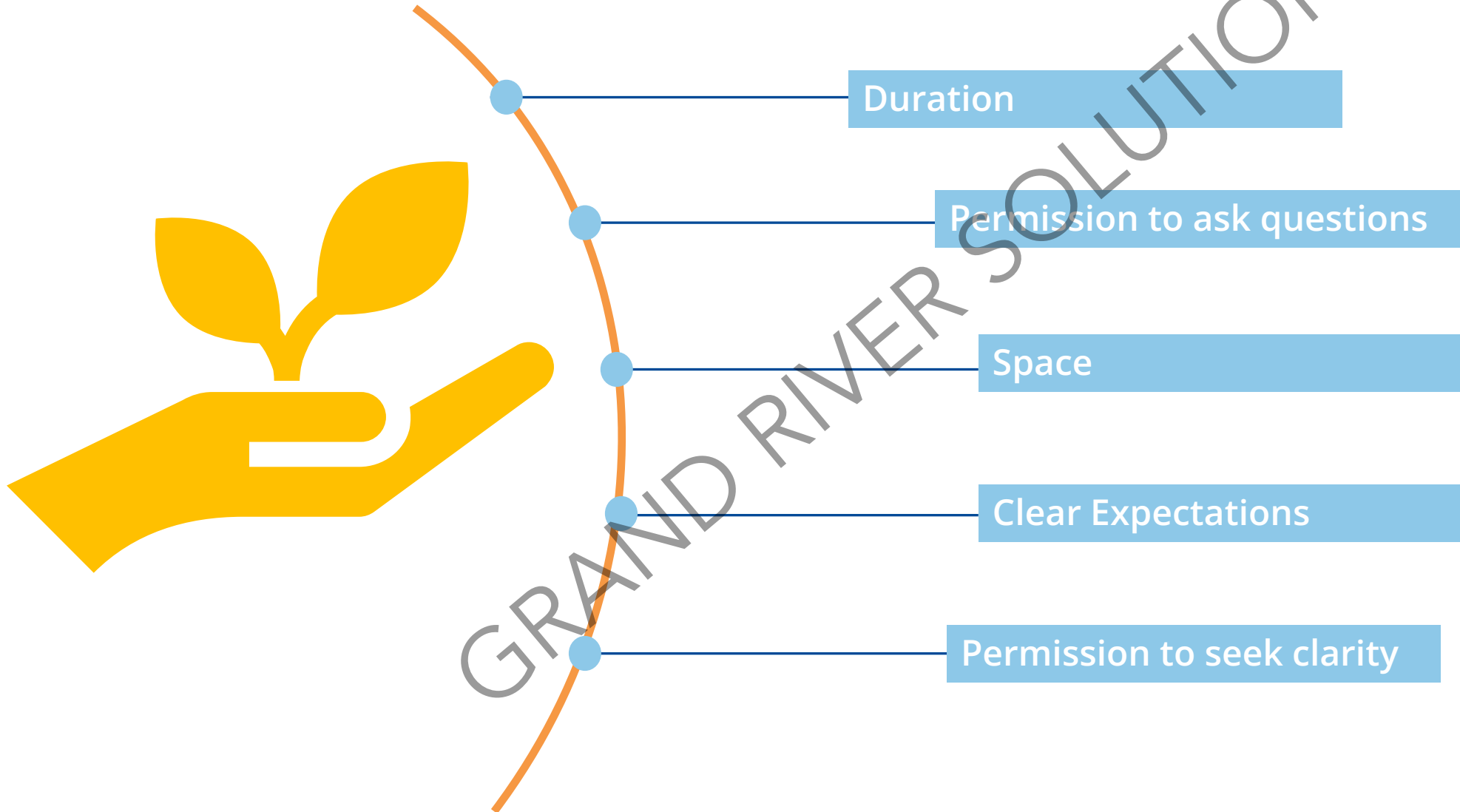
Empower?



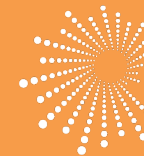
Rapport and Trust



Empowerment



Investigative Interviews



Start the interview by eliciting a narrative...

Help me understand your experience?

Start where you are comfortable and share what you are able to remember.

What are you able to tell me about your experience?

Allow the person to speak uninterrupted. This takes patience.



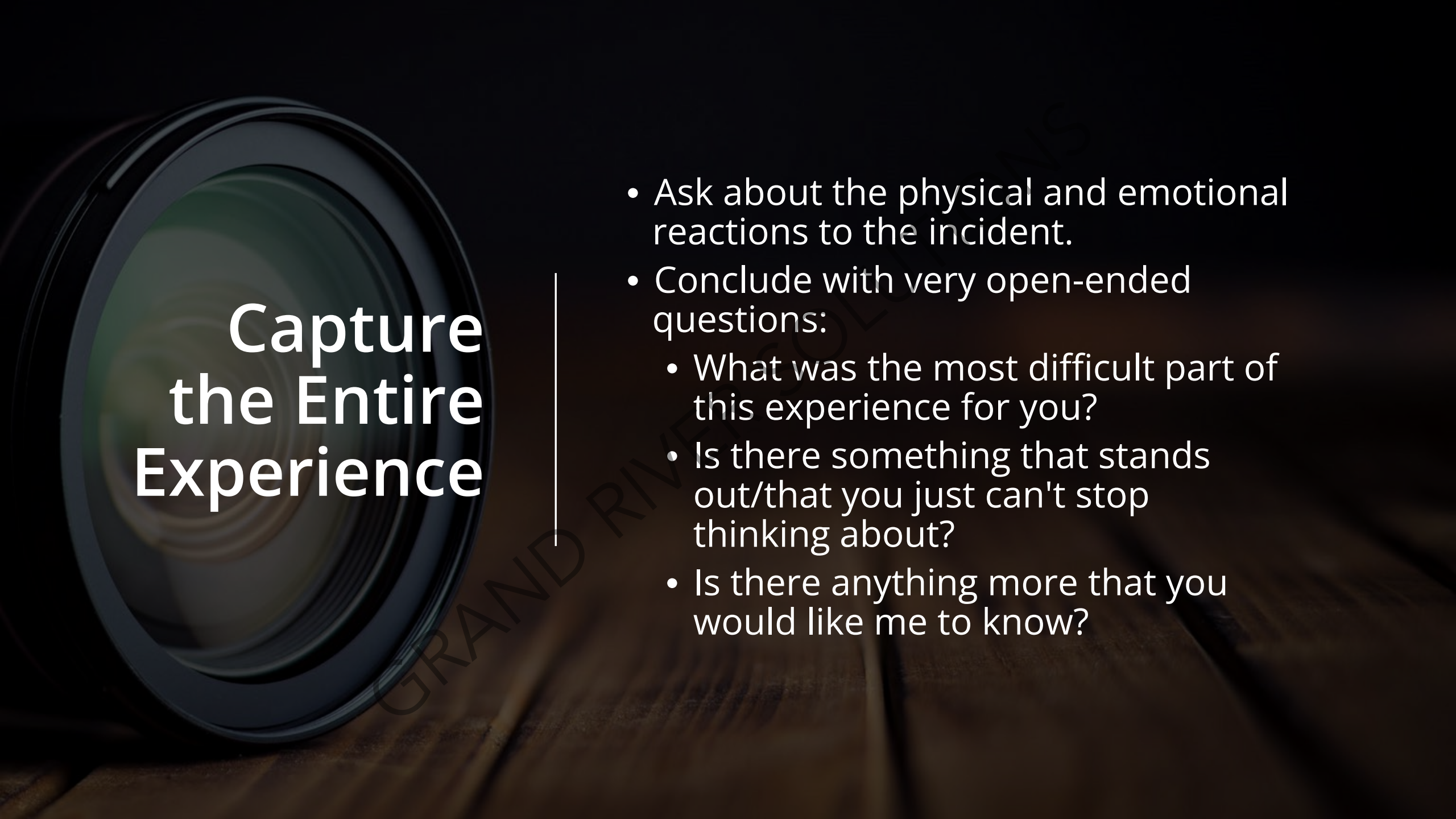
Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

Do Ask:

- Interview for clarification
- Help me understand?
- Can you tell me more about...?
- Is there anything else you can share about...?

Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions

A close-up photograph of a camera lens resting on a dark wooden surface. The lens is the primary focus on the left side of the frame, with its glass element and surrounding metal housing visible. The background is a blurred wooden texture.

Capture the Entire Experience

- Ask about the physical and emotional reactions to the incident.
- Conclude with very open-ended questions:
 - What was the most difficult part of this experience for you?
 - Is there something that stands out/that you just can't stop thinking about?
 - Is there anything more that you would like me to know?

The Before

At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.

And The After

It is also important to explore the events following the incident. Oftentimes, the best evidence is produced after the incident.

- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction
 - "Has anyone expressed concern about you since the assault?"
- Communication/contact between the complainant and respondent

Meet Your Facilitator



Pari Le Golchehreh

She/her/hers

Senior Solutions Specialist

Meet Your Facilitator

Pari Le Golchehreh is a Senior Solutions Specialist at Grand River Solutions and has extensive experience in Title IX and Equity work on college campuses. Prior to joining Grand River, Pari served as the Equity and Title IX Office's Lead Investigator at California Institute of Technology where she developed a deep expertise in leading investigations, trained campus community members, and facilitated mediated conversations and remedy-based resolutions. Pari is a certified mediator, and is skilled in aiding parties to resolve disputes in a trauma informed and collaborative manner.



Day Two Agenda

1

**Investigative Interviews
(continued)**

2

**Evidence Collection and
Assessment**

3

**The Investigative Report and
Record**



Quick Review!

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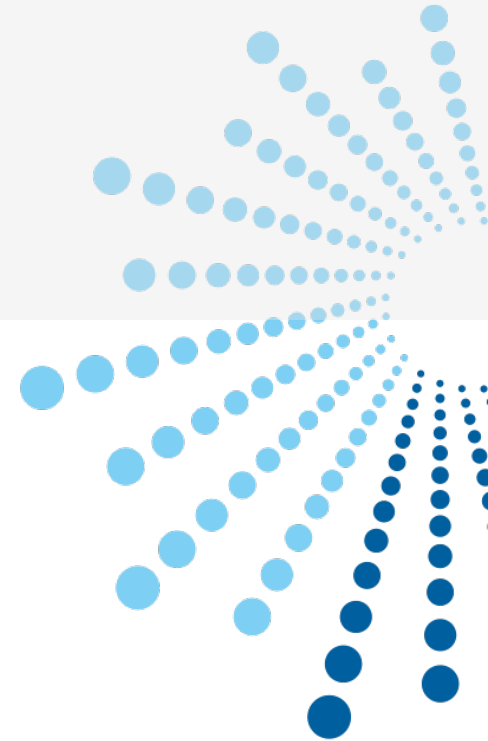




Investigative Interviews: Continued

01

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Throughout the Interview



Explain your questions, especially the difficult ones.

How much did you drink? What they hear: this is your fault because you were drinking.



Do not ask leading questions.



Watch your tone.



Do not rush.



LISTEN!!!!!!!!!!



Pay attention to and document information that might lead to additional evidence.



Document questions asked. Especially when a response is not provided.

At the Conclusion of the Interview



Discuss submission of evidence.



Explain statement review process.



Explain next steps in the process.



Keep the lines of communication open.



Review available support, privacy requirements, and prohibition against retaliation.

After the Interview: Actions



Memorialize the Interview in writing.

Notes

Summary

Transcript



Provide opportunity for the party or witness to review it.



Provide opportunity for party or witness to provide a response.



Incorporate the response.

A Note About Witness Summaries



The reader of any report should not know of the investigator's presence in the report; for example, report should not say "I then asked ..."



Use interviewee's words and put the words in quotes if it is their words



Avoid conclusory words, or words that suggest that the investigator has an opinion about the information offered

After the Interview: Reflection



Reflect.



Is there something you missed or forgot to ask?



Do you need clarity on any of the information shared?



Has this interview revealed additional evidence that you want to explore or collect?



Has evidence of additional policy violations been shared?

Follow Up Interviews



Seek clarification

Explore inconsistencies

Explore contradictory evidence

Explore difficult issues

Opportunity to respond

Follow Up Interview Approach

1

Explain the purpose of the follow up.

2

Set the stage for the topics you will be covering.

3

Prepare the interviewee for "the shift."

4

Do not avoid asking the hard questions.

The “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions.

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

What Questions Do You Have for Quinn?



Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn't want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.



What Questions Do You Have for Barri?

//

When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don't remember anything. And then I woke up in Marc's bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn't hearing it. He looked guilty and I could tell he felt bad

//

What Questions Do You Have for Colin?



Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.

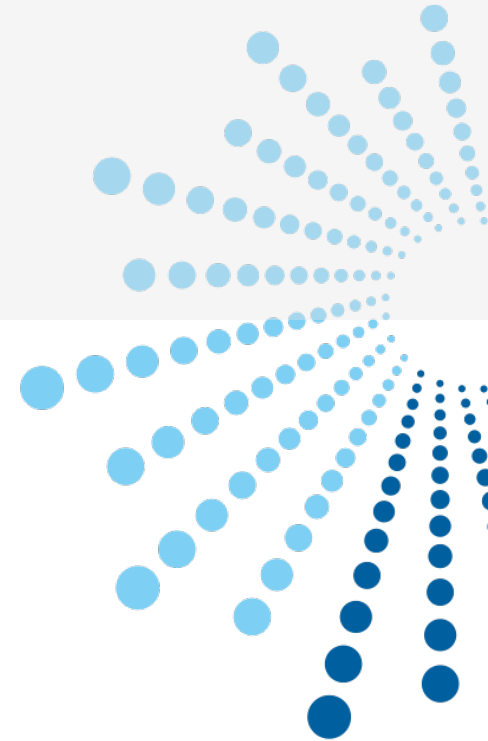




Evidence Collection and Assessment

02

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Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary

Types of Evidence

Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows

Evidence

Testimony

Text Messages

Social Media
Posts and
messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera
Footage

Swipe Records

Medical
Records

Phone Records

Audio
Recordings

Evidence Collection



Identify the items of evidence that you would like to obtain.



Develop an intentional strategy for obtaining that evidence.



Overcome barriers to evidence collection.



Considerations about collecting certain types of evidence.

A Thorough Investigation

is more than evidence collection

Evaluating the Evidence

Is it relevant?

Is the evidence important, or of consequence, to the fact-finding process?



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief and can the decision maker rely on it?



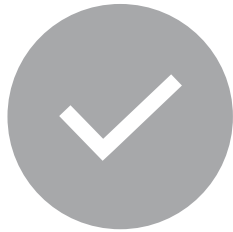
What weight, if any, should it be given?

How important is the evidence to the fact-finding process?

A Thorough Investigation Permits the Decision Maker to Assess



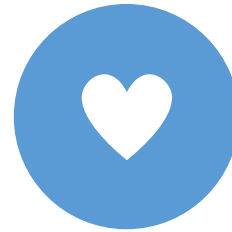
Relevance



Credibility



Reliability



Authenticity



Weight

“Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

Assessing Relevance

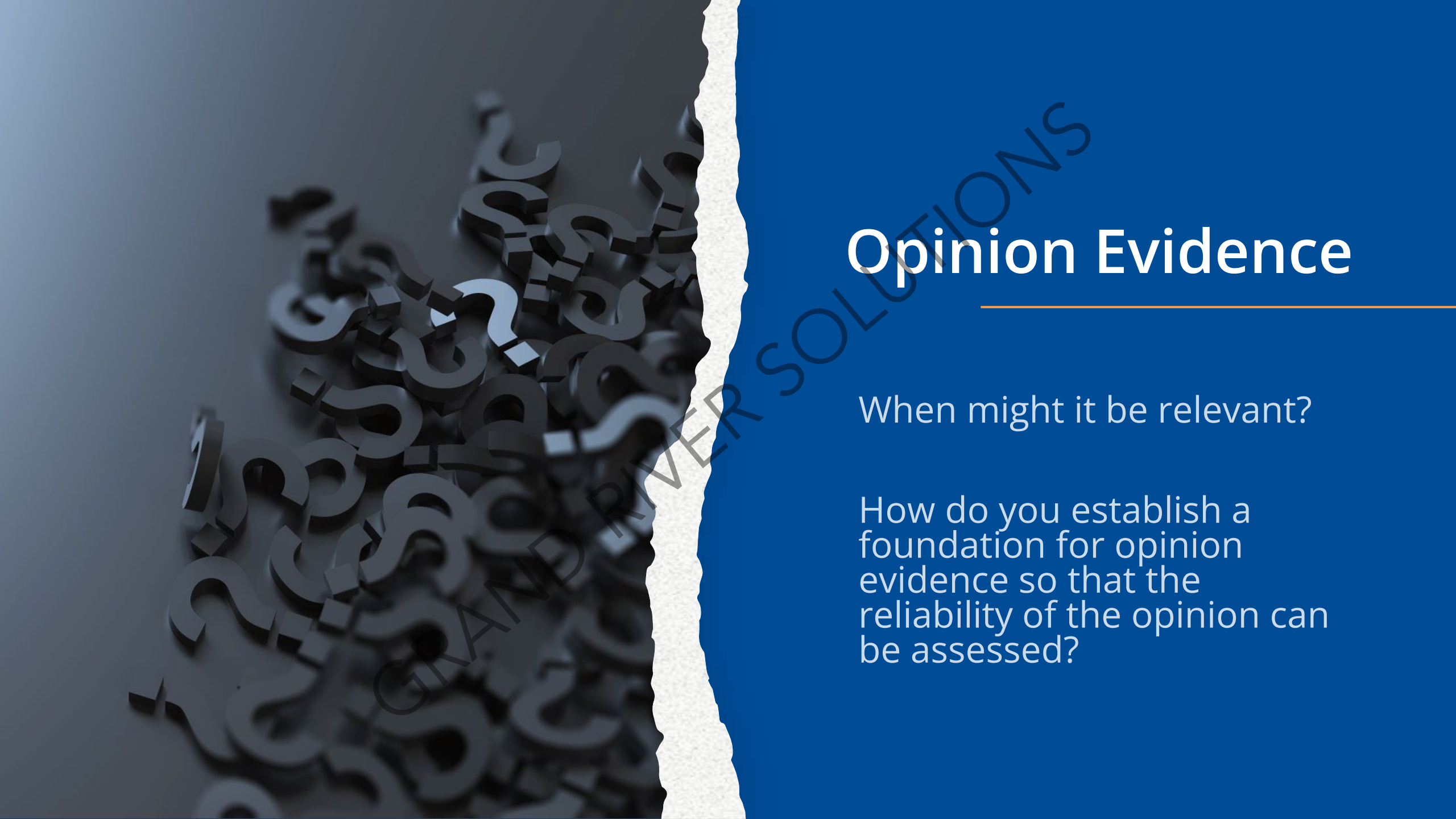
Why Does it Matter?

Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.

Character Evidence

Polygraph evidence

Opinion Evidence



Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Opinion Evidence: Try it!

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

"I got to the party pretty late, and Taylor was already lit."

"Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex"



Assessing Authenticity

Investigating the products of the Investigation



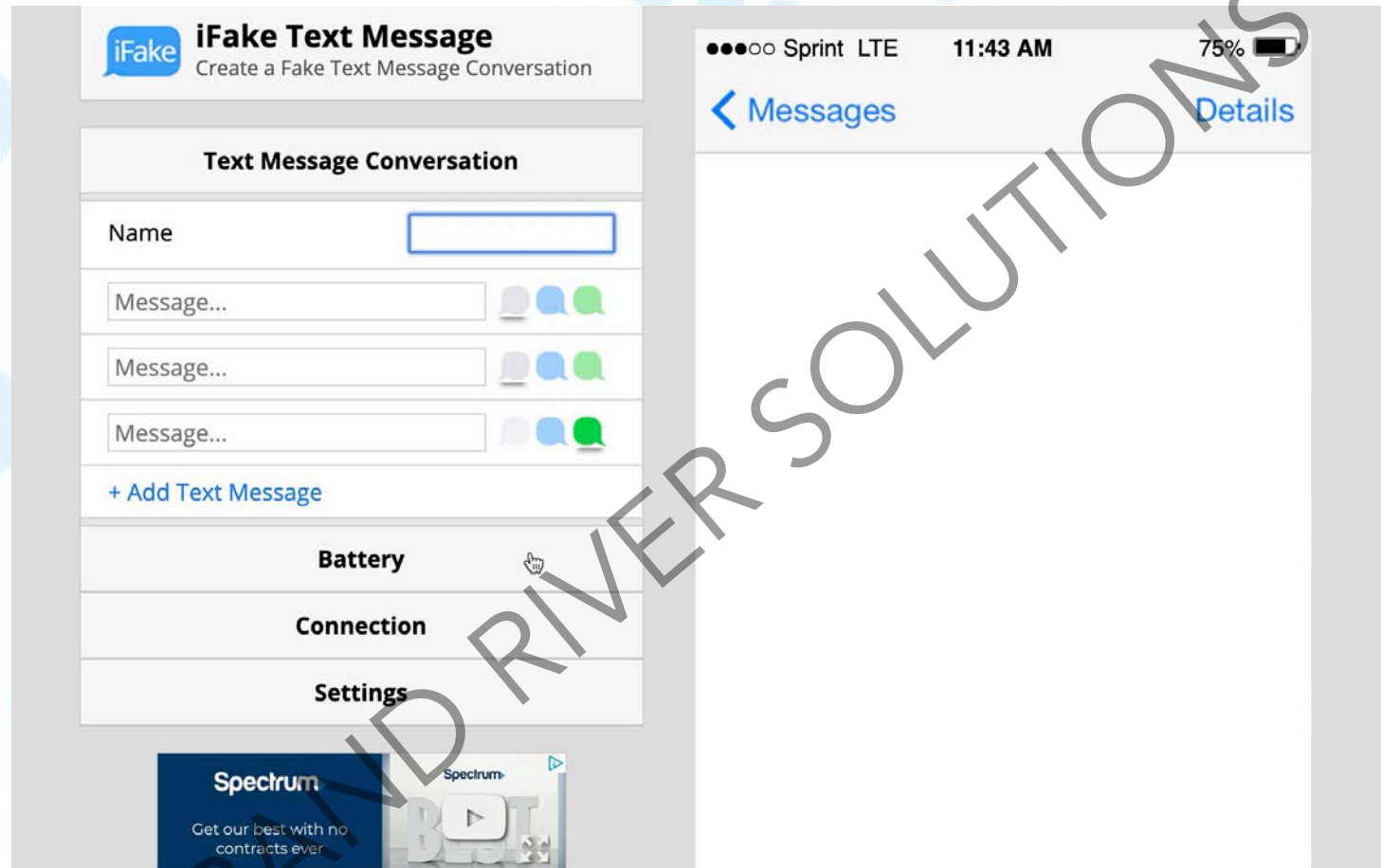
Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.



Is it authentic?



QUESTION THE
PERSON WHO
OFFERED THE
EVIDENCE



HAVE OTHERS
REVIEW AND
COMMENT ON
AUTHENTICITY



REQUEST
ORIGINALS



OBTAIN
ORIGINALS FROM
THE SOURCE



ARE THERE OTHER
RECORDS THAT
WOULD
CORROBORATE?

Assessing Credibility and Reliability

No formula exists, but consider the following:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Character, background, experience, and training

Coaching

Bias

Barriers to Evidence Collection

Non-Participating Parties

Uncooperative Witnesses

Uncooperative Advisors

Identity of party or witness unknown

Refusal to share materials

Materials lost or no longer accessible

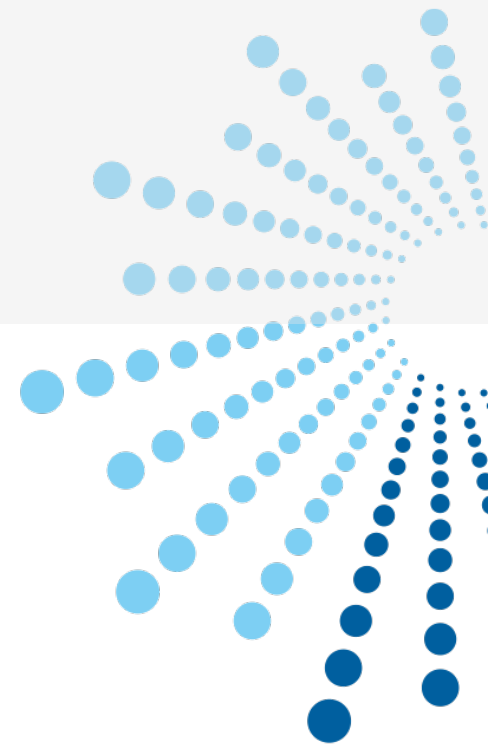
Difficult topics



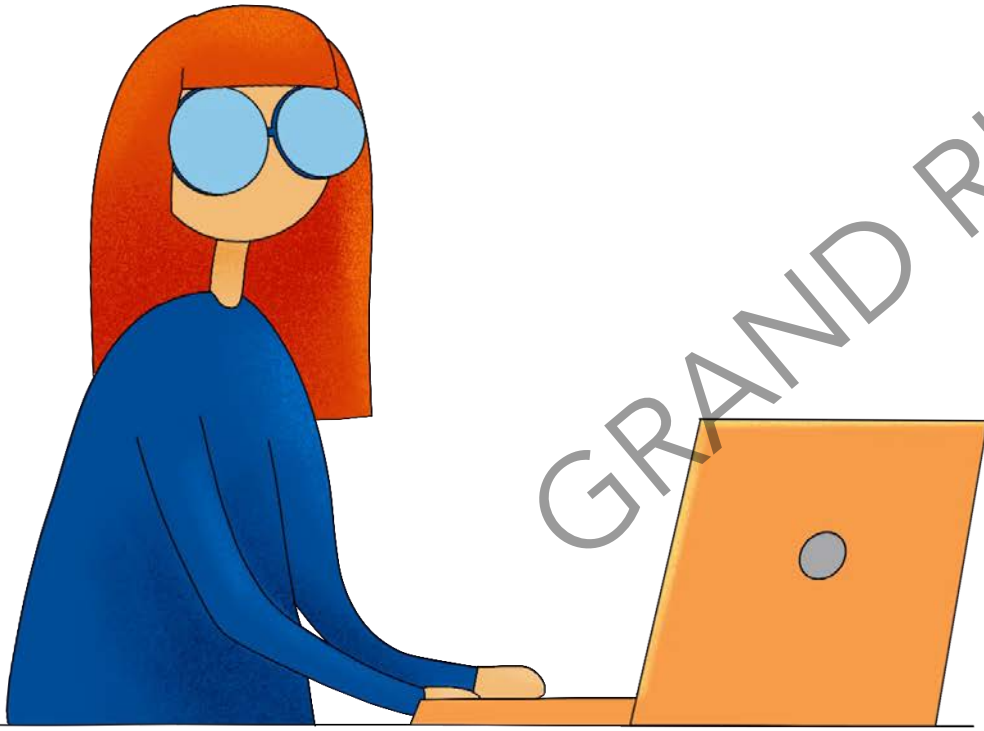
The Investigative Report and Record

03

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At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.



Relevancy Standard

Relevant Evidence

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions
- Legally recognized and un-waived privilege.
- Records related to medical, psychiatric, psychological treatment

Who Decides?

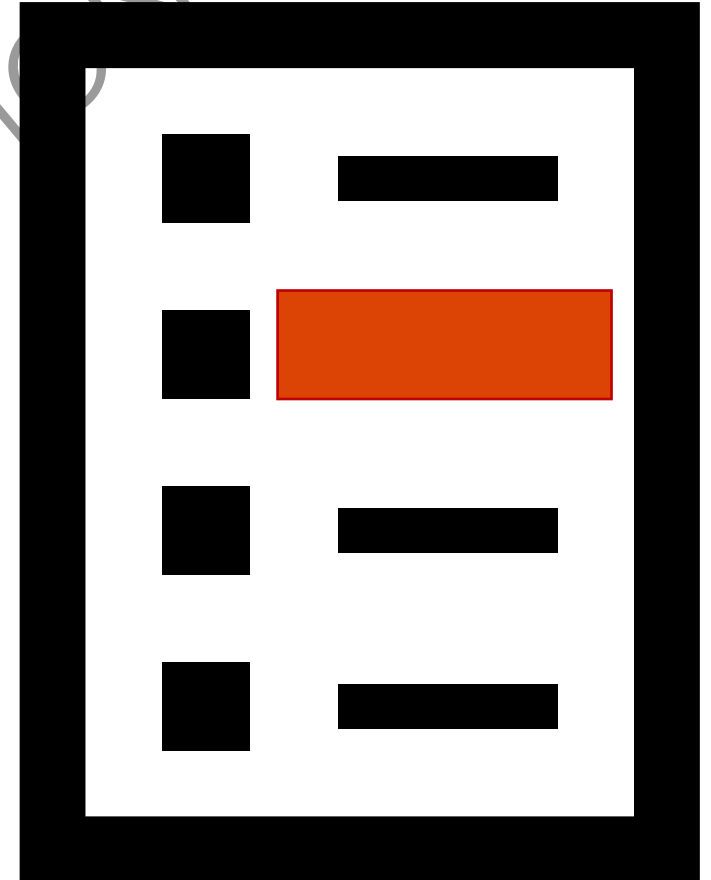
Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage

Redactions



Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



At least 10 days prior to the hearing

The Purpose of the Report

To allow for advance Review

To allow for advance Preparation

- By the Decision Maker
- By the Parties

Reduce likelihood of bias in final outcome

Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

Other Recipients?

Friends of
the parties

Parents

Law
enforcement

Attorneys

Judges

Media

Social media

Essential Elements

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format

Report and Evidence File



Summary of the
Evidence



Compilation of the
Evidence

The Evidence File



Compilation of the evidence



organized intentionally and consistently



Divided into Appendices



Is attached to the report



Includes a procedural timeline

Examples of Appendices



Appendix A

Contains all of the party/witness testimony (e.g., transcripts, statements summaries, etc.) that the investigator deems relevant



Appendix B

Contains all of the documentary evidence (e.g., text messages, SANE reports, photographs, etc.) that the investigator deems relevant



Appendix C

Contains the remaining evidence deemed irrelevant by the investigator, but that is directly related to the allegations in the formal complaint



Appendix D

The procedural timeline



Structure of the Report



Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

Conclusion



Report Structure

Overview

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct



Report Structure

Statement of Jurisdiction

1. Cite Jurisdictional Elements

2. State all grounds for Jurisdiction



Report Structure

Identify Investigators

1. Identify the investigators by name

2. Investigator's training belongs in file, not in report



Report Structure

Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.



Report Structure

Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.

2. Include definitions of prohibited conduct from institution's policy/procedures.

Report Structure

List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List

Example of a Detailed List

Witness Name	Witness identified by:	Information offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.



Report Structure

Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices

Report Structure

Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.



Report Structure

Conclusion

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.

Thank you!

Email Us

info@grandriversolutions.com

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Send Feedback



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