

Sexual and Interpersonal
Misconduct
Investigator Training
Supplement

Presented By:

Kristan Tucker, Tucker Consulting Group

September 14 – 15, 2020

Use of Slides

- **This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.**
- **These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.**
- **All rights are reserved to Tucker Consulting Group.**

What is your role?

- **Take initial reports?**
- **Support/advocacy/intake functions are separate from investigative/adjudicative functions?**
- **Adaptable Resolution Officer?**
- **Investigator?**
- **Hearing Panel Member/Decision Maker?**
- **Appeals Officer?**

Whatever your role...

- **You must avoid conflicts of interest**
- **You must avoid bias**
- **You may not make a prejudgment of the facts at issue**
- **You need to have a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.**

Understanding Title IX Sexual Harassment

- An Employee conditions the provision of an aid, a benefit, or a service on another Employee's or a Student's participation in unwelcome sexual conduct (i.e., Quid Pro Quo sexual harassment); or
- A Student, Employee, or Third Party (to the extent applicable) engages in unwelcome conduct on the basis of sex that would be determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies another person equal access to the University's programs or activities; or
- A Student, Employee, or Third Party engages in Sexual Assault, Domestic Violence, Dating Violence, or Sexual and/or Gender-based Stalking as defined below; and
 - The alleged conduct was perpetrated against a person in the United States; and
 - The conduct took place within the University's programs and activities. Conduct takes place within the "University's programs and activities" when that conduct occurs:
 - in a location, at an event, or in a circumstance where the University exercises substantial control over both the respondent and the context in which the conduct occurs; or
 - in any building owned or controlled by a student organization recognized by the University. Events that occur off campus or in locations with no connection to the University are unlikely to be considered a University program or activity.

Scope of ETBU's educational programs or activities

Conduct takes place within the “University’s programs and activities” when that conduct occurs:

- in a location, at an event, or in a circumstance where the University exercises substantial control over both the respondent and the context in which the conduct occurs; or
 - in any building owned or controlled by a student organization recognized by the University. Events that occur off campus or in locations with no connection to the University are unlikely to be considered a University program or activity.
-
- On campus – residence halls, other buildings owned by ETBU?
 - Traveling for a school event such as sports
 - Examples?

Conduct Covered Under ETBU's *Sexual and Interpersonal Misconduct Policy*

- **Title IX Sexual Harassment**

(Verbal, Physical, Electronic)

- Title IX Quid Pro Quo Sexual Harassment
- Title IX Severe, Pervasive and Objectively Offensive Sexual Harassment
- Title IX Sexual Assault
- Title IX Domestic Violence
- Title IX Dating Violence
- Title IX Stalking

- **Non-Title IX Misconduct**

- Non-Title IX Sexual Assault
- Non-Consensual Sexual Contact
- Sexual and Gender-Based Harassment
- Sexual Exploitation
- Domestic Violence
- Dating Violence
- Stalking
- Retaliation
- Complicity

TIX Sexual Harassment

Title IX Quid Pro Quo Sexual Harassment: is conduct on the basis of sex by which an employee of the University conditions the provision of an aid, benefit, or service of the University on a student's or employee's participation in unwelcome sexual conduct.

Title IX Severe, Pervasive and Objectively Offensive Sexual Harassment: is conduct on the basis of sex that constitutes unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a student or employee equal access to the University's education program or activity.

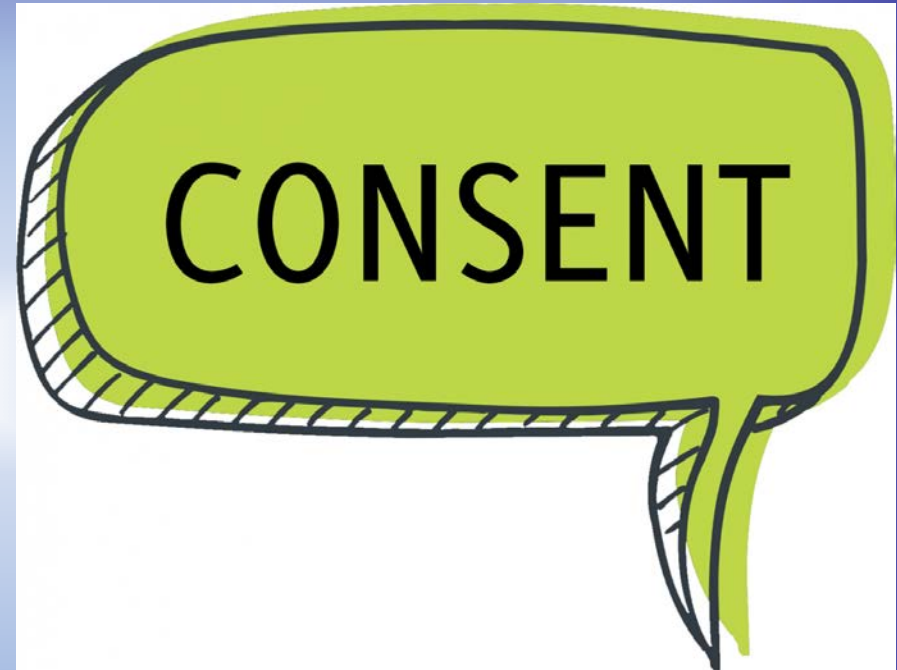
TIX Sexual Harassment (Continued)

Title IX Sexual Assault: Includes rape, fondling without consent, incest or statutory rape, defined as follows:

- Rape is the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral genital contact of another person without consent (as defined below).
- Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without consent.
- Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory rape is sexual intercourse with a person who is under the statutory age of consent. Under Texas law, individuals younger than 17 years of age are legally incapable of giving consent to sexual penetration or contact by an adult (someone 18 years of age or older) who is three or more years older than the individual.

Consent

Consent is the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon sexual acts. Consensual activity happens when each partner willingly and affirmatively chooses to participate.



Consent

- <https://www.youtube.com/watch?v=fGoWLWS4-kU>

Incapacitation

- Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring.
- An individual is incapacitated if they demonstrate that they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in an act.
- A state beyond drunkenness, intoxication, or being under the influence.

Alcohol, Drugs, and Incapacitation

Role of Alcohol

- **Central nervous system depressant**
- **Impairs cognition and psychomotor skills**
- **Progressively impairs all body functions**
- **Decreases inhibitions**
- **Impairs perceptions**
- **May cause blackouts or loss of consciousness**
- **May cause memory loss**
- **Effects exacerbated when mixed with other drugs**
- **Intoxication breeds vulnerability**
- **A person may be less likely to think someone is trying to sexually assault him/her**
- **A person intent on harming another may not need to use physical force**
- **A person may not realize incident has occurred**
- **A person may delay in reporting for multiple reasons**
- **No toxicological evidence of BAC/impairment level due to delay in report**

Role of Alcohol

- **80% to 90% of sexual assaults on campus are acquaintance rapes and involve drugs or alcohol.¹**
- **“Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month.”²**
- **90% of campus rapes are alcohol related.³**

1. DOJ, National Institute of Justice, 2005.

2. National Center on Addition and Substance Abuse at Columbia University 2007.

3. Bureau of Justice Statistics, 2000, National Commission on Substance Abuse at Colleges and Universities

Alcohol: Investigative Challenges

- **Lack of memory**
- **Inability to give detail**
- **Person may have been unconscious or in and out of consciousness**
- **Delay in reporting because:**
 - **May not know event occurred**
 - **May not recognize it as lack of consent**
 - **Feeling of “contributory negligence”**
 - **Concerns over conduct policy consequences**

Frame Questions Appropriately

- **Be aware that questions about drugs and alcohol are often subject to misinterpretation**
- **Explain amnesty**
- **Commit to clarity on why you are asking**
- **Explain the reasons for your questions**
 - **Assessing for incapacitation**
 - **Evaluating the “lens” through which the party or witness observed the events (opportunity to see, hear, understand, and remember)**
- **Explain that you will ask similar questions of all witnesses**
- **Invite the witness to ask questions before you go further**

Get Detailed Information

Considerations

Avoid	Why?	Try this instead
Asking about intoxication on a scale (e.g. "from 1-10")	There is no universal understanding of what the numbers on the scale mean	Asking about the impacts of alcohol on a person physically, cognitively, verbally, and otherwise; Asking for specific observations regarding conduct
Committing to a determining a specific BAC	It is very difficult to pinpoint a person's BAC after the fact. Additionally, BAC is only one data point and does not correlate precisely to a person's subjective experience or objective indicia of intoxication/incapacitation.	Use BAC when it is available in medical records. Otherwise, avoid attempting to pinpoint the BAC and rely instead on the subjective and objective indicia of intoxication/incapacitation.
Failing to obtain or ignoring medical evidence or observations of first responders, when they are available	Such witnesses are (generally) sober, trained observers who are paying close attention to the parties and surroundings. Their observations are critical, but it may necessitate coordination with external law enforcement or medical personnel.	Be attendant to mentions of first responders or medical personnel and try to obtain as much information about them as you can. Witnesses may remember, for example, that the EMT was female and had short brown hair. Work with your local agencies to identify such personnel and ascertain whether they can be made available for an interview.
Failing to fully contextualize witnesses' observations through use of a timeline	Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated.	Create a visual timeline of events that shows the parties' alcohol consumption, witness observations, and the alleged incident. Circle or highlight the timeframe when the parties were in each other's presences.

TIX Sexual Harassment (Cont.)

Title IX Domestic Violence: Conduct that constitutes a felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the complainant;
- By a person with whom the complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

TIX Sexual Harassment (Cont.)

Title IX Dating Violence: conduct that constitutes violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the parties' statements and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

Title IX Stalking: Conduct on the basis of sex that constitutes 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.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy

*Not Title IX either due to the nature of the conduct or because it did not reportedly occur within a program or activity of the University in the United States.

- *Non-Title IX Sexual Assault*: Same behavior as Title IX, but not in program/activity of University in the U.S.
- *Non-Title IX Non-Consensual Sexual Contact*: Any intentional touching of a person's breast(s), buttock(s), groin, genitals, or other intimate parts without consent. May be over or under clothing. May be RP touching CP, RP making CP touch RP/other person, or RP making CP touch own body.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Sexual Harassment: Unwelcome sexual advance, request for sexual favors, and/or other unwelcome, verbal, or physical conduct of a sexual nature when one of the three conditions outlined below is present.

Non-Title IX Gender-Based Harassment: Based on gender, sexual orientation, gender identity, or gender expression, which include acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature, when one of the three conditions outlined below is present.

- Submission to, or rejection of, such conduct is made implicitly or explicitly a term or condition of a person's instruction, academic standing, employment, or participation in any University program, activity, or benefit (not TIX Quid Pro Quo).
- Submission to, or rejection of, such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions, in circumstances (not TIX Quid Pro Quo).
- Such conduct creates a hostile environment.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Sexual Exploitation: Any act where one person violates the sexual privacy of another or takes unjust or abusive sexual advantage of another, but that does not fall within the definition of Title IX Sexual Harassment.

- Examples:
 - Filming an intimate encounter without the other person's knowledge and showing it to others.
 - Posting the nude pictures that your girlfriend or boyfriend sent only you, that they asked to keep private, to Snapchat or Instagram.
 - Surreptitiously observing another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Domestic Violence

Non-Title IX Dating Violence

Non-Title IX Stalking

Complicity: Any act that knowingly aids, facilitates, promotes, or encourages the commission of Prohibited Conduct by another person.

Retaliation: intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing regarding Prohibited Conduct.

Potential Amnesty

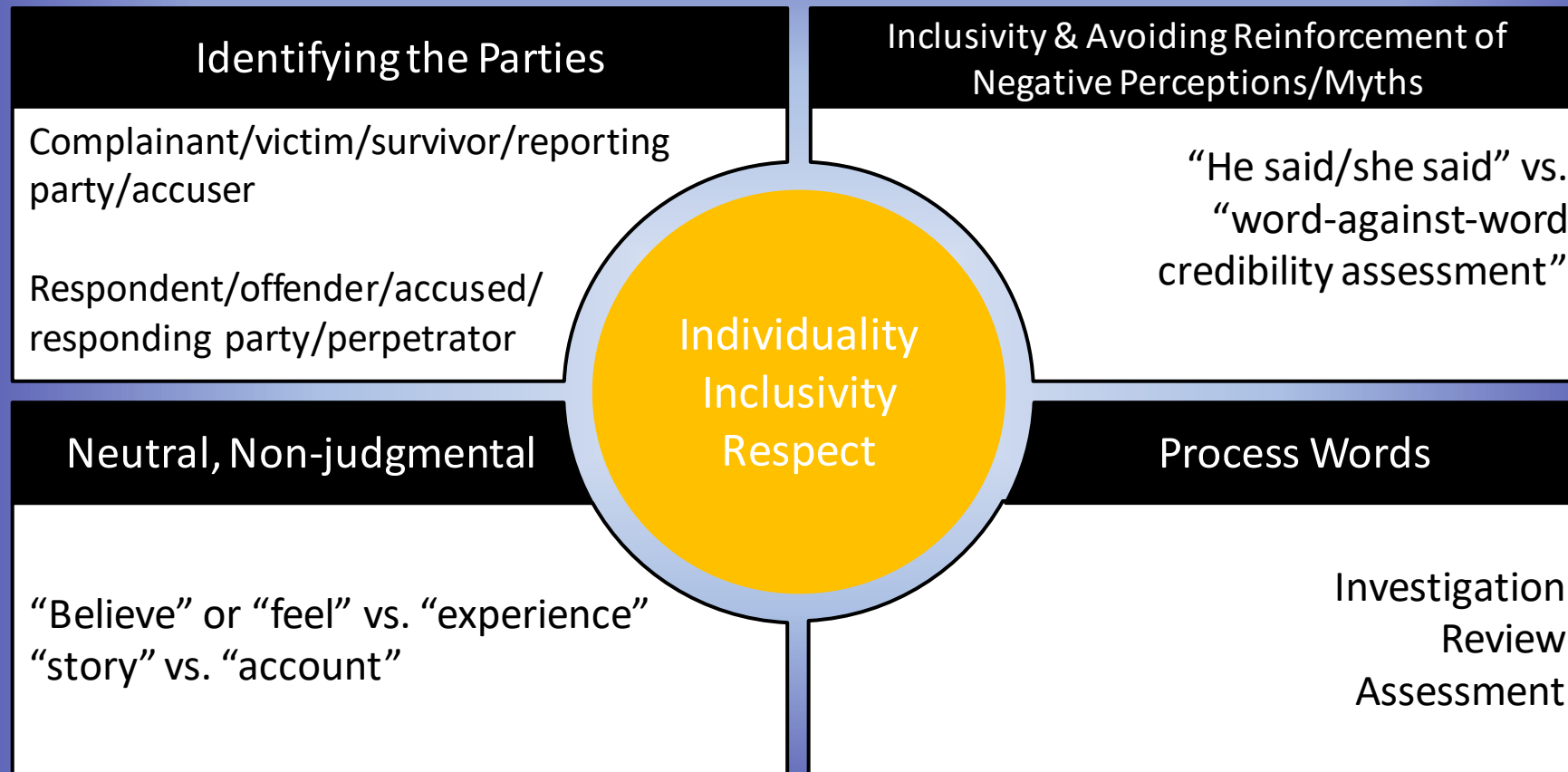


Reporting and Confidentiality

- All “responsible employees” must report to Title IX Coordinator suspected: sexual or gender-based harassment, sexual assault, sexual exploitation, stalking, intimate partner violence (dating and domestic), or retaliation regardless of where or when the alleged misconduct occurred.
 - Includes Student workers who are responsible employees such as Resident Assistants and Graduate Assistant Coaches
- Confidential Resources
 - Any employee who is a licensed medical, clinical, or mental-health professional when acting in that professional role in the provision of services to a patient.
 - Dean of Spiritual Life

**Dynamics of Sexual
Harassment
(including sexual and
interpersonal misconduct)**

Awareness of the Impact of Language



Trauma

Trauma informed response – Clery Center video

Potential Effects of a Trauma

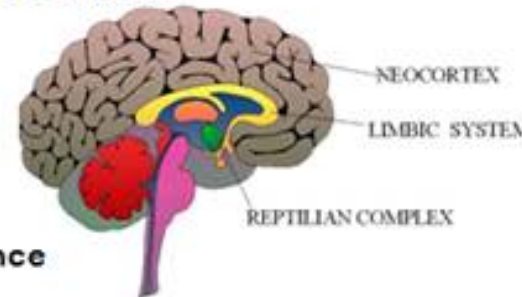
- **APA DSM-5 defines “trauma” as: “Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: directly experiencing the traumatic event(s)”**
- **During a traumatic event, the brain may detect a threat to survival**
- **The body may respond to this threat by producing hormones that can affect a person’s reaction to the event, during and after**
- **It may also affect a person’s ability:**
 - **To remember details (some details may be recalled in great detail, others details not - central versus peripheral)**
 - **To recount incident (memory of sexual assault may be fragmented and impaired)**
 - **To provide a chronological account**
- **Key Takeaway:** Just as it is improper to cede decision making to statistics, it is improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.

Russell Strand (2014)

A Paradigm Shift...

Forensic Experiential Trauma Interview

- Acknowledge their trauma/pain/difficult situation
 - What are you **able** to tell me about your **experience**?
 - Tell me more about ... or that...
 - What was your thought process during this experience?
 - What were your reactions to this experience
 - Physically
 - Emotionally
 - What are you **able** to remember about...the 5 senses
 - What was the most difficult part of this experience for you?
 - Clarify other information and details...after you **facilitate** all you can about the "**experience**"



Investigative Considerations

- **Questioning of event and actions**
 - I should/shouldn't have
 - Why did/didn't I
- **Effect of Complainant's own misconceptions**
 - I was drinking
 - I consented to some of the acts
 - I put myself in that position
 - Not enough force/no weapon used
 - Not a stranger
 - I have been abused before – it must just be me

Investigative Considerations

- **Effect of power differential**
- **Preservation of dignity**
- **Cultural or religious influences**
- **Processing of incident not linear**

Disclosure

- **A process where an individual reveals abuse or assault**
- **On-going, not a one-time event**
- **Stages of Disclosure:**
 - **Denial**
 - **Tentative**
 - **Active**
 - **Recantation**
 - **Reaffirmation**
- **Triggers for Disclosure**
 - **Accidental – person's secret is found out**
 - **Purposeful – person makes decision to tell**

Recantation

- **Understand the real life repercussions of disclosing**
- **How was disclosure received?**
- **Tremendous actual & emotional costs of disclosure**
- **Possibility that recantation is real**
- **Does NOT end the investigation or the process**
- **Explore direct and indirect causes of recantation**

Direct Causes of Recantation

- **Complainant is blamed by family, friends, or respondent**
- **Direct threats to complainant by respondent/others**
- **Indirect threats to complainant by community members (shunning)**
- **Complainant is stigmatized, labeled, or the object of ridicule on campus**
- **Pressure by any individual to recant**
- **Emotional blackmail by respondent (I'll be kicked out of school)**

Indirect Causes of Recantation

- Love for the respondent
- Loss of respondent in life
- Fragmented peer group/community
- Effect on family members (sadness/depression)
- Lack of family support
- Feeling guilty/responsible
- Fear of testifying
- No desire or emotional fortitude to endure process
- Change in living conditions
- Change in financial status
- Change in school, neighborhood, circle of friends
- Multiple interviews and medical procedures
- Does not want respondent to suffer consequences
- Does not want to relive incident again
- Only wanted abuse to stop
- Just wants life to get back to normal

Key Takeaways

- **Individuals respond to trauma differently. Our role is never to conclude that a person has or has not experienced trauma.**
- **We learn about the potential impacts of trauma so that we avoid improper prejudgments about a person or the information they share.**
- **Just as it is improper to cede decision making to statistics, it is improper to base a finding of responsibility on whether the Complainant appears to exhibit effects of trauma.**
- **While we do not typically think of Respondents experiencing potential neurobiological impacts of trauma, they may experience stressors that impact the way they present themselves and how they share information. We should avoid improper prejudgments about all people and the information they share.**
- **Again, each individual case must be evaluated on its facts.**

Investigative Protocols

Investigator's Role

- **Investigator takes the lead on the investigation**
 - Not the parties' burden
- **Goals:**
 - Maintain neutrality
 - To gather the most robust set of facts
 - To listen with an earnest intent to understand
 - To learn, not assume
 - Search for corroboration
 - Assess credibility
- **How many investigators?**
- **Expectations with two – both present and engaged**
- **Key tasks:**
 - Manage expectations
 - Regular and timely communications
- **Documentation/Report**
 - Verbatim/“quotes”
 - Areas of agreement and disagreement
 - Note-taking vs. recording

Investigator's Role

- **A good investigator should be:**
 - Objective
 - Fair
 - Impartial
 - Open-minded
 - Professional
 - Appropriate in demeanor
 - An active listener
 - Polite and respectful to all parties
- **A good investigator should not:**
 - Allow emotion to overrule reason
 - Make assumptions as to how a person “should” react
 - Pre-judge the facts
 - Put him/herself in the shoes of the Complainant or Respondent
 - Allow bias or prejudice to affect his/her judgment

Identifying Our Own Biases

- **What does sexual assault or rape look like?**
- **Victim-blaming**
 - What was she thinking when...
 - What did he think was going to happen?
- **Over-identifying with complainant or respondent**
 - I would have...
 - If it was me...
 - That could have been me...
- **Culture/diversity/world view**

Diversity and Culture

- **Sensitivity to language and bias in a variety of communities**
 - **LGBTQ**
 - **Cultural differences**
 - **Race**
 - **Insular groups**
 - **504/disability**
- **Reporting barriers**
- **Communication differences/impediments**

Investigative Protocols Overview

- **Developing an investigation plan**
- **Maintaining a working chronology**
- **Building a timeline**
- **Communications**
- **Documenting interviews**
- **Gathering physical evidence**
- **Investigative report**
- **Privacy and retaliation considerations**

Investigation Protocols

- **University should “own” the investigation**
 - Parties should not be required to obtain, interview or ensure witnesses’ presence
 - Parties should not be *required* to write their own statements
 - A thorough investigation is the College’s responsibility – 2020 Regs. – Gather evidence sufficient to reach a determination regarding responsibility
- **Parties should have equal access to information that will be used in the process**
 - Opportunity to review and adopt statement
 - Build in follow up interview
 - Allow for review of investigative report
 - Opportunity to challenge or offer additional information/witnesses
 - Maintain the original and create addendum for any changes

Investigation Protocols

- **Gather evidence directly related to the allegations whether or not the University intends to rely on such evidence (for instance where evidence is directly related to the allegation, but the University's investigator does not believe the evidence to be credible and thus does not intend to rely on it.**
- **Not restrict the ability of either party to discuss the allegations under investigation or gather/present evidence.**
- **Allow inculpatory and exculpatory evidence**
 - **Inculpatory – tends to show person's involvement (establishes guilt)**
 - **Exculpatory – tends to exonerate the person**

Preparing for an Interview

- **Interview Protocols**
 - Introduction templates
 - Scope of interview
 - Conclusion
- **Question preparation**

Interviewing

Interview Overview

- **Recognize the potential impacts of events of parties/witnesses on memory and presentation**
 - Allow the witness to give a narrative
 - Use open-ended free recall questions
 - Build in an opportunity for follow up questions
- **Consider timing and location**
- **Allow a support person to be present**
- **Be transparent about how information will be used**
- **Develop rapport and allow for closure**
- **Allow sufficient time for thorough exploration of the issues**

Practical Considerations – face to face vs. remote

- **Developing rapport**
 - Allow additional time for interview
 - Conversational language and tone
 - Avoid distractions
- **Privacy considerations**
 - Private setting
 - Advisor of choice present
- **Sharing documents**

Interviewing Overview

- **Narrative and follow up**
- **Corroboration**
- **Questioning techniques**
- **Informed and sensitive communications**

Interviewing

- **Intro – explain note taking, recording, as for questions before commencing fact gathering.**
- **Note taking – details and all who are present**
- **Use consistent language**
- **Offer breaks**
- **Avoid interruption and utilize open-ended questions**
- **Ask about documentation and witnesses**
- **Timing of interviews**
- **Listen for additional allegations/issues**
- **Attempt to establish timeline**
- **End with next steps**

Evaluating Credibility

- **Assessing credibility factors:**
 - Demeanor
 - Interest
 - Detail
 - Corroboration
 - Common sense
- **Testing inherent plausibility in light of the known information, relationships, and circumstances of the disclosure**

Identify and Elevate Concerns

- **Be aware of signs of distress**
 - **Personal**
 - Excessive fatigue, dramatic weight changes, poor hygiene, disorientation, withdrawal, increased drug or alcohol use, social self-isolation
 - **Academic**
 - Decline in attendance, falling asleep in class, missing assignments, drastic drop off in quality of work
 - **Verbal**
 - Expressing feelings of depression, isolation, hopelessness, or expressing suicidal or homicidal ideation
 - **Other**
 - Peers or others expressing concerns

Key Takeaways

- **Do not hesitate to identify and elevate concerns.**
- **Respect the separation of the investigatory function from the provision of support and resources. Connect the person with the right resource, inform the Title IX Coordinator, and designate someone else (not you) to follow up with the person to ensure support.**
- **Avoid assumptions about behavior (i.e. regarding someone as having a disability).**
- **Consider ways to invite the parties to identify needs for disability accommodations. Examples: include language in notices, preamble to interview, and at the beginning of a hearing.**
- **Where possible, consider having someone other than the investigator evaluate the admissibility of mental health information (or other potentially inadmissible information).**
- **Depending on your role, understand whether and how you should evaluate mental health information. May a person's mental health diagnosis insulate them from responsibility under the policy? Does a Respondent's diagnosis factor into sanctions? What about their ongoing treatment? Does a Complainant's diagnosis factor into the Respondent's sanctions?**

Evidentiary Considerations

Evidentiary Considerations

- **Privileged Information and Records**
- **Relevance**
- **Prior Sexual History**
- **Prior to Subsequent Misconduct**
- **Directly Related Evidence**
- **Setting Evidentiary Rules**

Privileged Information

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under legally recognized privilege, unless the person holding such privilege has waived the privilege.

Cannot access, consider, disclose, or otherwise use a party's records made or maintained by a physician, psychiatrist, psychologist, or otherwise recognized professional/paraprofessional...unless the University obtains that party's voluntary, written consent to do so for a grievance process.

Relevance

2020 regs do not define relevance and the ordinary meaning of the word should be understood and applied.

“While the proposed rules do not speak to:

- Admissibility of hearsay,**
- Prior bad acts,**
- Character evidence,**
- Polygraph (lie detector) results,**
- Standards for authentication of evidence,**
- Or similar issues concerning evidence,**

The final regulations require to gather and evaluate relevant evidence” including inculpatory and exculpatory, and questions about a CP’s prior sexual behavior to be irrelevant with two exceptions...

Prior Sexual History

Questions and evidence about the CP's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the CP's prior sexual behavior are offered:

- To prove that someone other than the RP committed the conduct alleged by the CP, or
- To prove consent, if the questions and evidence concern specific incidents of the CP's prior sexual behavior with respect to the RP.

*Only applies to CP – the Dept's reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of the RP, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

Prior Sexual History: Motive

- **Dept disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the CP had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the CP's sexual behavior.**
- **RP's in that scenario could probe a CP's motive by, for example inquiring whether a CP had a dating or romantic relationship with a person other than the RP, without delving into a CP's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.**

Prior and Subsequent Misconduct

- **2020 Regs do not prohibit the use of prior or subsequent misconduct – evidence of inappropriate behavior by an alleged harasser is permitted if relevant**
- **Schools need to determine if the conduct is:**
 - **Relevant**
 - **May be used in determining responsibility**
 - **May be used in sanctioning**
- **If so, will need to set criteria for consideration**

Prior and Subsequent Conduct Practically

- **May be relevant to demonstrate:**
 - **Intent/Knowledge**
 - **Motive**
 - **Opportunity**
 - **Lack of mistake**
 - **Pattern**
 - **Identity**
 - **Information that is inextricably interwove with the facts**
- **Consider prejudicial vs. probative value**
- **May not adopt a rule excluding relevant evidence because such relevant evidence my be unduly prejudicial, concern prior bad acts, or constitute character evidence.**

Investigation Protocols: Evidentiary Issues

- **Always consider relevance**
- **Admission of medical information**
 - Must be accompanied by expert guidance
 - If provided voluntarily by one party, must be shared with the other
 - Interview professional tied and need approval from student
- **Admission of mental health records**
- **Admission of statements of unavailable witnesses**
- **Compelling witness participation**
- **Admission of police report**
 - Interview police officer
 - Make available for questioning at hearing
- **Considerations regarding character witnesses**
- **Prior bad acts/pattern evidence (Respondent/Complainant)**
 - May be relevant and probative
 - Use for fact-finding? Sanction?
- **Prior sexual history of the complainant**
 - Generally barred
 - Limited grounds for admission

Evidence – Directly related

- **Information within evidence (documents, interviews, medical records) may be redacted if:**
 - **Not directly related, or**
 - **Privileged, or**
 - **Obtained without proper consent.**
- **A University may permit or require the investigator to redact information...such as information protected by a legal recognized privilege...contained within documents...that are directly related to the allegations, before sending the evidence to the parties for inspection and review.**

Evidence obtained illegally

If University knows a recording is unlawfully/illegally created, then the recipient should not share a copy of such unlawful recording.

Ex. Two party recording states

Investigative Report

Investigative Report

- **Use template format with consistent language and content across investigations**
- **Language: balanced, neutral, and non-judgmental**
- **Avoid declarative credibility language**
 - **“Unreliable” vs. insufficient information**
 - **Recognize perspective of the parties**
 - **Comment on the evidence, not the parties**
- **Use verbatim quotes**
- **Leave sufficient time for writing, editing, proof reading, and review by a fresh set of eyes.**

Investigative Report Format Overview

- **Cover Sheet**
- **Table of Contents**
- **Jurisdictional Statement**
- **Interview Summaries**
- **Alleged implicated prohibited conduct policy language**
- **Relevant evidence**

Scope of Review of Report

- **Parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.**
- **If relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.**

Credit

Information provided within this training was compiled from the various regulations and guidance documents, materials and education from Cozen O'Connor and Husch Blackwell, and relevant experience.