



End Violence Against Women International
(EVAWI)

Trauma-Informed Interviewing and the Criminal Sexual Assault Case: Where Investigative Technique Meets Evidentiary Value

Roger Canaff, JD
Kimberly A. Lonsway, PhD
Sgt. Joanne Archambault (Ret.)

February 2020
Update December 2022

Public Domain Notice

Unless something is excerpted directly from a copyrighted source, all the material in this document is in the public domain and may be reproduced or copied without specifically requesting permission from End Violence Against Women International (EVAWI) or the authors. Any direct quotes or excerpts should be properly cited, however. No one may reproduce or distribute this material *for a fee* without the specific, written authorization of End Violence Against Women International (EVAWI).

Electronic Access and Copies of Publication

The publication may be downloaded from End Violence Against Women International's [Resource Library](#).

Recommended Citation

Canaff, R., J., Archambault, J., Lonsway, K.A (2022). *Trauma-Informed Interviewing and the Criminal Sexual Assault Case: Where Investigative Technique Meets Evidentiary Value*. End Violence Against Women International.

Please Note

This training bulletin is the second in a series addressing a variety of topics related to trauma-informed interviewing, including: a description of specific interviewing strategies such as the Forensic Experiential Interview (FETI), and an exploration of research on how to effectively elicit information during an investigative interview, whether it is conducted with a victim, witness or suspect in a criminal investigation, as well as recommendations for best practice.

Authors

Roger A. Canaff, Esq. is an attorney, public speaker, and author on child protection, abuse and sexual assault cases. He has prosecuted sexual abuse and violent crimes against women and children in multiple jurisdictions in the United States and has provided technical and legal training to prosecutors and victim advocates around the world. Mr. Canaff is also an expert and consultant on the legal and social strategies institutions should employ to address sexual assault and abuse in their midst, and he is a partner with the training company [Justice 3D](#).



Dr. Kimberly A. Lonsway has served as the Director of Research for EVAWI since 2004. Her research focuses on sexual violence and the criminal justice and community response system, and she has written over 60 published articles, book chapters, technical reports, government reports, and commissioned documents – in addition to numerous training modules, bulletins, and other resources. Over her career, Dr. Lonsway has trained thousands of professionals across the country, in a diverse array of disciplines and settings, and volunteered for over 15 years as a victim advocate; in 2012, she was awarded the first-ever Volunteer of the Decade Award from the Sexual Assault Recovery and Prevention (SARP) Center in San Luis Obispo, CA. She earned her PhD in the Department of Psychology at the University of Illinois, Urbana-Champaign.



Sgt. Joanne Archambault (Retired, San Diego Police Department) is the Chief Executive Officer for EVAWI. Prior to founding EVAWI in 2003, Sgt. Archambault worked for the San Diego Police Department for almost 23 years, in a wide variety of assignments. During the last 10 years of her service, she supervised the Sex Crimes Unit, which had 13 detectives and was responsible for investigating approximately 1,000 felony sexual assaults each year. Sgt. Archambault has provided training for tens of thousands of practitioners, policymakers, and others – both across the country and around the world. She has been instrumental in creating systems-level change through individual contacts, as well as policy initiatives and recommendations for best practice.



Acknowledgements

We are extremely grateful to the following individuals (listed in alphabetical order) for their valuable contributions to this training bulletin:

- Mike Davis, Sergeant (Ret.), Vancouver Police Department, Cadre of Experts, EVAWI, Vancouver, WA
- Elizabeth Donegan, Sergeant (Ret.), Austin Police Department, Consultant / Trainer, Sexual Assault Training and Investigations, SATI, Cadre of Experts, EVAWI, Austin, TX
- Rachael Frost, Master Investigator (Ret.), Chief Executive Officer, Frost ICED (Investigation, Consultation, Education & Development), Cadre of Experts, EVAWI, Murrieta, CA
- Leslie A. Hagen, JD, National Indian Country Training Coordinator, US Department of Justice, Columbia, SC
- Carlton Hershman, Detective (Ret.), San Diego Police Department, Cadre of Experts, EVAWI, San Diego, CA
- James W. Hopper, PhD., Clinical Psychologist, Independent Consultant, Teaching Associate in Psychology, Harvard Medical School, Boston, MA
- Catherine Johnson, Investigator, Cadre of Experts, EVAWI, Beaufort, NC
- Kristen Littel, MA, Consultant on Interpersonal Violence Prevention and Response, Seaville, NJ
- Richard Mankewich, Sergeant, Orlando County Sheriff's Office, Cadre of Experts, EVAWI, Orlando, FL
- Andrea Munford, Lieutenant, Michigan State University Police, Advisor, MSU Office of the President, Cadre of Experts, EVAWI, East Lansing, MI
- Wendy Patrick, PhD., Deputy District Attorney, San Diego County District Attorney's Office, Cadre of Experts, EVAWI, San Diego, CA
- Keith Reid, Sergeant (Ret.), Metropolitan Police Department, Cadre of Experts, EVAWI, Clinton, MD
- Michael Schentrup, Captain, Gainesville Police Department, Cadre of Experts, EVAWI, Gainesville, FL



Introduction

When it comes to interviewing sexual assault victims, it's clear we've benefitted from advancing research on psychological trauma, including the neurobiological processes and responses involved.¹ These developments provide practitioners with a scientifically defensible underpinning for interviewing techniques, including many that professionals already used because experience taught them what worked, and treating victims compassionately felt like the right thing to do.²

This is all good news, but we are concerned that some practitioners – and even survivors – have come to view the “neurobiology of trauma” as a silver bullet for proving sexual assault cases. We have heard this notion expressed by professionals and laypeople alike, including survivors who have read or heard about trauma-informed interviewing, and place disproportionate faith in its ability to overcome all the challenges that might come up during a sexual assault investigation and prosecution, including at trial. We believe this level of faith is misplaced, and ultimately damaging for survivors as well as professionals. It is unrealistic to think that testimony regarding the neurobiology of trauma – *or any other single type or piece of evidence* – will secure a conviction on its own.

This training bulletin was written to explore what the evidence produced from a trauma-informed interview of a sexual assault victim can (and cannot) accomplish within the US legal system, and how this evidence should (and should not) be used in a sexual assault investigation and prosecution. Various possibilities are illustrated with hypothetical courtroom exchanges. We hope this is helpful for investigators and prosecutors seeking to understand this field of knowledge and appropriately utilize these techniques. But first, some basics.

¹ While this training bulletin focuses on sexual assault, many of the same conclusions apply equally well to cases involving intimate partner violence or other traumatic victimization.

² Abbe, A. & Brandon, S.E. (2014). Building and maintaining rapport in investigative interviews. *Police Practice and Research*, 15 (3), 207-220; Brandon, S.E. & Wells, S. (2018). *Science-based interviewing*. Published by authors; Diamond, D., Campbell, A., Park, C., Halonen, J., & Zoladz, P. (2007). The temporal dynamics model of emotional memory processing: A synthesis on the neurobiological basis of stress-induced amnesia, flashbulb and traumatic memories, and the Yerkes-Dodson law. *Neural Plasticity*, 60803, 1-33; Meissner, C.A., Surmon-Böhr, F., Oleszkiewicz, S., & Alison, L.J. (2017). Developing an evidence-based perspective on interrogation: A review of the U.S. government's high-value detainee interrogation group research program. *Psychology, Public Policy, and Law*, 23 (4), 438-457; Schwabe, L. (2017). Memory under stress: From single systems to network changes. *European Journal of Neuroscience*, 45 (4), 478-489; Vrij, A., Meissner, C.A., Fisher, R.P., Kassin, S.M., Morgan, C.A., & Kleinman, S.M. (2017). Psychological perspectives on interrogation. *Perspectives on Psychological Science*, 12 (6), 927-955; Wells, S. & Brandon, S.E. (2019). Interviewing in criminal and intelligence-gathering contexts: Applying science. *International Journal of Forensic Mental Health*, 18, (1), 50-65.

What is Trauma-Informed Interviewing?

What do we mean by “trauma-informed interviewing?” A basic definition is offered in the first training bulletin in this series, [*Becoming Trauma Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews*](#).

Specifically, we use the term to describe techniques based on an accurate understanding of trauma, informed by the relevant research on neurobiology and memory. Often referred to as *the neurobiology of trauma*, this work explores: (1) How brains and bodies respond to acutely stressful and traumatic events such as a sexual assault *as they are happening*, and (2) How these experiences of extreme stress are encoded, stored, and potentially retrieved from memory afterward.

In a trauma-informed interview, questions are asked in ways that are consistent with how traumatic memories are often encoded, stored, and retrieved. Interviewers also understand, listen for, and gather information about common brain-based impacts of trauma on attention, cognition, and behavior (e.g., narrowed attention, impaired reasoning capacities, freezing, habit behaviors, dissociation, and tonic immobility). These strategies can help interviewers elicit more complete and accurate information from sexual assault victims, which can, in turn, lead to more thorough evidence-based investigations. Specific techniques include the following:

- Sincere efforts to establish trust, rapport and comfort for the victim.
- Acknowledgment of the victim’s trauma and/or pain.
- Creating an environment that feels physically and emotionally safe for victims.
- Communicating in language victims understand and are comfortable with.
- Understanding that no one can remember “everything,” at any particular time, so victims are encouraged to relay all the information they are able to at that time.
- Use of non-leading questions and other open-ended prompts (e.g., “Tell me more about that,” or “What if anything can you recall thinking/feeling at that point?”).
- Encouragement of narrative responses with pauses, and without interruptions.
- Focus on what victims can recall thinking and feeling throughout the experience.
- Particular emphasis on emotional and sensory experiences (five traditional senses of sight, hearing, touch, taste, and smell, plus internal body sensations).
- Documenting brain-based impacts of trauma on the victim’s attention, cognition, and behavior during the sexual assault, and potentially during the interview.
- Expressions of patience, empathy, and understanding throughout the interview.

- No necessity for information to be provided in a sequential or “logical” order.
- Instruction not to guess at answers, and to say “I don’t know” when needed.
- Not asking victims “why” they did or did not do something during the assault, but rather inquiring in ways that convey a non-judgmental desire to understand their experiences, reactions, and (often unconscious, automatic) decisions.
- Acknowledgement that the victim may recall additional information as time passes and this does not indicate deception, nor does it necessarily mean that the victim was intentionally withholding information during a previous interview.³

(For more information on trauma-informed interviewing, including specific techniques, please watch for future installments in this training bulletin series).

So, What Do We Mean by “Evidence?”

The dictionary defines *evidence* as “that which tends to prove or disprove something” or “ground for belief; proof.”⁴ Alternatively, “something which furnishes proof.”⁵

In every criminal trial in the US, the prosecution has the burden of producing admissible evidence (testimony, objects, photographs, reports, etc.), that contribute to proving the elements of each crime beyond a reasonable doubt. To illustrate, the Model Criminal Jury Instructions for the District Courts of the Ninth Circuit⁶ outlines three types of evidence to be considered when deciding what the facts are:

- 1) Sworn testimony of any witness
- 2) Exhibits that are received in evidence
- 3) Any facts to which the parties agree

The defense has no such burden to produce evidence; they need not prove anything. Rather, their job is to challenge the prosecution’s case, by refuting evidence or testimony, so the judge or jury concludes there is reasonable doubt about whether the crime was committed and/or whether the defendant was the person who committed it.

³ Of course, victims do sometimes deliberately withhold certain information, including details about the sexual assault that are particularly shameful or humiliating, or information the victim does not want the investigator to know about (like underage drinking, drug use, or involvement in sex trade). For more information on addressing these challenges, please see EVAWI’s OnLine Training Institute (OLTI) module on *Effective Victim Interviewing: Helping Victims Retrieve and Disclose Memories of Sexual Assault*.

⁴ Dictionary.com: <https://www.dictionary.com/browse/evidence>

⁵ Merriam-Webster online: <https://www.merriam-webster.com/dictionary/evidence>

⁶ [*Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*](#) (2010 Edition, Last Updated 12/2019), Section 1.3, “What is Evidence,” p. 5.



Every crime has specific elements that must be proven for a defendant to be convicted on the charge. All defendants are presumed to be innocent (on each charge) until proven guilty in the US criminal justice system.

Case Illustration

At its simplest, imagine a case where a prosecutor must prove that a defendant ran a red light, causing an accident. As evidence, the prosecutor might use:

- (1) Testimony of witnesses, including the driver of the car that was struck, who actually saw the defendant's car pass through the intersection against the light;
- (2) Admissions of the defendant, if any statements were made to the police officer or other witnesses at the scene of the accident;
- (3) Video footage or photographs, if any existed, which captured the accident as it happened; and/or
- (4) Accident reports and diagrams reconstructing the accident based on any skid marks and/or the point of impact.

All four of these would constitute evidence and based on various state and federal rules and laws, all four would also generally be admissible to prove the criminal case against the defendant. It would then be the factfinder's job (the judge or jury) to evaluate how *credible* and *probative* this evidence is, in terms of meeting the prosecutor's burden. Does it help prove the defendant's guilt? If so, how persuasive is it? This analysis will involve issues such as determining witness credibility, authenticating certain pieces of evidence (such as video footage, photos, skid mark diagrams, etc.), and anything else that will assist the judge or jury in determining how much weight to give each piece of evidence.

Admissibility

There are other forms of evidence (beyond those described above) that prosecutors might want to use, but they aren't allowed to, no matter how compelling they think it might be for proving their case. This is based on the many rules and laws governing *admissibility* of evidence in a criminal trial.

"Prior Bad Acts"

For instance, let's say the prosecutor in our red-light case discovers that the defendant has been convicted for running red lights ten previous times. That certainly seems compelling; if the defendant has disregarded red lights on so many previous occasions, can't that evidence be used to show she probably disregarded one on this occasion?



The answer, in our criminal justice system, is usually “no.” Evidence of a defendant’s past behavior (often called *prior bad acts*) will usually not be admitted, even if it seems logical for the case.⁷



Exceptions to “Prior Bad Acts”

Evidence regarding past behavior or proclivity is not usually admissible in a sexual assault case, but there are some exceptions. These are outlined in the [Model Response to Sexual Violence for Prosecutors \(RSVP\)](#), by the Urban Institute, The Justice Management Institute, and AEquitas: The Prosecutors’ Resource on Violence Against Women (2017).

For example, such evidence cannot be introduced “to prove a person’s character” or to “show that that the person acted in conformity with that character trait on a particular occasion” (p. 82). However, it *can* potentially be introduced to prove matters other than propensity, “such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” (pp. 82-83). It can also be admitted when defendants attempt to disclaim knowledge of prior bad acts or maintain that they have “never been through this before” (for example in the case of the defendant who has been ticketed for such behavior several times). The prior bad acts then become admissible to impeach the defendant’s testimony. This is often referred to as a defendant “opening the door” to evidence of prior conduct through presenting a false image of good citizenship and law-abiding behavior. Finally, it is worth noting that some jurisdictions “explicitly *do allow* propensity evidence in sexual violence cases” (p. 83, emphasis added). For more information and recommendations on how to identify and introduce such evidence, please see the [RSVP document](#).

Hearsay Evidence

When a person testifies in a criminal trial – not to what they saw or heard themselves – but instead to what another person said, this is called *hearsay evidence*, and it is usually not admissible in a criminal case (unless it falls within one of the enumerated exceptions), no matter how logical or compelling the testimony might seem to the average layperson. The rationale for excluding hearsay is that this second-hand evidence, even when coming from a highly respected source, is not reliable enough to be introduced in court.⁸

Relevance

⁷ See Federal Rule of Evidence (404(b)).

⁸ One exception to the hearsay rule relates to *outcry witnesses*, the first person (or people) someone tells about their victimization. In sexual assault cases (as well as other crimes such as child abuse and domestic violence), outcry witnesses are often called to testify, not only regarding *what the victim said* when they first disclosed their sexual assault, but also how *they behaved or appeared* during the disclosure.



One key question for the admissibility of any evidence pertains to its relevance. In general, evidence is admissible in a criminal trial if it is *relevant*. This seems intuitive, but what exactly does it mean? In this context, relevance basically means the subject of the testimony (or type of evidence) is not only reliable, but it also has a connection to the case; it tends to prove or disprove a legal element.⁹

Case Illustration

To illustrate, imagine that a woman reports being sexually assaulted by a man who wore a black wool cap, and a suspect is detained just a few minutes later at a nearby location wearing a black wool cap. Further investigation produces probable cause to arrest the suspect for the sexual assault, and he is taken into custody. This testimony by the victim is almost certainly relevant, because it matters if the suspect was found wearing a black wool cap matching the description provided by the victim during the preliminary response.

Now imagine that the investigator offers the victim coffee during the follow-up interview, and she mentions casually that there are no good coffeeshops in her neighborhood. This fact may be true, but it's not relevant to the case, because it doesn't prove or disprove a legal element establishing that she was sexually assaulted, and by whom. In other words, it's not evidence in this case.

These two examples might seem obvious, but it gets more complicated when the statement *seems* to be related to the case yet isn't actually relevant to proving the legal elements of the crime. For example, many people assume that a victim's prior sexual history is automatically relevant in a sexual assault case, but this is only true if it speaks to a legal element or other fact at issue (which may then speak to the victim's credibility as a testifying witness). We do not intend to address the complex issues relating to a victim's prior sexual history and the history of rape shield laws in the U.S. We simply want to highlight that relevance requires that the evidence or testimony prove or disprove a legal element, not simply that it is somehow *related*, or relevant to the issues in the case.

Direct vs. Circumstantial Evidence

One final legal concept worth clarifying is that evidence may be categorized as either *direct* or *circumstantial*. Either type of evidence can be used to prove any fact. This is spelled out in the model jury instructions for the District Courts of the Ninth Circuit, which also notes that juries determine how to weigh the value of such evidence:

The law makes no distinction between the weight to be given to either direct or circumstantial [evidence]. It is for you [the juror] to decide how

⁹ One exception to relevance is when evidence is introduced to personalize and humanize a witness. Although such evidence cannot be used to vouch for witness credibility, background information such as where a witness works or lives, or how a witness is employed, may be admissible even if it is not relevant to any of the elements of the charged crimes.

*much weight to give to any evidence.*¹⁰

The manual then goes on to provide a real-world example to illustrate this point:

*By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.*¹⁰

Direct Evidence

Direct evidence is direct proof of a fact, such as testimony by a witness about what this witness personally saw or heard or did. Such evidence serves to prove (or disprove) a legal element without requiring any inference. This is true whatever form the evidence takes (witness testimony, forensics, photographs, etc.).

For example, if semen is recovered from a victim's vagina, and the source is identified through forensic testing as belonging to the defendant, this speaks *directly* to the question of whether a sexual act took place between the two people. Of course, the defense may argue that the identification was wrong, based on faulty procedures or contamination during evidence collection, storage, or testing. Or, they may acknowledge that the direct evidence establishes that sexual contact took place between the defendant and the victim, but argue that it says nothing at all about whether that sexual contact was *consensual*. This aspect of the case- *consent*- may be the most crucial given the circumstances. Nonetheless, the evidence speaks directly to a legal element in the case. The sexual act must be proven beyond a reasonable doubt for the judge or jury to convict someone on a sexual assault charge.

Circumstantial Evidence

On the other hand, circumstantial evidence does not directly prove or disprove a legal element or other fact in the case, it simply supports an *inference* that a fact may be true or not. Examples include the wool cap highlighted in the previous illustration. Without additional facts, the cap does not directly prove that a crime was committed, or that the defendant is the person who committed it. It just offers one piece of support for the inference that the defendant *might* be the person who committed the crime. There would need to be an accumulation of additional direct and/or circumstantial evidence to establish probable cause for an arrest, and then proof of his guilt beyond a reasonable

¹⁰ [Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit](#) (2010 Edition, Last Updated 12/2019), Section 1.5, "Direct and Circumstantial Evidence," p. 7.



doubt.¹¹

Circumstantial evidence is often used to prove the mental element for criminal offenses that require what's called *specific intent* in the law. For example, some sex crimes (e.g., contact crimes like attempted sexual assault or sexual battery), require that an act be committed *for the purpose of the defendant's sexual gratification*. Direct evidence of this intent might include statements made by the suspect during the act, or physical evidence such as ejaculate. Such direct evidence (like ejaculate) can establish what defendants *did* during the act, but circumstantial evidence is especially helpful to prove *what they were thinking* when they acted.

The classic example is an attempted sexual assault where the suspect drags the victim into a dark area and pulls down her pants, but the attack is interrupted when witnesses respond to the victim's cries for help. For the defendant to be found guilty, the prosecution must unequivocally prove that the defendant did something that was a substantial step toward committing the crime (not just preparing), and that the crime would have taken place unless interrupted by independent circumstances.¹² In this scenario, the suspect's actions (pulling down the victim's pants rather than grabbing her purse), corroborate the specific intent to commit a sexual assault rather than a robbery.

In another scenario, where the suspect meets the victim in a bar, the suspect's intention *to engage in sexual activity* might be inferred from the fact that he repeatedly bought the woman shots, isolated her from her friends, persuaded her to join him at a private table, and searched his phone for inexpensive hotel rooms nearby. Maybe the suspect then insisted on driving the victim home, even though she repeatedly declined his offer, and she had several girlfriends at the bar who could have helped her get home. But what evidence might indicate that he intended to *sexually assault* her (i.e., without her consent)? Maybe the suspect used a false name when he reserved the hotel room. Or, maybe he drove the victim to a remote location, such as a parking lot or field, where no one could hear her scream. None of these is a "silver bullet" that proves the legal element on its own, but together they can help to build a circumstantial case.

Sexual Assault Cases

Sexual assault cases may have little or no direct evidence. However, an accumulation of circumstantial evidence can still build a powerful case for the prosecution. This is described in EVAWI's training module on [Crime Scene Processing and Recovery of](#)

¹¹ In their book, Brandon and Wells (2018) distinguish between verified *facts*, and *information* (including hearsay), as well as *inferences*, which can be characterized as: "What do we think based on the facts and information available?" The book goes on to describe a process for tracking and utilizing each for the purpose of planning and conducting investigative interviews. See Brandon, S.E. & Wells, S. (2018). *Science-Based Interviewing*. Published by authors.

¹² [Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit](#) (2010 Edition, Last Updated 12/2019), Section 5.3, "Attempt," p. 91.

Physical Evidence from Sexual Assault Scenes:

Generally, sexual assault scenes don't include the elusive 'smoking gun.' Sometimes, despite our best efforts, we are left with two versions of a story, and the only choice we have is to build a circumstantial case. Investigators must recover the evidence available and allow it to support or refute each person's account of what happened (Ware, 2017, p. 19).

Next, we will use these concepts and terminology when we examine the types of evidence that might be produced with a trauma-informed interview, and explore how each kind may prove useful to the prosecution of a sexual assault case.

Interviewing and Evidence: What's the Connection?

There is no question that trauma-informed interviews can potentially yield evidence. That is one of the main goals. But *what kind of evidence* can these interviews produce? The answer is three-fold: They can potentially yield (1) victim statements, (2) investigator observations of victim behaviors, and (3) additional corroborative evidence (often identified on the basis of victim statements).

(1) Victim Statements

Perhaps the most obvious conclusion is that trauma-informed interviews can produce statements, which may ultimately be admitted at trial as *testimonial evidence*. To illustrate, a sexual assault victim may first tell an investigator (and then later, a prosecutor) what they remember experiencing before, during, and after a sexual assault, and the prosecutor may build on this information to craft a direct examination of the victim in court. The victim's testimony in court will help meet the prosecution's burden of proof if it contributes toward proving the legal elements of the specific offense(s) being charged. Cross-examination will also produce evidence, when the victim testifies in response to defense questioning.

As long as it meets certain legal standards (e.g., relevance), sworn testimony becomes a part of the lawyer's case who has put it forward (either the prosecutor or defense attorney). It is therefore important to note that trauma-informed interviewing techniques can be used both by the investigator who conducts the detailed interview, *and* by the prosecutor who crafts a direct examination for the victim based on the victim's recollection of events and other corroborative evidence. Trauma-informed techniques may achieve this goal more effectively than traditional interviewing approaches (and even science-based approaches that are not necessarily "trauma-informed"), because they take into account common trauma responses and the implications for victims' memories, behaviors, and ultimately their statements and testimony regarding their

sexual assault.¹³

Now, testimony may not be as innately compelling as physical or scientific forms of evidence (like fingerprints or DNA), but it is still very powerful, and the bedrock of our criminal justice system. When a person takes an oath and promises to testify truthfully in a court of law, their words become more than just a solemn account. In fact, those words become *evidence*, a thing of actual legal weight that a jury or a judge can put into a mental calculus when making a determination in the case. Sworn testimony, as any judge will instruct a jury, is evidence. The question for factfinders in the case (the judge or jury) is what credibility and probative weight, if any, to assign to that evidence.

Meeting Legal Elements: Victim Statements

How might victim statements help to meet the legal elements of a sexual assault offense? First, victims might testify both about sexual acts committed by the defendant, as well as the conditions that rendered those acts unlawful. For example, in a case of involving force, threat, or fear, the victim may testify regarding the factors that created this environment, including the defendant's use of any weapons, the defendant's size and strength, physical isolation, history of prior violence, etc. Or, in a drug- or alcohol-facilitated case, the victim may testify about the specific drugs or alcohol consumed, the level of incapacitation they experienced, and the defendant's role in creating, encouraging, or otherwise facilitating the victim's incapacitation. Testimony by the victim would then be offered as direct evidence to establish one or more of these legal elements.

¹³ See, for example, work conducted by the High Value Detainee Interrogation Group (commonly referred to as "the HIG") which aims to accumulate evidence for a variety of interviewing techniques and package them together in an approach described as "science-based investigative interviewing." Like trauma-informed interviewing, the HIG approach includes "developing cooperation via rapport, persuasion and conceptual priming" and "eliciting information via conversational rapport and facilitating memory retrieval" (see Meissner et al., 2017). The approach also incorporates strategies and techniques from Fisher and Geiselman's (1992) Cognitive Interviewing (CI) protocol. However, this approach does not integrate other research, including neuroscientific research, on how the trauma of sexual assault can affect victims' attention, cognition, behavior, and memory processes. Nor does the HIG approach (or CI) address the impact of deep-seated cultural misconceptions about sexual assault, and the profound skepticism that has long been directed toward sexual assault victims and their disclosures. If the statements and behaviors of sexual assault victims are not considered in light of these factors, this can potentially lead to errors in assessing credibility. This is particularly concerning when victims withhold information or provide inaccurate information, for example, because they feel ashamed, fear being disbelieved or judged, or can tell that the interviewer doesn't understand or believe what they're saying. See Fisher, R.P. & Geiselman, R.E. (1992). *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview*. Springfield, MA: Charles C. Thomas; Meissner, C.A., Surmon-Böhr, F., Oleszkiewicz, S., & Alison, L.J. (2017). Developing an evidence-based perspective on interrogation: A review of the U.S. government's high-value detainee interrogation group research program. *Psychology, Public Policy, and Law*, 23 (4), 438-457.



Victim Statements Involving Neurobiology of Trauma

So then, how does the neurobiology of trauma come into play? During the course of a trauma-informed interview, a sexual assault victim might describe experiences that could potentially be explained – at least in part – by neurobiological processes associated with severe stress and trauma. For example, victims may say that they: “froze,” “couldn’t move all of a sudden,” “collapsed like a rag doll,” “spaced out,” “felt like I left my body,” “felt like I was watching the whole thing from the ceiling,” “couldn’t see anything but the knife in his hand,” “focused on this one painting on the wall,” “felt like I was going in and out of the scene like a movie,” or “I just kept saying [or thinking] the same thing over and over again.”

When victims use phrases like this, the investigator’s job is to document the exact wording – but then use open-ended prompts to find out what the victim means by the phrase. For example, when victims say they “froze” during the sexual assault (which they often do), investigators should document this exact wording, but then go on to elicit a detailed description of any physical, sensory, cognitive, and emotional aspects of that part of the experience that the victim can recall: “Tell me more about when you ‘froze.’” “What if anything do you remember seeing?” “What if anything do you remember hearing?” “What were you feeling at that point?” or “What was going through your mind when you ‘froze?’” The investigator can then document these sensations, feelings, thoughts, and experiences as part of the victim’s statement. If the case goes to trial, the statements might be admitted into evidence through the victim’s sworn testimony.



Inappropriate to Label or “Diagnose” Victim Responses

There’s a risk that someone who has received training in the neurobiology of trauma may, when hearing a victim describe their experience with such phrases, instantly assume the role of an armchair neuroscientist or trauma expert. They may think: This victim was clearly experiencing “impairment of the prefrontal cortex,” or “dissociation,” or “tonic immobility,” or “collapsed immobility,” etc. However, as we emphasized in [the first training bulletin in this series](#), it is inappropriate for investigators and other non-clinicians to label or diagnose such victim responses.

While it’s essential that the process of *listening* to victims and *eliciting* more information from them is informed by an understanding of common brain-based responses, *explaining* and *interpreting* such information should be left to experts. Indeed, it is not the investigator’s role to determine whether someone has experienced *trauma*. As taught in report writing classes for law enforcement, the investigator’s job is to document the victim’s statements, then elicit more detail with open-ended prompts.



Remember, prosecutors often use victim testimony as direct evidence to establish the legal elements that render a sexual act a crime, such as (a) force, threat or fear, or (b) incapacitation. With examples such as those described above, a prosecutor would most likely use the victim's testimony to establish these elements, arguing that the experiences described by the victim are more consistent with force or incapacitation than they are with consensual sex. The defense will then most likely seek to undermine this testimonial evidence by challenging the victim's credibility, and arguing that the victim consented to the sexual acts.

(2) Investigator Observations

The first type of evidence thus involves the *content* of a victim's statement. However, closely related to what the victim says are the observations documented by an investigator about how the victim *appears or behaves* during the interview. This includes things like the victim's general demeanor, and specific reactions, like crying, trembling, handwringing, staring vacantly, slumping in the chair, etc. The investigator's observations of these behaviors are the second type of evidence that can be produced from a trauma-informed interview.

But they will only be introduced as evidence if they are relevant to the case, admissible in court, and probative in terms of proving a legal element. The prosecutor might call the investigator to testify about such victim behavior during the interview, as circumstantial evidence that the person was sexually assaulted.

Hypothetical Exchange #1

To illustrate what this might look like, we'll offer a hypothetical exchange between a prosecutor and investigator at trial. In this case, the investigator is testifying about a trauma-informed interview conducted with a victim of sexual assault. The investigator simply makes behavioral observations about the victim, and describes how this behavior changed at various points during the interview.

Prosecutor: Detective, without telling us what was said during the interview you conducted, please tell us this: While you were asking these questions, what was the complainant, Ms. Chen's, demeanor?

Investigator: She cried through much of the interview, so her eyes were red and swollen. She had to stop and collect herself several times.

Prosecutor: Did you give her a chance to collect herself?

Investigator: Yes, I offered her the opportunity to take a break. I let her sit quietly for a few minutes, and I went and got her a cup of coffee. I've found that sometimes helps.

Prosecutor: And in this case, did it help?

Investigator: Yes. When I came back with the coffee, about five minutes later, Ms. Chen appeared much calmer. I gave her a chance to drink the coffee, and we just sat quietly for a few minutes. After that, I asked her if it would be okay to continue with my questions.

Prosecutor: And did you?

Investigator: Yes. I was able to complete the interview.

In this exchange, the victim's behaviors fit with common expectations for how a sexual assault victim will behave during an investigative interview. They will therefore "make sense" to most judges and jurors, and will not require further explanation. Of course, the prosecutor may still provide additional information about the victim's behaviors, if this will help the judge or jury better understand them. For example, the prosecutor might call an expert to explain that these reactions are common among people who have experienced sexual assault.

Meeting Legal Elements: Investigator Observations

Again, keep in mind what the point of such testimony is: It is designed to meet the prosecutor's burden by establishing legal elements of the crime. If the investigator testifies that the victim was "crying," "shaking," or "tearing a tissue to shreds" while describing the sexual acts, the prosecutor may argue in closing that this demonstrates the victim was clearly frightened and upset, and that this corroborates the nonconsensual nature of the act – that it was committed by the defendant using force, threat, or fear, or while the victim was incapacitated.

Yet again, investigators should not label or diagnose any such behaviors that victims might exhibit *during their interview*, just as they should not for behaviors victims describe experiencing *during the sexual assault*. Any investigator who uses such terminology may find themselves defending their "diagnosis" in court and they might not be able to provide an explanation based on science.

Instead, investigators should simply document the victim's behavior during the interview with concrete and objective wording that is free of interpretation. For example, it is always possible that victims might lapse into a dissociative state during an investigative interview (even one that's trauma-informed). If so, the investigator will likely observe behavioral indications of such a lapse. However, even if the investigator suspects that the victim is dissociating during the interview, it is not appropriate to state in the report that the victim "experienced dissociation" or "went into a dissociative state." Rather, the investigator might document that the victim "did not make eye contact," "stared at the wall throughout the interview," "spoke without any emotional expression," etc.

Statements and Observations: Is it Evidence?

Of course, it's not certain that any particular statement made by the victim, or any specific observation documented by the interviewer, will be introduced as evidence in the case or be testified to at all. As previously noted, this depends on whether they are determined to be relevant, probative, and admissible in court. For example, the victim will not typically testify about the quality of coffeeshops or other irrelevant statements made throughout the course of the interview. Similarly, the investigator will not testify about clothing worn by the victim to the interview unless there is some reason why this is relevant and probative.

But it is not always obvious at the beginning of an investigation what evidence will become critical in the case. This will typically only become clear after taking additional investigative steps and interviewing any suspects and witnesses.

This point can be illustrated with an example of one type of physical evidence: Latent prints. Crime scene investigators will often collect numerous latent prints at the scene of a sexual assault and home invasion, not knowing which might ultimately be probative. All the latent prints that are collected will be impounded as *evidence*, but the only ones that will be presented by the prosecution at trial will be those that are relevant to the case. Latent prints found on the outside of a window may be used to identify the defendant, and to help prove the criminal offense by establishing a point of entry and the fact that the suspect was not invited into the victim's home. The defense may then try to introduce other prints that were collected, to show that the crime could have been committed by some other person – assuming all the impounded prints could not be identified and excluded as belonging to the residents of the home, or any past guests.

Another analogy can be drawn with biological samples drawn from the victim. At the time samples are collected from the victim during a medical forensic exam, we don't know (yet) if they are *evidence*. We don't know if they will help to prove a legal element (or disprove it), or whether they will corroborate (or challenge) any statements made by the victim, suspect, or witnesses. At this point, a vial of blood or a vaginal swab are just that: A vial of blood or a vaginal swab. More investigation is needed to determine whether they will become evidence in the case. Similarly, it is impossible to know during a victim interview which documented statements, observations, and items of evidence collected will ultimately be introduced as evidence in the case, by the prosecution or defense.

How Victims Recall and Relay Memories

When we are talking about the neurobiology of trauma, however, some behaviors observed by an investigator will pertain to *how victims remember and share their memories of the sexual assault*. For example, victims may have inconsistencies or gaps in their memories (even significant ones). Their memories may lack any logical order (such as chronology). They may lack any sense of time or context (such as the layout of

a room). Victims may also have “flashbulb memories,” particularly at the onset of an attack, where they can recall a great deal of detail, followed by periods of time where they cannot seem to recall many details at all, including details that would seem “unforgettable” to investigators (e.g., whether the suspect sexually penetrated the victim, wore a condom, and/or ejaculated).

But it is critical to note that *these observations of how someone recalls, or shares memories are not evidence that the person was sexually assaulted*. In other words, they do not help meet the legal elements of a sexual assault offense.

This is because such behaviors may be explained in part by neurobiological process, but they may also be due to other causes. For instance, trauma can certainly cause gaps and inconsistencies in memory, but so can alcohol or drug use, inappropriate interviewing tactics, and many other factors – and it can be difficult or impossible to differentiate what the actual cause might be.

Victims can also deliberately withhold certain information, including details about the sexual assault that are particularly shameful or humiliating, or information the victim does not want the investigator to know about (like underage drinking, drug use, or involvement in sex trade). Observed behaviors may therefore be *consistent with* sexual assault and trauma, and expert testimony may be used to help the jury understand this, because the defense will often point to these behaviors as evidence that the person is not credible and was not sexually assaulted. However, they should not be considered evidence of the sexual assault itself (“Look, he has gaps in his memory – that proves he was raped.”)

Who Should Testify: Victim or Investigator?

Another question is whether the victim or the investigator should be the one to testify about certain experiences or observed behaviors on the part of the victim.

In almost all cases (and subject to hearsay exceptions), an interviewer can’t simply repeat in their testimony what the victim is already testifying to. For one thing, this would be hearsay evidence. But it would also be improper because it’s *cumulative*. The jury will hear from the victim personally, so it is considered unduly prejudicial to hear the same information repeated by someone else. For this reason, the victim’s account will almost never be repeated by another person to whom they gave it. The victim will typically be the only one to testify regarding what they experienced and felt, in terms of both sensations and emotions.

On the other hand, the interviewer may be the best person to testify regarding their observations of how the victim *behaved* during the interview. This may be seen as more credible and compelling by the judge or jury. To illustrate, rather than having the victim testify about her feelings (“I was upset and cried a lot in the interview”) the investigator might testify regarding observed behaviors (“She was crying so hard I had to keep waiting to ask her follow-up questions”).

Investigator observations of victim behavior may corroborate victim statements about emotional experiences, and this in turn, may challenge misinterpretations of what those behaviors mean. For example, many victims are quiet and non-responsive during their interview, and this can come across as uncooperative or indifferent. However, this may actually be due to the victim feeling hopeless and depressed, and these emotions can be described by the victim in the interview.

Or, the victim may describe the sexual assault in a matter-of-fact way, without any visible display of emotion. This may lead factfinders to question whether the sexual assault really happened, or how traumatic an experience it was for the victim. Yet the victim might have been profoundly traumatized by the sexual assault; it may be that the victim is dissociating during the interview, or that after telling the story so many times the words have lost their emotional impact. Alternatively, the victim might be compartmentalizing the assault emotionally, to maintain composure and equilibrium. If victims are provided the opportunity to describe their emotional experiences, this can demonstrate that the feelings and experiences do in fact line up with the observed behaviors and therefore counter potential challenges to their credibility.

Hypothetical Exchange #2

Once again, we will illustrate what this type of testimonial evidence might look like in a courtroom exchange with the prosecutor. As in the first example, the investigator in this second exchange offers behavioral observations documented during a trauma-informed interview with a sexual assault victim. However, this time, the victim's behaviors are different from many people's expectations.

Prosecutor: While you were asking these questions, what was the complainant, Mr. Garcia's, demeanor?

Investigator: He was actually very calm, and almost conversational when he was describing what happened to him.

Prosecutor: Did that reaction strike you as odd?

Investigator: Me? No, not at all.

Prosecutor: Why not, Detective?

Investigator: Well, because I've interviewed hundreds of sexual assault victims throughout my career. I've seen everything. The fact is, victims react in many different ways. It's not unusual to see crying, or obvious signs of fear on the part of a victim while giving details about the sexual assault. But it's also not unusual to see nervous reactions like laughter, or no emotional expression at all. It just runs the gamut.

Prosecutor: What happened then?

Investigator: Nothing out of the ordinary. Because he was in a calm state, I was able to complete the interview. After that, I gave him a brochure to refer him to our local rape crisis center, and I included details about the interview in my investigative report.

Again, the prosecutor may want to provide further context for these behaviors – perhaps with expert testimony that such behaviors are common among sexual assault victims. This may be helpful for factfinders to better understand the behaviors, and not see them as a challenge to the victim’s credibility. Or, the prosecutor may prompt the investigator him/herself to offer additional context, for example that he’s seen the same lack of emotion in traumatized fellow police officers or fellow soldiers while serving in the military.

Hypothetical Exchange #3

This alternative strategy is illustrated in a third hypothetical courtroom exchange, where the investigator provides the same type of testimony about victim behaviors observed during a trauma-informed interview, but then goes on to describe the range of reactions seen among sexual assault victims.

Prosecutor: While you were asking these questions, what was the complainant, Ms. Ahmad’s, demeanor?

Investigator: She appeared very frightened. She was obviously upset. Her eyes were red and swollen. She had to stop and collect herself several times.

Prosecutor: Is this a reaction you’ve seen before when interviewing victims of sexual assault?

Investigator: Certainly.

Prosecutor: What other reactions do you sometimes see?

Investigator: I see everything. Really there’s no telling how a victim will react when asked to give an account in a trauma-informed interview. One of the things we’re trained on about sexual assault is that victims will react in many different ways. We need to be prepared for all of them.

Prosecutor: Why is that?

Investigator: It's because there's no appropriate or inappropriate way to feel or act after being sexually assaulted. Just because a victim presents in a way that might not immediately seem typical or normal, it doesn't necessarily mean they're lying. Everyone reacts differently to trauma, so we need to be ready for any reaction and do our job as best we can.

Note that the investigator does not go into detail about specific victim responses, because testimony is being offered as a fact witness, not an expert witness. An expert witness could give far more detailed information as part of their opinion.



When Does an Investigator Testify?

There are three general ways in which investigators may testify about statements made by the victim or observations of the victim's behavior during a trauma-informed interview. First, the prosecutor might call the investigator to testify during the *case-in-chief*, or in a *rebuttal* to the defense's case. Then, depending on the circumstances, the prosecutor might ask the interviewer to relay what the victim said or how they appeared or behaved. This is not as likely a scenario because of hearsay and other evidence rules, but it does sometimes occur.

Second, the investigator might be questioned about the victim's behaviors or demeanor *on cross-examination*. This may only happen if the investigator was initially called to discuss the interview on direct examination. Third, the defense attorney could call the investigator *as his or her own witness* in the defense's case. In any of these scenarios, what the investigator can testify to will be limited by the rules of evidence, and the rulings of the judge if objections are made.

Information about the *interview process* may also be admissible, as part of the investigator's testimony. This might include general information about trauma-informed interview approaches (or other science-based interviewing techniques), and specific details about how they were used to elicit information in this particular interview. This is entirely case-specific, though; whether or not such testimony would be admitted depends on an almost limitless set of variables.

For a detailed discussion of the investigator's testimony in a sexual assault case, including sample language for both prosecutor and investigator, please see EVAWI's training bulletin, [The Investigating Officer's Direct Exam: Strategic and Tactical Considerations to Take Advantage of the IO's Expertise](#).

(3) Identifying Corroborative Evidence

So far, we have described how trauma-informed interviews can potentially produce evidence in the form of victim statements and investigator observations of victim



behavior during the interview. As a third possibility, these interviews can lead investigators to additional evidence that corroborates (or challenges) statements made by the victim, suspect, or witnesses.

Case Illustration

To illustrate, imagine that a man reports being sexually assaulted in the suspect's home, and he recalls that the room had a distinctive pattern of wallpaper. The victim then describes the pattern in detail to the investigator. Armed with a search warrant and the location of the suspect's home, the investigator might identify this wallpaper and photograph it. That photograph is now a piece of corroborative evidence produced as a result of the interview. Whether it's relevant or probative depends on other facts in the case. In this example, the recollection of the wallpaper and subsequent corroboration would definitely be relevant and probative for the prosecution, if the suspect denied the victim was ever in his home, or if he denied knowing the victim at all.

Meeting Legal Elements: Circumstantial Evidence

What legal elements could be corroborated with additional evidence identified as a result of a trauma-informed interview? It depends. And this is where the distinction between direct and circumstantial evidence becomes important.

In the example of the wallpaper, the evidence corroborates that the victim was in the defendant's home at some point. It does not provide direct evidence of a sexual act, or the factors that made that act a crime (e.g., force or incapacitation). Instead, it provides one piece of circumstantial evidence to build the case piece-by-piece. Undoubtedly, the defense will provide an alternative explanation for why the victim knows the pattern of the defendant's wallpaper (e.g., because the victim was invited to the defendant's home and they engaged in consensual sex).

Meeting Legal Elements: Direct Evidence

The victim's statement may also help to identify direct evidence. For instance, imagine a scenario where patrol officers respond to a victim's home in the immediate aftermath of a home invasion and sexual assault committed by a stranger. The reporting officer will almost certainly ask the victim about anything the suspect may have touched or used during the commission of the crime (e.g., condom wrapper, jar of lubricant, tissue, or towel to clean up afterward). At the time, the victim may or may not be able to identify any such objects.

However, it is possible that several days later, during the course of a trauma-informed interview, the victim may recall that the suspect touched a candle on her bedside table, and also that he cleaned himself with a towel, which the victim later threw in her laundry bin. If law enforcement is able to collect the candle, and the crime laboratory identifies

prints belonging to the suspect, this provides direct evidence that the suspect was in the victim's bedroom at some point (a legal element for the home invasion). It also provides circumstantial evidence that the suspect committed the sexual assault (by placing him in the room). However, the towel might provide *direct evidence of the sexual assault* if ejaculate is recovered and DNA testing identifies the defendant as the source of the biological material.

Painting the Whole Picture

When utilized properly, trauma-informed interviewing can yield information about the victim's psychological experiences (e.g., sensations, thoughts, and feelings, or the absence of those in dissociative states), as well as behaviors or lack of behaviors during the sexual assault that may have a physiological basis (e.g., freezing, habit behaviors, tonic immobility). Such information may enable investigators, prosecutors, and others to better understand the victim's perspective and more fully envision what the experience was like for them. The information may also help identify additional corroborative evidence (like the wallpaper pattern, or the candle and towel). In addition, some of the details that victims recall make compelling testimony, because they are so unique or unusual, they have the true ring of authenticity (as in, "you can't make this stuff up").

The information gathered during a trauma-informed interview can also help prevent the victim's experience from being sanitized or minimized. All too often, sexual assaults are described in factual language and technical terms that utterly fail to capture the terror, horror, pain, confusion, and shame experienced by a victim. This is less likely if there is a recording, or a well-documented report, from an interview conducted with a trauma-informed approach. If the information is accurately captured and introduced as evidence, the judge or jury will be better equipped to truly understand what the sexual assault was like for the victim.



For more information on audiotaping or videotaping victim interviews, please see EVAWI's training bulletin on [Recording Victim Interviews](#).

Another way that prosecutors can paint the whole picture is to have an expert testify about neurobiology of trauma or common responses of sexual assault victims (including those described as "counterintuitive"). This may help factfinders better understand the victim's testimony in the context of this scientific knowledge. However, the expert's role is not to vouch for the victim's individual testimony; it is to provide background information that a prosecutor might use in closing arguments to show that the victim's behavior was closer to the rule than the exception. Also, it is critical that anyone retained as an expert actually understands the science and can explain it clearly to the judge or jury.



Expert Testimony

American law has long recognized the contribution of expert witnesses when legal proceedings involve topics outside the common knowledge of the average judge or juror. In fact, this is exactly how an expert is defined in all American jurisdictions. For legal purposes, an *expert* is any individual who, through knowledge, skill, experience, training or education, has developed scientific, technical or other specialized knowledge about a subject.¹⁴ The individual is not required to have a particular educational degree or any formal training to be received as an expert in a court of law. Rather, the attorney presenting the expert to the court must simply “qualify” that expert with a series of questions regarding the expertise in question and how the witness possesses it.



Expert witnesses are not supposed to be advocates for either side in a criminal trial; they are (ideally) called simply to give context to other evidence in the case, so the trier of fact can weigh it fairly.

Like all witnesses, experts provide testimony based on legal rules governing admissibility (such as relevance, etc.). This testimony then becomes evidence for factfinders to consider when deciding whether the prosecution has proven their legal elements – or whether the defense has introduced reasonable doubt. The difference is that an expert (unlike lay witnesses) can also provide *opinions* on evidence or testimony in the case. For instance, if prosecutors want the jury to hear more about a victim’s behavior during the interview, an expert can be called and qualified, and then the expert witness will render an opinion about these behaviors and how they might be interpreted. This might include behaviors that are consistent with the known impacts of trauma.

Exchange #4: Expert Witness

It might go something like this:

Prosecutor: Dr. Jones, you’ve been qualified as an expert in psychology, with particular focus on how trauma impacts sexual assault victims. I’d like to ask you some questions about how victims might react to such trauma, particularly when relating the details in an interview. Would that be okay?

Expert: Of course, that’s what I’m here to do.

Prosecutor: First, do you know any of the parties in this case? The defendant, or the complaining witness?

¹⁴ See Federal Rules of Evidence 702.



Expert: No, I do not. My job is to educate the jury on typical victim reactions, but it's not to comment on the reactions of any particular person or case.

Prosecutor: Thank you. So, let me ask you a hypothetical question. In an interview with a detective about a sexual assault that happened a few hours earlier, would you expect any particular behavior on the part of the victim? What I mean is, would you expect the victim to be emotional, frightened, or obviously traumatized?

Expert: No, not necessarily. Certainly, they could be. But they might not.

Prosecutor: Would you be surprised if the victim was entirely calm and even lightly conversational, for instance, when describing a sexual attack, even a violent one, that happened recently?

Expert: No, I would not. People react to trauma in many different ways, and that's one of them. There is no right or wrong way.

Prosecutor: Would you be surprised if it was revealed that a victim, even though they were being truthful about the core allegation, initially lied to the investigator about some detail, like what they were drinking or whether they consumed illegal drugs?

Expert: No, not at all. Some victims may withhold information or provide inaccurate information about some detail in the case. Most of the time, this happens because of either shame or fear. Many victims will feel shame if they feel they somehow allowed themselves to be victimized, or if they were taking part in behavior that could be frowned upon, like illegal drug use, or some initial and consensual sexual contact with the suspect. Also, victims are often fearful of either not being believed or not having their case taken seriously if they admit to certain kinds of behaviors.

Prosecutor: Would you be surprised if the victim, while relating details of the crime, got some of those details wrong? For instance, if the victim described the suspect's shirt as red, when actually it was blue?

Expert: Again, no this is not surprising. What we know about the recollection and disclosure of a traumatic event is that it's a process and not a single, uninterrupted and accurate playback. Sometimes they get details wrong, either because they are rushed into answering, or they feel pressured to respond in certain way. Maybe they were presented with leading questions, for example. Or it may be because of the way their brain processed the event, they didn't absorb those details at the time of the assault, or they did remember those details, but now they've faded from memory. Usually over time, accuracy increases, assuming the interactions with the victim are compassionate and competent. What I mean is, they are interviewed by an investigator who is patient, non-judgmental, doesn't ask leading questions, and who

understands the neurobiological effects of trauma on people's perceptions, thoughts, feelings, behaviors, and memories.

Prosecutor: Can you explain?

At this point, the expert could describe some basic neurobiological effects of trauma on behavior and memory, and go on to explain why these common responses are not necessarily indicators of deception. And so on. The defense will then cross-examine the prosecution's expert (and/or call an expert of their own) to undermine these opinions, and thus the credibility of the victim.

Most likely neither the victim's testimony nor the expert's will meet the prosecution's burden of proof on their own. Instead, many sources of evidence are typically needed to corroborate the legal elements, including criminal history checks of the suspect, crime scene diagrams, surveillance videos, 911 calls, other phone calls, text messages, photos and/or videos of the sexual assault. Reports may also be available from the victim's and/or suspect's forensic exam, toxicology analysis, or DNA testing. Investigators will also need to interview the suspect and any witnesses. Prosecutors will then build their case, piece-by-piece, with these various sources of evidence.

Conclusion

Throughout this training bulletin, we have sought to address the question of what type of information might be produced by a trauma-informed interview of a sexual assault victim, and whether it might constitute evidence in a sexual assault case. Our intent is to address possible misunderstandings about whether testimony regarding the neurobiology of trauma – whether it is provided by the victim, investigator, or expert witness – can help prosecutors meet their burden of proof.

As we detail in this training bulletin, such evidence *can* potentially help meet the legal elements of a sexual assault offense. However, it is unrealistic to think that testimony regarding the neurobiology of trauma – *or any other single type or piece of evidence* – will be sufficient to secure a conviction on its own. This is especially true because of the deep-seated misconceptions that factfinders often hold regarding sexual assault and the profound skepticism long directed toward sexual assault victims and their disclosures. Testimony involving the neurobiology of trauma may help to overcome some challenges to the victim's credibility (for example, those based on "counterintuitive behaviors"), but it is unlikely to overcome other credibility challenges, such as victim behaviors that are viewed by many people as high-risk or undesirable, even immoral or illegal. Addressing these challenges will likely require additional evidence, and strategy.

We hope this training bulletin is helpful for investigators and prosecutors seeking to understand this field of knowledge and appropriately utilize these techniques. The neurobiology of trauma is not a silver bullet, or a smoking gun. It is just one more piece of the puzzle in a sexual assault investigation and prosecution.



The 5 Stages of Preparing Your Title IX Investigative Report



Jean M. Hobler, Esq., P.C.

Attorney
jmh@hobleresq.com



1

1

learning
OUTCOME

*After participating, you
will be able to apply a
five-stage process to
prepare and write your
final investigative report.*

2

2

#1

Regulations & Reports: An Introduction

3

3

New Regulations, New Report Considerations

(ii) Require an objective evaluation of all relevant evidence — including both inculpatory and exculpatory evidence — and provide the credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

§ 106.45(b)(1)(ii)

Definition of *inculpatory*

: implying or imputing guilt : tending to incriminate or inculcate
// an *inculpatory* statement

Definition of *exculpate*

transitive verb

: to clear from alleged fault or guilt

4

4

New Regulations, New Report Considerations

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

§ 106.45(b)(1)(iii)

5

New Regulations, New Report Considerations

investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

§ 106.45(b)(1)(iii)

6

New Regulations, New Report Considerations

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence,

§ 106.45(b)(1)(iii)

7

Relevance

FRE 401 – 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.

REGS – layperson applying logic and common sense* - decision-maker looking for plausibility and consistency without prejudging

FRE 401 – low threshold for admissibility

REGS - permit a wide universe of evidence that may be “relevant” (and thus not subject to exclusion)

8

Rape Shield Exceptions

§ 106.45(b)(6)(i) -

Sexual behavior *questions and evidence* are IRRELEVANT except:

1. are offered to prove that someone other than the respondent committed the conduct alleged by the complainant;
2. 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

New Regulations, New Report Considerations

(iv) Include 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;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard,

§ 106.45(b)(1)(iv), (vii)

New Regulations, New Report Considerations

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

§ 106.45(b)(5)(ii)

11

New Regulations, New Report Considerations

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

§ 106.45(b)(5)(vi)

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for the review and written response.

§ 106.45(b)(5)(vii)

12



The Report Audience

- Who do you write for?
- What are your goals in drafting the report for the audience(s)?

13

How to Approach the Report



ai ACADEMIC
IMPRESSIONS

14

14



15



16

#2

Activity: What Makes a Good Report?

17

17

ACTIVITY

Review the report provided, answer the following questions:

1. What sections in the report are appropriately included?
2. What information is not included that should be there?
3. Is the report easy to follow?
4. What policy violations are at issue in this report?
 - a. What information in the report relates to violation 1 (whichever violation you identify first)?
 - b. What information in the report relates to violation 2 (whichever violation you identify second, if any)?
5. How did the investigation proceed?
6. What is the result of the investigation?

18

18



ACADEMIC
IMPRESSIONS

#3

Elements and Format of a Report (and Appendices)

19

19



Report Format

INVESTIGATION REPORT PREPARED FOR

Texas University

Issue: Stalking, Retaliation
Reporting Party: JP
Responding Party: EB
Report Date: October 3, 2019

Investigation Performed & Report Prepared by

HOBLER

ACADEMIC
IMPRESSIONS

20

20



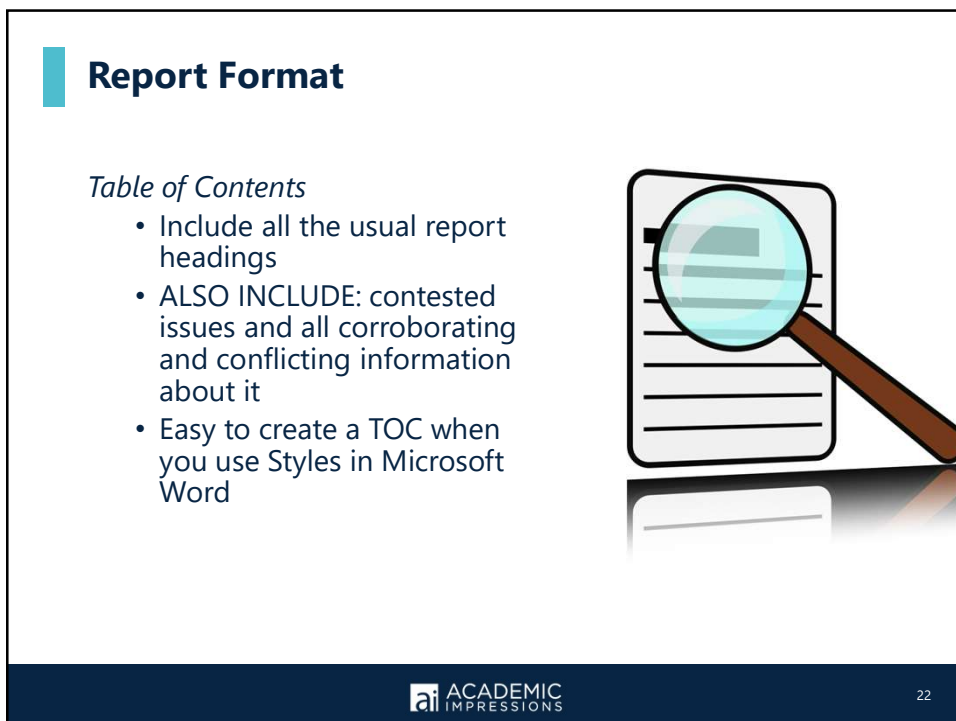
POLL



What is the longest report (page length) you've ever written on an investigation?

21

21




Report Format

Table of Contents

- Include all the usual report headings
- ALSO INCLUDE: contested issues and all corroborating and conflicting information about it
- Easy to create a TOC when you use Styles in Microsoft Word

22

22



Report Format

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis


23

Report Format

- **Executive Summary**
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis

Executive Summary: Example

JH is a female first year student who filed a reporting indicating that SC, a male third year student, made deliberate sexual contact with her without her consent on three occasions. As reported, the first was in JH's dorm room, the second was in a hallway in the STEM building, and the third was at a party in the middle of a group of dancers.

 ACADEMIC IMPRESSIONS

24

24

Report Format

- **Executive Summary**
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence
 - Subheadings depend on events in your case
 - Analysis
- Executive Summary: Example
- JH and SC are tenure track professors in the underwater basket-weaving department, which currently has no tenured professors due to faculty retirements. SC is a year ahead of JH in tenure track and is the department chair. JH alleged that SC removed responsibilities from him and changed department policies to his disadvantage in retaliation for a prior report by JH that SC engaged in unprofessional conduct, an allegation that was substantiated in a prior investigation.

25

Report Format

- Executive Summary
- **Background**
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Background
 - General Background
 - Who's who in re: the complaint itself (major players, not all witnesses)
 - Complaint
 - Summarize what the complaint said
 - Summarize any related complaints
 - Include timing
 - Investigation (detail coming up)
 - Evidence Collection (detail coming up)

26

Report Format

- Executive Summary
- **Background**
 - General Background
 - Complaint
 - **Investigation**
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Background
 - General Background (covered)
 - Complaint (covered)
 - Investigation
 - Who was interviewed, when, who they are, if they haven't already been introduced
 - Did they provide you any hard evidence (e.g., video, emails, text messages, etc.)?
 - Were interviews recorded? Transcribed?
 - Evidence Collection (detail coming up)

27

Report Format

- Executive Summary
- **Background**
 - General Background
 - Complaint
 - Investigation
 - **Evidence Collection**
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Background
 - General Background/Complaint/Investigation (covered)
 - Evidence Collections and References
 - Where is the evidence obtained from different sources?
 - How is it organized?
 - How is it referenced in the report?
 - Audio: (JH [date of interview], 1:41)
 - Memo (JH Memo, at p. 2)
 - Memo (JH Memo, at ¶ 3)
 - Is there a transcript of any recorded audio?
 - Are there memoranda of interviews and, if so, where do they live? When and how were they produced?

28

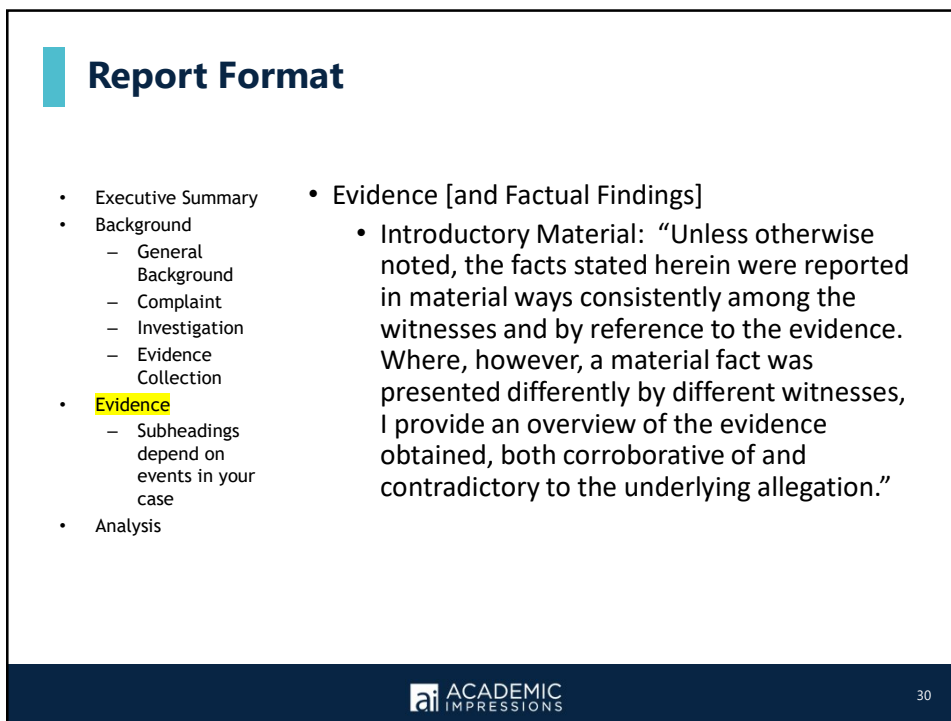


POLL

Where do you include your interview summaries?

29

29



Report Format

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- **Evidence**
 - Subheadings depend on events in your case
- Analysis
- Evidence [and Factual Findings]
 - Introductory Material: “Unless otherwise noted, the facts stated herein were reported in material ways consistently among the witnesses and by reference to the evidence. Where, however, a material fact was presented differently by different witnesses, I provide an overview of the evidence obtained, both corroborative of and contradictory to the underlying allegation.”

ACADEMIC IMPRESSIONS

30

30

Report Format

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Report Conclusion
- Evidence
 - Start from the beginning
 - Chronology or Chronological?
 - Can start with some background if that is relevant.
 - “JH and SC have a shared, 150-person class, but otherwise did not know each other before the first incident reported.”
 - Use subheadings to guide the reader through the events
 - Pre-incident Interactions Between JH and SC
 - The First Reported Incident: Unwanted Touching on X Date

31

Report Format

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Report Conclusion
- Evidence
 - Set forth in neutral, narrative form
 - Acknowledge conflicts in the varying accounts
 - “JH stated that she and SC had never met before the first incident.”
 - “By contrast, SC indicates he and JH sat next to each other in their shared class and regularly chatted before and after class. On one occasion a week before the reported incident, SC said he and JH got coffee at Insight Roasters.”

32

Report Format

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Report Conclusion

33

Write Like a Lawyer

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence
 - Subheadings depend on events in your case
 - Analysis
- IRAC (law school)
 - IRF (Title IX Investigation Report)
 - Issue
 - Rule
 - Facts relating to Issue & Specific Rule by Element
 - Where all versions of events materially agree, NBD
 - Where they diverge, address contradictory and corroborative evidence

34

Write Like a Lawyer

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- What is the Issue in this case?

35

Write Like a Lawyer

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- What is the rule in this case?
 - Stalking is the repeated following, watching or harassing of a specific person that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress. [Cite to policy.]

36

Write Like a Lawyer

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- **Analysis**
 - How do the facts in this case **relate** to the rule in this case?
 - Stalking is the repeated following, watching or harassing of a specific person...
 - Facts supporting or contradicting this, with references to evidence
 - ...that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress.
 - Facts supporting or contradicting this

37

KEY POINT

Don't make your reader search out key information. If a piece of tangible evidence is key, put it right in the report.

38

Example

Jane alleged that Eliza doctored a photograph taken while on vacation to make Jane appear haggard and unwell, using that photograph on social media to malign Jane. A copy of the social media post photograph provided by a witness is on the left, below, and the original photograph, retrieved from Jane's phone is on the right, below.



(cite to evidence.)

39

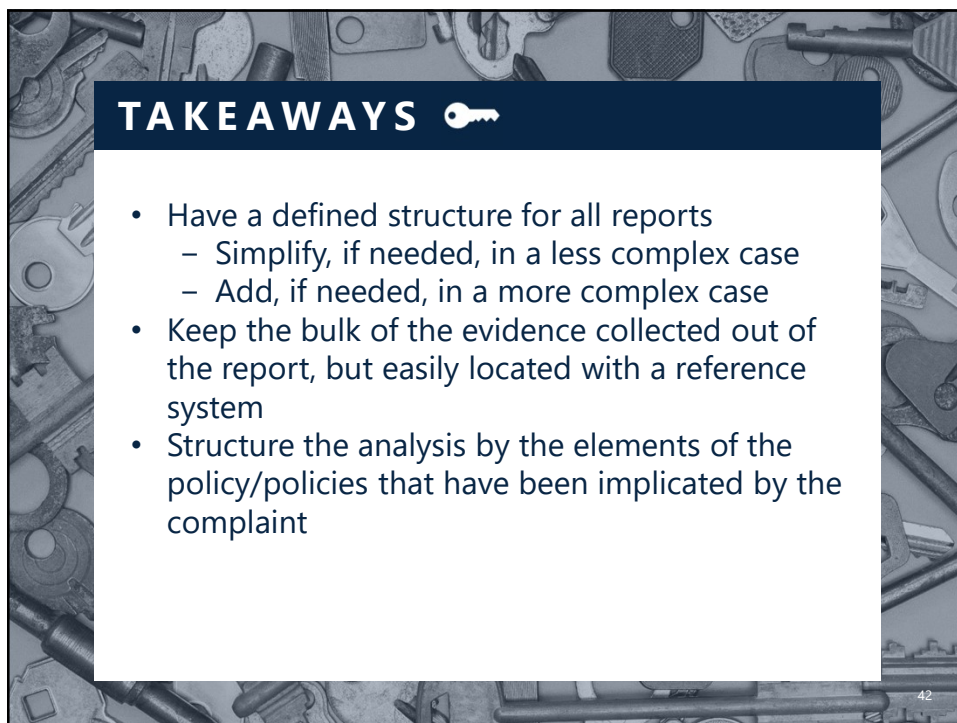
Report Format

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence
 - Subheadings depend on events in your case
- Analysis
- Analysis Structure in Report
 - Issue (e.g., stalking)
 - Rule overview
 - Rule, first element
 - Facts relating to Rule, first element
 - Rule, second element
 - Facts relating to Rule, second element

40



41



42



#4

Outlining the Corroborations & Contradictions in Evidence


43

43

The Regulation

(ii) Require an objective evaluation of all relevant evidence — including both inculpatory and exculpatory evidence — and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

§ 106.45(b)(1)(ii)



44

44

Must Have Structure

Where do you get a disciplined approach to determining whether the information you've obtained is accurate? Complete?

45

Every Court System Has a Credibility Instruction

The trick is to apply the structure consistently.

Every time

To all evidence

Without bias

And to look to how issues are illuminated by the contradictions and corroborations of all evidence obtained.

46

Ninth Cir. Jury Instruction 1.14

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Ninth Cir. Jury Instruction 1.14 (continued)

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

Ninth Cir. Jury Instruction 1.14 (continued)

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

What Aspect of Credibility?

- Oath — How seriously are they taking their role in investigation?
- Perception
- Recollection
- Communication
- Bias/Interest/Motive
- Consistency Over Time

What are we missing in this
corroboration and contradiction
analysis?

Credibility of Non-Witness Evidence

- Primary evidence
 - Authentic, relevant, tangible evidence
 - Firsthand, uninvolved, unimpaired witness reports
 - Surveillance video
- Secondary or tertiary
 - Secondhand reports (rumors)
 - Relevant, tangible evidence that can't be authenticated
- "Anti-evidence"
 - Fabricated or tainted evidence

51

Testimony + Non-Testimony Evidence = Credibility



52



POLL

Is circumstantial evidence less credible than direct evidence?


53

53

Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

 ACADEMIC IMPRESSIONS

54

54

Putting it Together

Factual Issue:

1. What did person 1 say about the issue?
 - a. Assess person 1's testimony with evidence received from that person over time (testimony or 'hard' evidence).
 - b. Assess person 1's testimony with testimony from others (consistent/inconsistent?).
 - c. Assess person 1's testimony with evidence received from others (e.g., video, documents, etc.).
2. Repeat with all witnesses or parties who addressed the issue.

55

How does this affect your report?

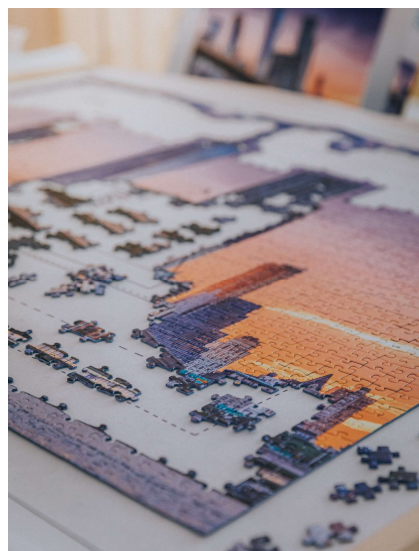
As the investigator, you have a command of the facts that your decision-making panel can never approach.

You will never have all the pieces of the puzzle.

But your job is to put the pieces together in your report, connecting them as well as you are able.

Even without all the pieces, the picture may be clear.

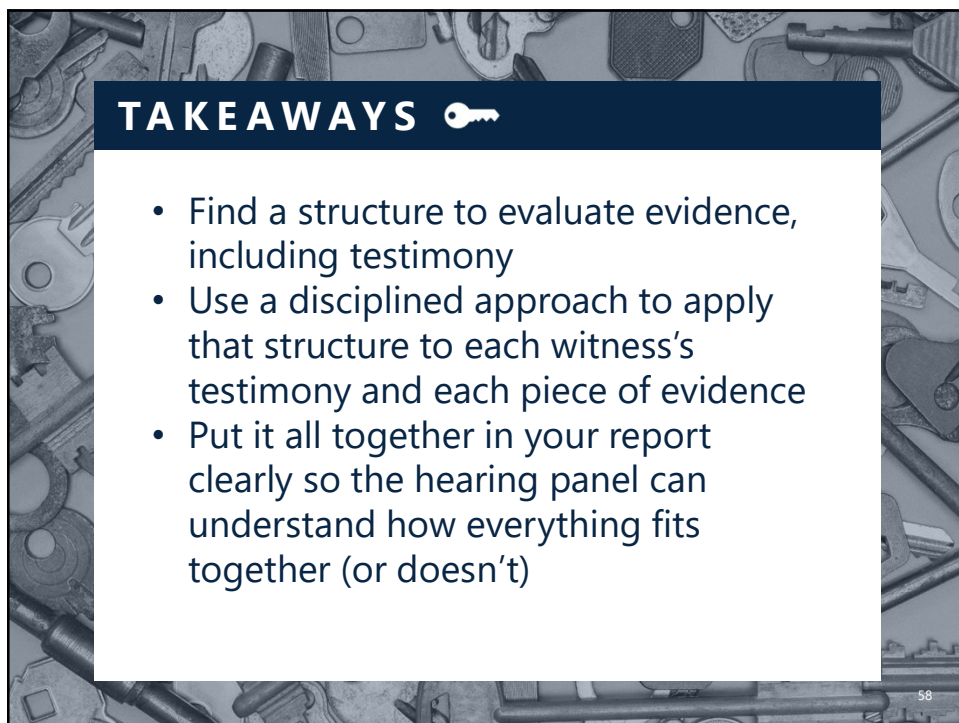
Up to the panel to determine what the picture shows.



56



57



58



#5

Relating Your Investigation to Your Report

59

59

ACTIVITY

In your breakout room, please reference the handout uploaded in the Chat:

1. Identify the elements of the policy violation.
2. Identify the facts available to you. Are they relevant?
3. Assess those facts versus your credibility structure.
4. Determine what else you need to put the whole credibility picture together.

60

60

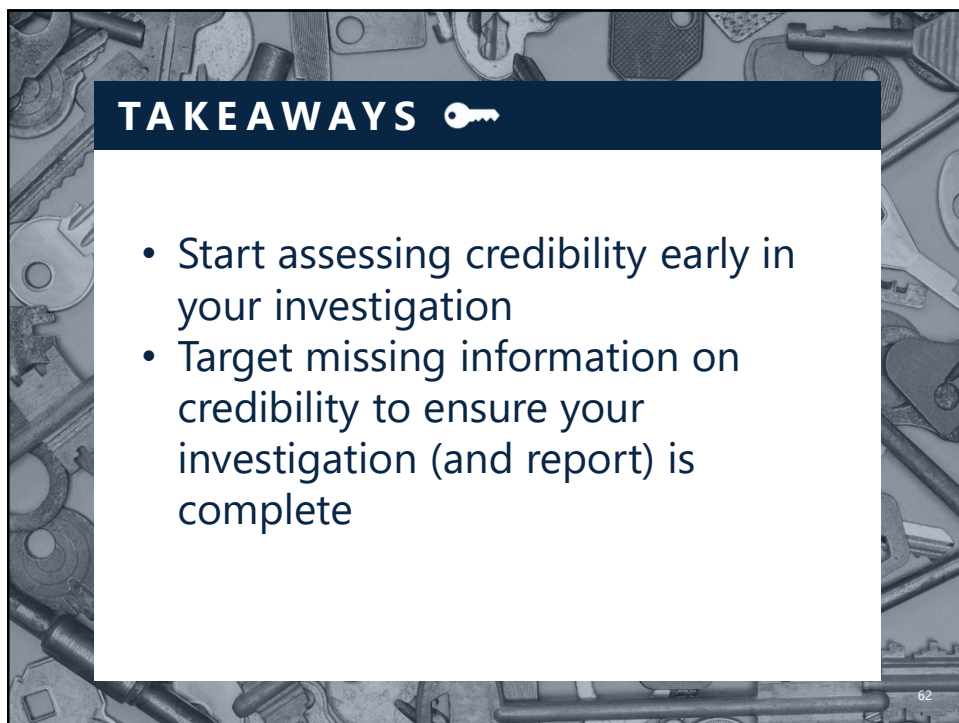
A presentation slide with a background of various lightbulbs. A dark blue rectangle on the left contains the word "ACTIVITY" in white, with a lightbulb icon below it. To the right, a white rectangle contains the text "Large Group Share Out and Discussion".

ACTIVITY

Large Group Share Out and Discussion

61

61

A presentation slide with a background of various tools. A dark blue header bar at the top contains the word "TAKEAWAYS" in white, followed by a key icon. Below this, a white rectangle contains a bulleted list of two points.

TAKEAWAYS 🔑

- Start assessing credibility early in your investigation
- Target missing information on credibility to ensure your investigation (and report) is complete

62

62



63



64

10-Step Investigation Model



1. Identify Violations and Elements
2. Gather Information
3. Determine Interview Logistics
4. Review and Outline
5. Developing Questions
6. Using Documents
7. Starting the Interview
8. Questioning
9. Wrapping It Up
10. Specific Techniques/Situations

WHEN DO YOU START YOUR REPORT?

WHEN DO YOU REVISE YOUR REPORT?

65

5 Stages of Investigation Report Drafting



1. During investigation (bulk of fact writing)
2. At end of investigation (bulk of analysis)
3. Internal review and revision
4. Managing party/advisor review
5. Editing and response to party comments

66

Example – Post Complaint/ Pre Investigation Report Draft

Relevant Standards

the repeated following, watching or harassing

- RP in CP's dorm (complaint)
- RP at dining hall (complaint)
- RP at (next location)

of a specific person

- all re CP (complaint)

that would cause a reasonable person to

(a) fear for their safety or the safety of others, or

(b) suffer substantial emotional distress

- confrontation at dining hall (complaint)

67

You've "Finished" Your Investigation, Now What?

Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

§ 106.45(b)(5)(vi)

68

Example – Post Investigation Report Draft

First Issue: Stalking

Relevant Standards

the repeated following, watching or harassing

- RP at dining hall (complaint)
- Date, dining hall, CP at cashier (CP int, RP int)
- RP appeared, reached around CP inserted her own access card, stated “I’m buying breakfast for my good friend today!” (CP into. RP agrees but contests sudden & tone, cashier corroborates sudden & tone/CP)
- CP shouted “What are you doing?!?” Why can’t you just leave me alone?” (CP into., RP into, cashier into.)
- RP shouted “ungrateful bitch! Why can’t we go back to the way we were? What do I have to do to make you understand I love you and I’m sorry?! Why are you torturing me?!?” (CP into, RP contests tone and profanity, cashier into corroborates CP.)
- RP then left the hall rapidly, slamming the door open on her way out (CP into, RP

69

As you’re awaiting party comments, start converting your bullet points to English

Get a complete draft of all sections, *except* analysis.

70

As you're awaiting party comments, start converting your bullet points to English

General principles:

1. Keep it simple.
2. Keep it direct.
3. Proceed chronologically.
4. Do not include every fact you've obtained, only all relevant facts.

71

Relevance

FRE 401 – 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.

REGS – layperson applying logic and common sense* - decision-maker looking for plausibility and consistency without prejudging

FRE 401 – low threshold for admissibility

REGS - permit a wide universe of evidence that may be "relevant" (and thus not subject to exclusion)

72

As you're awaiting party comments, start converting your bullet points to English

Point of View

1. First Person:
"I interviewed the Complainant on X date."
"Your investigator interviewed the Respondent on Y date."
2. Second person: "You did X." Not an effective writing technique generally – don't try it outside of fiction.
3. Third person: "Complainant and Respondent went to a party at the Theta Beta house with a group of approximately 10 friends from the Psychology program. (Cite to evidence)"

73

As you're awaiting party comments, start converting your bullet points to English

Rewrite the below to remove the investigator from the story, except where called for:

I asked Ruth if she had ever followed George to the dining hall. She responded she had. I asked her to tell me about each time. She told me on June 1, it was his birthday, and she wanted to surprise him. I asked her how she knew it was his birthday; she told me he texted her the date and how excited he was to celebrate.

I asked her to provide me that text and she said she would do so that day. I have never received the text, although I sent a follow-up request several days later.

Ruth acknowledged following George to the dining hall on June 1, indicating it was his birthday and she wanted to surprise him. She indicated George had texted her that June 1 was his birthday and that he was "excited to celebrate with her."

I asked her to provide me that text and she said she would do so that day. I have never received the text, although I sent a follow-up request several days later.

74

As you're awaiting party comments, start converting your bullet points to English

Passive voice

"The beer was consumed by the end of the evening."

The partygoers drank the entire keg that night.

"Clothing got torn."

Respondent grabbed Complainant's clothing, which was torn during the struggle.

"Bruising occurred."

After the struggle, Respondent had a bruise where Complainant indicated she pushed him away.

75

As you're awaiting party comments, start converting your bullet points to English

Sentence structure - simple.

Complainant went to the party. S/he had two beers. She did not feel intoxicated. She usually drank six or more beers before feeling intoxicated.

Respondent brought Complainant her third beer. She had "one or two pulls" from the bottle. She then felt "very woozy." She does not remember anything else from that night. Her first recollection is waking up at 7 a.m.

Sentence structure, varied.

Complainant went to the party, where she had two beers. She did not feel intoxicated, reporting that it takes about six beers before she feels intoxicated.

Respondent brought Complainant her third beer and, immediately upon having "one or two pulls" from the bottle, she felt "very woozy." She does not remember anything else until waking up at 7 a.m.

76

As you're awaiting party comments, start converting your bullet points to English

Provide a transition to the next topic/paragraph.

No transition

... Complainant next remembered waking up at 7 a.m. She felt bruised and sore and extremely groggy.

The doctor found torn skin on Complainant's wrist and [etc.].

Transition

... Complainant next remembered waking up at 7 a.m. She felt bruised and sore and extremely groggy, and was so concerned she went straight to the emergency room for an examination.

The doctor there found torn skin on Complainant's wrist and [etc.].

As you're awaiting party comments, start converting your bullet points to English

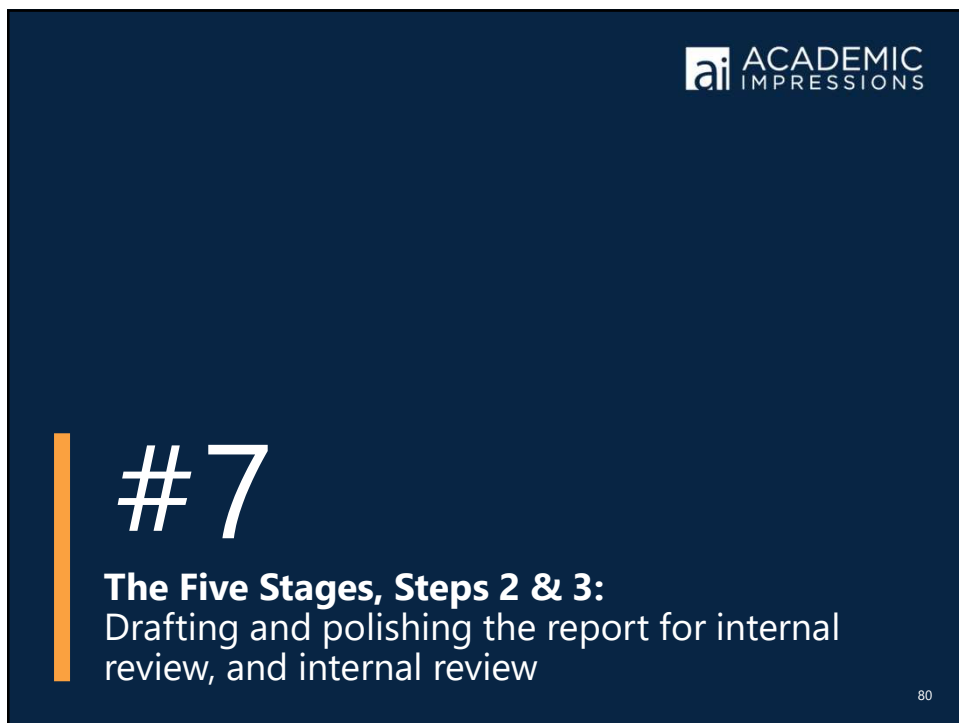
Define unfamiliar words or words used in a specific way

State how you will name specific people with similar names

Use titles if helpful to remind the reader who you're talking about (e.g., Professor Hobler versus Ms. Hobler).

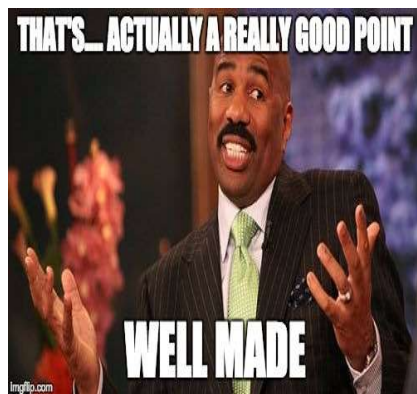


79



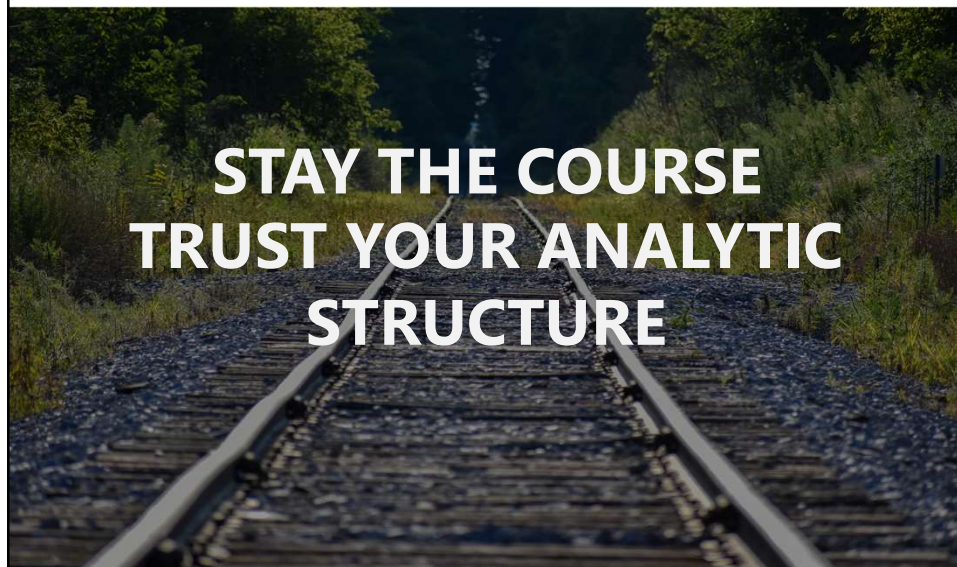
80

Party Evidence Comments & Your Analysis



81

Party Evidence Comments & Your Analysis



82

Finalize Your OWN Analysis



83

Complete Your Analysis Using All Corroborations & Contradictions in the Evidence

- Issue
- Rule
- Analysis

84

Example

Analysis: First Issue, Stalking

Repeated following, watching, or harassing of a specific person

The incidents complained of include five instances over five weeks of RP being in the same location as CP. Specifically, [list replicated from above.] As a general matter, RP indicates that there was good reason for her to be in the locations that had nothing to do with CP's presence, essentially that the incidents were a result of coincidence rather than intent. (Cite to evidence.) The corroborative and contradictory evidence on this point is summarized as follows:

First incident, date, "Unexplained" presence in CP's dorm. In CP's dorm, RP indicated that she did have friends in the dorm who she had arranged to meet in a common area near CP's room. (cite to evidence) When asked to identify these friends, RP declined to do so. (cite to evidence) When asked the purpose of the meeting with these unidentified individuals, RP declined to provide detail. (cite to evidence) I asked RP to identify any witnesses, documents, or other evidence that could corroborate RP's in-dorm friendships, or presence on the complained-of date. (Cite to evidence.) She indicated she could provide those after the [interview](#), and would go right back to her dorm to collect and send the information to me by e-mail. I did not receive anything that day. (Cite to evidence.) I followed up by e-mail asking her for the information on [date 1, date 2, date 3]. I never received a response to my inquiries. (Cite to evidence.)

Second incident, date, Encounter at Dining Hall. Dining Hall entrances and exits are monitored by video-camera. (Cite to evidence.) Video evidence from the day in question shows RP sitting on a bench in an area near Dining Hall's main entrance. (Cite to evidence.) CP approaches the entrance with her back toward RP, and does not appear to look in RP's direction. (Cite to evidence.) RP stands up as CP enters the hall, waits for approximately 25 seconds, then enters through the same door. (Cite to evidence.)

85

Inferences – don't make them. Lay the foundation for them.

Inference:

The witnesses said no one had more than two beers at the party, but they must have all been lying because the keg was empty by the end of the night.

Foundation for inference:

Although no witness admitted to drinking more than 2 beers, the keg was full at the beginning of the party and by the end of the evening it was empty. The average keg of beer contains approximately 15.5 gallons or 165 12-ounce servings of beer. Thus, a keg would empty with 82 to 83 persons present, each having 2 beers. There were 40 present, of whom approximately 10 were not drinking. That averages 5 and ½ 12 ounce servings of beer per drinker to empty the keg by the end of the evening.

86

Final Edit Before Internal Review

Never give your report to someone else without:

1. Running a spell check
2. Running a grammar check
3. Printing it out and editing it on hard copy.
 - a. Look for large blocks of unbroken text
 - b. Look for headings/guideposts for the reader as to where they are in the document. Add if necessary.

87

Internal Review

- Your institution will have its own process
- Keep track of the version that went out
- Track the comments that come back
- Approach comments with an open mind – goal is best possible reflection of the facts and the investigation, not personal glory
- If you disagree with comments, best practice is to talk about them, not start an e-mail debate
- Consolidate all comments in a single, new version to disseminate to the parties for review/comment.

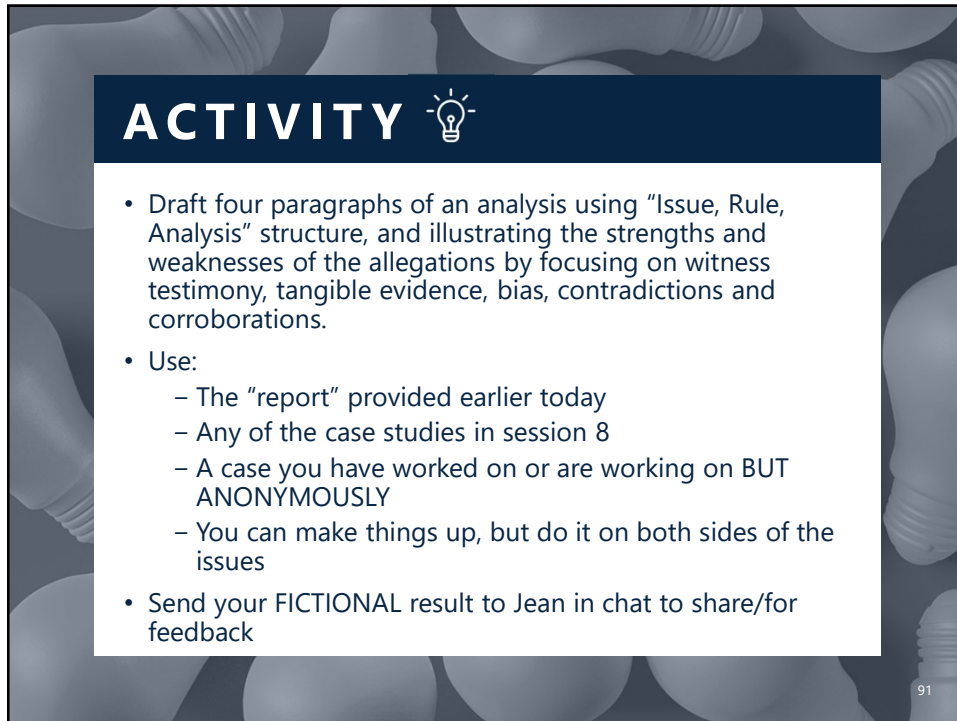
88



89



90

The slide features a dark blue header with the word "ACTIVITY" in white, bold, sans-serif font, followed by a white lightbulb icon. The background of the slide is a collage of various lightbulbs in different shades of gray and blue. The main content is a white rectangular box containing a bulleted list of instructions.

ACTIVITY

- Draft four paragraphs of an analysis using "Issue, Rule, Analysis" structure, and illustrating the strengths and weaknesses of the allegations by focusing on witness testimony, tangible evidence, bias, contradictions and corroborations.
- Use:
 - The "report" provided earlier today
 - Any of the case studies in session 8
 - A case you have worked on or are working on BUT ANONYMOUSLY
 - You can make things up, but do it on both sides of the issues
- Send your FICTIONAL result to Jean in chat to share/for feedback

91

91

The slide has a background of various gray and blue sticky notes scattered across a light gray surface. A dark blue rectangular box on the left contains the word "CHAT" in white, bold, sans-serif font, with a white speech bubble icon below it. To the right of this box is a white rectangular box containing the text "Large Group Share Out and Discussion" in dark blue, bold, sans-serif font.

CHAT

Large Group Share Out and Discussion

92

92

#9

The Five Stages, Step 4: Review by Parties and Version Control

93

93

Party Review of Investigative Report

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

§ 106.45(b)(5)(vii)

94

94

Format of Review Version

| | |
|--|--|
| <p>7. Posting information or spreading rumors about the victim on the internet, in a public place, or by word of mouth.</p> <p>8. Obtaining personal information about the victim by accessing public records, using internet search services, hiring private investigators, going through the victim's garbage, following the victim, contacting victim's friends, family work, or neighbors, etc.</p> <p>(depending on the issue, if the definitions are not entirely clear in university policy, I would obtain and include case law on point.)</p> <p>Analysis: First Issue, Stalking</p> <p>Repeated following, watching, or harassing of a specific person.</p> <p>The incidents complained of include five instances over five weeks of RP being in the same location as CP. Specifically, (list replicated from above.) As a general matter, RP indicates that there was good reason for her to be in the locations that had nothing to do with CP's presence, essentially that the incidents were a result of coincidence rather than intent. (Cite to evidence.) The corroborative and contradictory evidence on this point is summarized as follows:</p> <p>First incident, date, "Unexplained" presence in CP's dorm. In CP's dorm, RP indicated that she did have friends in the dorm who she had arranged to meet in a common area near CP's room. (cite to evidence) When asked to identify these friends, RP declined to do so. (cite to evidence) When asked the purpose of the meeting with these unidentified individuals, RP declined to provide detail. (cite to evidence) I asked RP to identify any witnesses, documents, or other evidence that could corroborate RP's in-dorm friendships, or presence on the complained-of date. (Cite to evidence.) She indicated she could provide those after the interview, and would go right back to her dorm to collect and send the information to me by e-mail. I did not receive anything that day. (Cite to evidence.) I followed up by e-mail asking her for the information on (date 1, date 2, date 3). I never received a response to my inquiry. (Cite to evidence.)</p> <p>Second incident, date, Encounter at Dining Hall. Dining Hall entrances and exits are monitored by video-camera. (Cite to evidence.) Video evidence from the day in question shows RP sitting on a bench in an area near Dining Hall's main entrance. (Cite to evidence.) CP approaches the entrance with her back toward RP, and does not appear to look in RP's direction. (Cite to evidence.) RP stands up as CP enters the hall, waits for approximately 25 seconds, then enters through the same door. (Cite to evidence.)</p> <p>[Other, factual stuff about what happened.]</p> <p>Page 6</p> | <p>7. Posting information or spreading rumors about the victim on the internet, in a public place, or by word of mouth.</p> <p>8. Obtaining personal information about the victim by accessing public records, using internet search services, hiring private investigators, going through the victim's garbage, following the victim, contacting victim's friends, family work, or neighbors, etc.</p> <p>(depending on the issue, if the definitions are not entirely clear in university policy, I would obtain and include case law on point.)</p> <p>Analysis: First Issue, Stalking</p> <p>Repeated following, watching, or harassing of a specific person.</p> <p>The incidents complained of include five instances over five weeks of RP being in the same location as CP. Specifically, (list replicated from above.) As a general matter, RP indicates that there was good reason for her to be in the locations that had nothing to do with CP's presence, essentially that the incidents were a result of coincidence rather than intent. (Cite to evidence.) The corroborative and contradictory evidence on this point is summarized as follows:</p> <p>First incident, date, "Unexplained" presence in CP's dorm. In CP's dorm, RP indicated that she did have friends in the dorm who she had arranged to meet in a common area near CP's room. (cite to evidence) When asked to identify these friends, RP declined to do so. (cite to evidence) When asked the purpose of the meeting with these unidentified individuals, RP declined to provide detail. (cite to evidence) I asked RP to identify any witnesses, documents, or other evidence that could corroborate RP's in-dorm friendships, or presence on the complained-of date. (Cite to evidence.) She indicated she could provide those after the interview, and would go right back to her dorm to collect and send the information to me by e-mail. I did not receive anything that day. (Cite to evidence.) I followed up by e-mail asking her for the information on (date 1, date 2, date 3). I never received a response to my inquiry. (Cite to evidence.)</p> <p>Second incident, date, Encounter at Dining Hall. Dining Hall entrances and exits are monitored by video-camera. (Cite to evidence.) Video evidence from the day in question shows RP sitting on a bench in an area near Dining Hall's main entrance. (Cite to evidence.) CP approaches the entrance with her back toward RP, and does not appear to look in RP's direction. (Cite to evidence.) RP stands up as CP enters the hall, waits for approximately 25 seconds, then enters through the same door. (Cite to evidence.)</p> <p>[Other, factual stuff about what happened.]</p> <p>Page 6</p> |
|--|--|

95

Format of Review Version – to Assist Feedback

1. post said "Losing sleep over the lies you told the cops about me? Guess you have a choice
2. now. I can help make your life better again or let you rot. LMAO bye." (Citation to evidence.)
3. W1 saw the post, too, and commented back, "Dude, stalker, uncool." (Citation to
4. evidence.) CP had blocked RP on all social media, so she did not see the post until W2
5. showed her a screen shot of it. (Citation to evidence.) By the time CP looked again, the post
6. was gone. (Citation to evidence.) CP and W1 both recognized the picture as one RP had
7. taken while they were in Mexico, but CP was healthy in appearance and reality in the
8. original. (Citation to evidence.)

9. CP immediately went back to her RA and the police and filed a Title IX report.
10. (Citation to evidence.) Texas University staff sent RP a notice of the report and investigation
11. with a standard reminder that the process was confidential and should be shared only with
12. specific individuals. (Citation to evidence.) Two days later, W1 showed CP RP's Instagram,
13. which had a picture of the notice with "Happy now, CP? What else will you do to ruin my
14. life?" written across it. (Citation to evidence.)

15. **Analysis**

16. **First Issue: Stalking**

17. **Relevant Standards**

18. According to Texas University policy, stalking is:

19. the repeated following, watching or harassing of a specific person
20. that would cause a reasonable person to (a) fear for their safety or
21. the safety of others, or (b) suffer substantial emotional distress.

22. Stalking can include:

23. 1. Repeated, unwanted, intrusive, and frightening
24. communications from the perpetrator by phone, mail,
25. and/or email.

26. 2. Repeatedly leaving or sending victim unwanted items,
27. presents, or flowers.

28. 3. Following or laying in wait for the victim at places such
29. as home, school, work, or recreation place.

30. 4. Making direct or indirect threats to harm the victim, the
31. victim's children, relatives, friends, or pets.

32. 5. Damaging or threatening to damage the victim's
33. property.

34. 6. Harassing victim via the internet, social networking
35. sites, or other electronic means.

Page 7

Adding line numbers (for purposes of review) can help when parties/advisors provide feedback.

May want to consider it (or paragraph numbers or some other protocol) in general.

96

Format of Review Version – to Assist Feedback

1 post said "Losing sleep over the lies you told the cops about me?" Guess you have a choice
2 now. I can help make your life better again or let you rot. LMK bye." (Citation to evidence.)
3 W1 saw the post, too, and commented back, "Dude, ~~stalking~~ uncool." (Citation to
4 evidence.) CP had blocked RP on all social media, so she did not see the post until W2
5 showed her a screen shot of it. (Citation to evidence.) By the time CP looked again, the post
6 was gone. (Citation to evidence.) CP and W1 both recognized the picture as one RP had
7 taken while they were in Mexico, but CP was healthy in appearance and reality in the
8 original. (Citation to evidence.)

9 CP immediately went back to her RA and the police and filed a Title IX report.
10 (Citation to evidence.) Texas University staff sent RP a notice of the report and investigation
11 with a standard reminder that the process was confidential and should be shared only with
12 specific individuals. (Citation to evidence.) Two days later, W1 showed CP RP's Instagram,
13 which had a picture of the notice with "Happy now, CP? What else will you do to ruin my
14 life?" written across it. (Citation to evidence.)

15
16 **First Issue: Stalking**

17 **Relevant Standards**

18 According to Texas University policy, stalking is:
19 the repeated following, watching or harassing of a specific person
20 that would cause a reasonable person to (a) fear for their safety or
21 the safety of others, or (b) suffer substantial emotional distress.

22 Stalking can include:

- 23 1. Repeated, unwanted, intrusive, and frightening
24 communications from the perpetrator by phone, mail,
25 and/or email.
- 26 2. Repeatedly leaving or sending victim unwanted items,
27 presents, or flowers.
- 28 3. Following or ~~laying~~ in wait for the victim at places such
29 as home, school, work, or recreation place.
- 30 4. Making direct or indirect threats to harm the victim, the
31 victim's children, relatives, friends, or pets.
- 32 5. Damaging or threatening to damage the victim's
33 property.
- 34 6. Harassing victim via the internet, social networking
35 sites, or other electronic means.

Page 7

Jean Hobler

To: Rabia Khan Harvey
Subject: Feedback from Respondent re Investigative Report

Dear Ms. Harvey:

Thank you for the opportunity to review the investigative report in this case. I have the following feedback on the report:

Page 7, lines 18-21: The definition of stalking correctly states the institution's policy, but does not reflect the full rule as reflected in the law. Specifically, the definition should include [blah blah blah] based on the case Person v. University.

Best,

J/H

HOBLER
JEAN M
Esquire, a Professional Corporation

**ai ACADEMIC
IMPRESSIONS**

97

97

**ai ACADEMIC
IMPRESSIONS**

#10

The Five Stages, Step 5: Editing and Response to Party Comments

98

98

What to do With Party Comments?



Options

1. You decide to make no changes to the report
2. You decide to make some changes to the report, but they're non-substantive
3. You decide to make substantive changes to the report
4. Some mix of the above

99

No Changes (or Not All Changes): When and How to Compose Your Response

- You can expect the hearing panel, or the parties, or both to want to know why you did not change your report in response to party comments.
- Come up with a policy/procedure of how to do this.
 - E-mail to your supervisor?
 - Response to party comments sent to both parties?
 - Internal memo for use at hearing when you are called to testify about it?

100

What about nitpicks?

The sampling method I ^{used in} use on this study was fair, but there are a few things I would improve ⁱⁿ the way of sampling. First of all, I used the systematic sampling method ^{for} from only one particular type of a share, i.e., "Investment Trusts". It caused data bias, because I actually chose companies ^{offering} from one type of share. At the beginning, I said that I investigated whether a ^{high-priced} high price of share makes more profit than a ^{low-priced} low price of one. I meant that the share is not only "Investment Trusts" ^{shares} share but also other types of shares. However, I investigated only "Investment Trusts" shares as a sample. This is a critical error. To solve this problem, I could use the ^{stratified} stratified sampling method to collect sample data. However, in this case, I have to know the number of all companies on the newspaper ^{just by} counting ^{them} from top to bottom of the list (there would be more than 1000 companies). If I could do this, the ^{stratified} stratified sampling method would provide me with a much fairer opportunity of getting ^{a sample} a sample of data from all different types of ^{shares} a share than the systematic sampling method did. Secondly, I could choose more than 54 sets of data as ^{are} ^{the} the

101

When to Revise Substantively



102

Hybrid Model



ai ACADEMIC
IMPRESSIONS

103

103

QUESTIONS?

ai ACADEMIC
IMPRESSIONS

104

104

Thank you!

Please remember to complete the [event evaluation](#).
Your comments will help us continually improve the
quality of our programs.

*Please look for the evaluation link in the Chat Box and it will also be
emailed to you.*



Association of
Title IX Administrators

Investigation Report Writing for Higher Education

Training & Certification Course



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

The slide features decorative curved lines in the top-left and bottom-right corners. These lines are composed of multiple overlapping, semi-transparent bands in shades of blue and purple, creating a sense of depth and movement.

CONTENT ACKNOWLEDGEMENT

TNG Consulting would like to thank April Paul Baer, Ed.D., Regina Curran, J.D., and Mandy Hambleton, M.S. for creating the foundational content for this training and granting TNG permission to use it for purposes of this course.

Why this topic?

“It’s a process of asking questions and then pruning and splicing and editing the transcribed answers, and it takes a tremendous amount of time and labor.”

– William Zinsser

COURSE OBJECTIVES

After completing this training, attendees will be able to:

- Identify words or phrases in investigation reports that indicate bias or a non-neutral tone
- Understand how to effectively incorporate direct quotations into investigation reports
- Separate the applicable information for each section of an investigation report
- Evaluate the use of appropriate tone, voice, tense, and point of view for investigation report writing
- Distinguish between relevant, directly related, and irrelevant evidence/information and document accordingly

AGENDA

1 Overview of the Investigation Process

2 Purpose of the Investigation Report

3 Writing Mechanics

4 Writing Clarity

5 Absent Information

6 Investigation Report Sections



INVESTIGATION PROCESS

- IX Commandments
- 10 Steps of an Investigation
- Investigation Records

TITLE IX

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

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



THE IX COMMANDMENTS

INVESTIGATION

(plus prompt &
fair per
VAWA Sec. 304)



Thorough

Reliable

Impartial

PROCESS



Prompt

Effective

Equitable

REMEDIES



Act reasonably
to stop
discrimination

Act reasonably
to prevent
recurrence

Act equitably to
remedy effects

10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation (“Charge”)
5. Establish investigation strategy
6. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering

10 STEPS OF AN INVESTIGATION

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide draft report and all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final report
 - Synthesize and analyze relevant evidence
 - Send final report to parties and Advisors for review and written response at least 10 days prior to hearing/determination

COMPREHENSIVE FILE

Title IX Coordinator should maintain:

- Supportive measures and interim action correspondence and documents
- Emergency Removal documents (if applicable)
- Communication regarding informal resolution (if applicable)
- Signed releases of information for Advisors
- Advisor Non-Disclosure Agreement (if applicable)
- Dismissal information (if applicable)
- Allegations of bias or conflict of interest and response

INVESTIGATION FILE

Investigator should maintain:

- Copies of the policies and procedures in place at the time of the incident and at the time of the investigation
- Notice of Investigation and Allegations (NOIA)
 - All subsequent NOIA updates
- File for each party and witness
 - Approved interview transcripts
 - Associated evidence (e.g., screenshots, written statements, etc.)
 - Correspondence with the Investigator(s)
- Other collected evidence (log)

INVESTIGATION FILE (CONT.)

- Background information (education, employment, etc.)
- Witness flowcharts
- Issue tracking list
- Investigator notes
- Timelines for incident and investigation
- Contact log

INVESTIGATION OUTPUTS

Investigator will produce:

- Investigation Report
 - Relevant evidence
 - Investigation timeline
 - Appendices including review and comment by parties and any response from Investigator(s)
- Evidence File
 - Includes relevant and directly related evidence
 - Index or other organizational structure for file



PURPOSE OF THE INVESTIGATION REPORT

- Title IX Regulations Requirements
- Relevant and Directly Related Evidence
- Information for Decision-makers

TITLE IX REGULATION REQUIREMENTS

- Federal regulations require an investigation report that fairly summarizes relevant evidence (34 C.F.R. § 106.45(b)(5)(vii))
 - While the regulations use the term “summary,” the preamble specifies the report will summarize **all** relevant evidence, meaning the report is comprehensive, not skeletal
- Any individual designated as an Investigator may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent (34 C.F.R. § 106.45(b)(1)(iii))
- A recipient also must ensure that Investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence (34 C.F.R. § 106.45(b)(1)(iii))

RELEVANT AND DIRECTLY RELATED EVIDENCE

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- While directly related evidence (DRE) is not defined by the regulations, it may be helpful to think of DRE as evidence connected to the complaint, but which is not inculpatory or exculpatory, and/or which is explicitly excluded by the regulations
- Under the Title IX regulations, evidence of the Complainant's sexual predisposition is **never** relevant

RELEVANT AND DIRECTLY RELATED EVIDENCE (CONT.)

- Evidence of the Complainant's prior sexual behavior is explicitly and categorically **not** relevant except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- The regulations do not require the same analysis applied to the Respondent so that consideration of pattern behavior is possible

RELEVANT VS. DIRECTLY RELATED EVIDENCE

EXAMPLE 1

Investigator: Walk me through the evening and the next morning with as much detail as you can share. I just want you to tell me a really detailed story that fills in all of those gaps for me.

Respondent: All right. You said you want to know how I met [Complainant].

Investigator: Yeah.

Respondent: It was sometime last semester. She was at a party that I went to that one my roommates knew this guy and I guess he is her brother and she was there and we just kind of talked while we were at the party.

Respondent: She told me that she was going to be a student at school in the fall and so she was looking for friends and just connections and that kind of thing. So, I thought she was pretty cute and so we exchanged our Snapchat information and our cellphone numbers and kind of talked a little bit over the summer.

Respondent: Then she hit me up when she got to campus in the fall. So, that was kind of like how I know her.

RELEVANT VS. DIRECTLY RELATED EVIDENCE

EXAMPLE 2

- Witness 2 is the roommate of the Respondent. Witness 2 and the Respondent share membership in several student organizations. Witness 2 is also a senior and knows the Complainant's older brother through social interactions. Witness 2 reports never meeting or communicating with the Complainant.
- Witness 2 remembers seeing the Respondent in their shared apartment around 2:00 a.m. on the date of the reported incident. Witness 2 remembers the Respondent coming out of their room with just shorts on.
- Witness 2 recalls joking about Respondent's luck.
- Witness 2 recalls telling Respondent to try to "keep it down" as Witness 2 was going to sleep.
- Witness 2 e-mailed the Investigator screenshots of group text messages from September 5-6, 2020 in which the Respondent, Witness 2, and Witness 3 debriefed the night.

SEPARATING EVIDENCE

- Investigation Report = only relevant evidence
- Evidence File = all relevant evidence and DRE
- The report is the narrower document, and the evidence file is a broader file
- When a portion of an interview/document/etc. is relevant, and another portion is DRE, the content needs to be separated
- ATIXA recommends an approach that separates the evidence so that all participants know what is what but all evidence can still be seen in the DRE file in a complete form

SEPARATING EVIDENCE (CONT.)

One helpful way to do this is by:

1. Color-coding the evidence in the evidence file for what is DRE and what is relevant (thus also contained in the report) for easy visual distinction, and
2. Adding footnotes or internal notes to the investigation report to indicate where the information is located in the evidence file
 - Any time a partial record is removed from the report because it is DRE and not relevant, the report should cross-reference to where this information can be found in the evidence file
 - If an entire record is removed as not relevant, it should only appear in the evidence file and not the investigation report

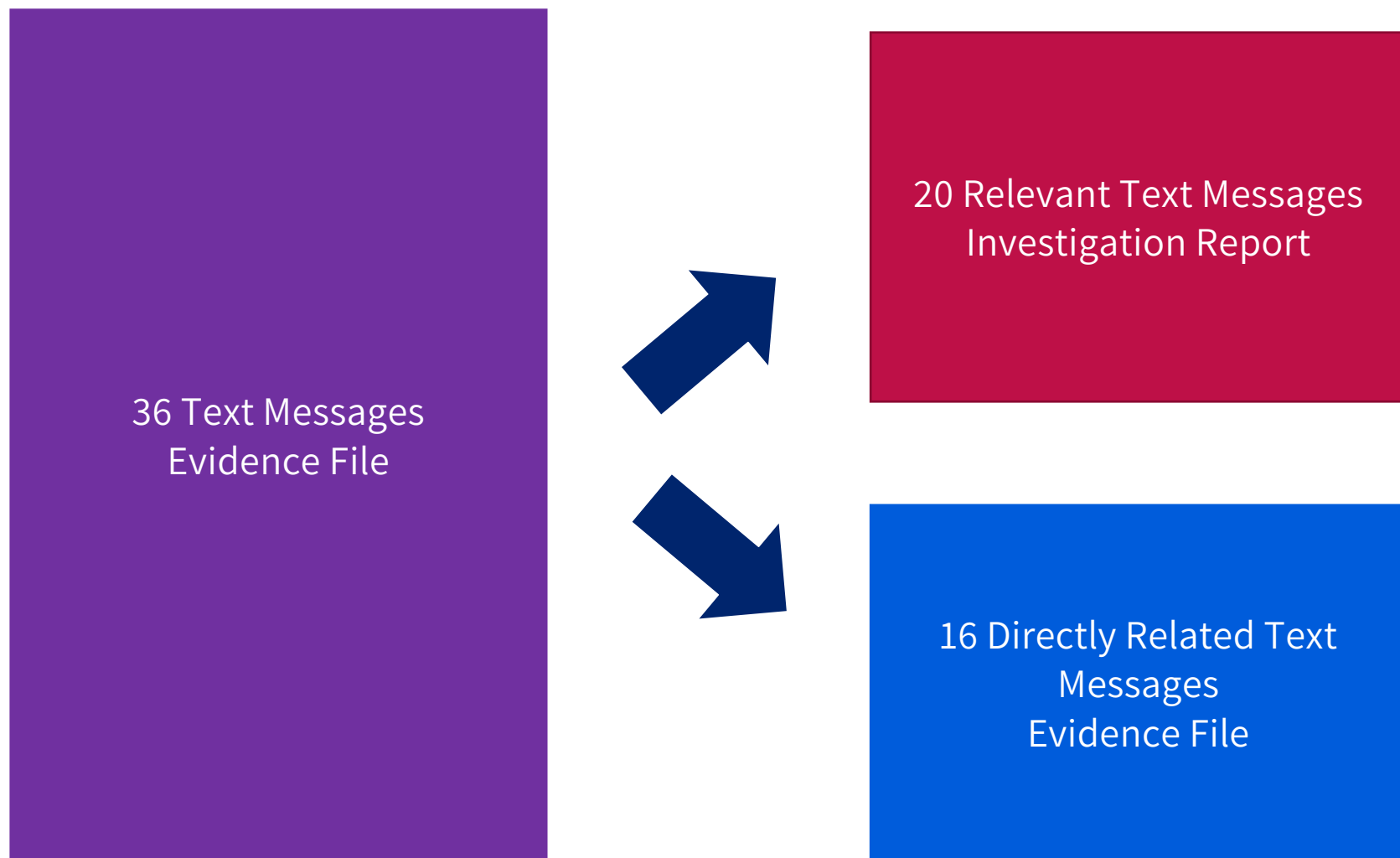
SEPARATING EVIDENCE (CONT.)

- While the investigation report can feel stilted because DRE context is missing/removed, that context can be provided by reviewing the evidence file, which is clearly cross-referenced for ease of use
- DRE can't be relied upon by the Decision-maker, but it can offer some additional coherence and/or context

SEPARATING EVIDENCE EXAMPLE

- The parties exchanged 36 text messages, each writing 18. This text thread between the parties is provided to the Investigator, who determines that 20 messages are relevant and 16 are DRE
- The Investigator includes the 20 in the report, noting that a section of the texts is redacted and referencing where in the evidence file the removed sections of the thread can be found
- In the evidence file, the Investigator provides the entire text thread, but uses color-coding to show the section(s) that is relevant (and thus found in the report) and the section that is DRE, which is only found in the evidence file, and not in the report
- Thus, the reader has the entire context, but can clearly see what evidence has been deemed relevant and what has not

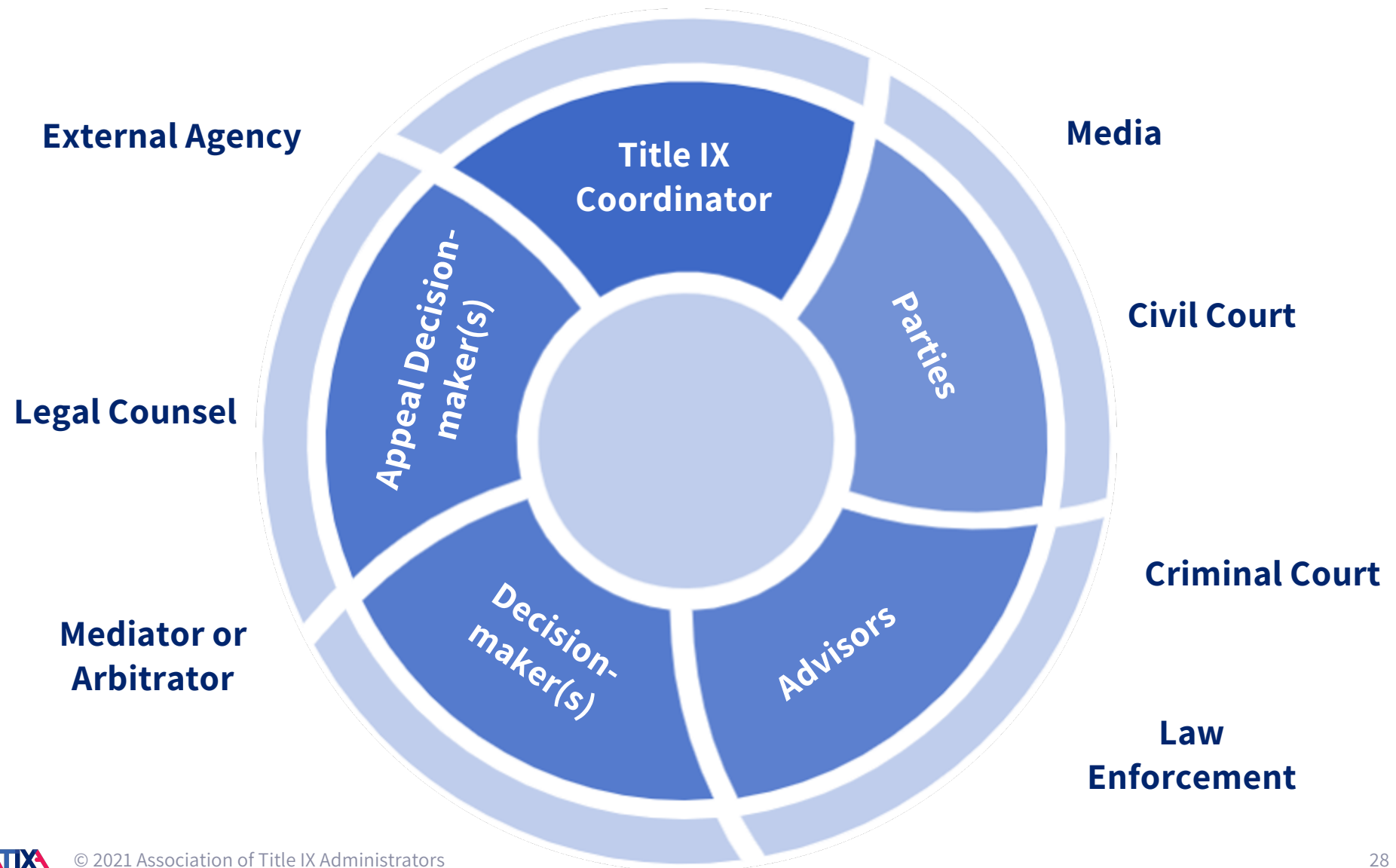
SEPARATING EVIDENCE EXAMPLE (CONT.)





Let's Practice!

AUDIENCE





WRITING MECHANICS

- Tone
- Voice
- Tense
- Point of View
- Formal vs. Informal Language
- Active vs. Passive Voice

TONE, VOICE, TENSE, & POINT OF VIEW

- **Tone:** an attitude of the writer toward the subject or audience; typically conveyed through word choice, syntax, and punctuation
- **Voice:** form or format through which a narrator communicates a story
- **Tense:** when events or actions occurred in time—in the past, present, or future. Verb choices can also indicate aspect, which expresses the completeness or effects of an action.
- **Point of View:** the position from which the author “speaks” to the reader

TONE

- Value-laden words reflect the bias of the author
- Words typically have a positive, negative, or neutral connotation
 - Evaluate the origin of the word
 - Author
 - Interviewee
 - Another source
 - Evaluate if the word communicates a neutral tone

FORMAL VS. INFORMAL LANGUAGE

Formal Language

- Medical/biological terms
- Accurate terms for alcohol or other drugs, their composition, and use
- Full words--we would, cannot, percent
- Last name, role, titles
- Third-person writing

Informal Language

- Colloquial terms for anatomy (“junk”) or sexual acts (“smashing”)
- “Weed,” “jungle juice,” “hammered”
- Contractions--we’d, can’t
- First name or nickname
- Empathic writing/taking a position

ACTIVE VS. PASSIVE VOICE

- **Active Voice:** used when the subject performs the action
- **Passive Voice:** used when the action is performed upon the subject

| Examples of the Three Voices in Writing | |
|--|--|
| 1. Active Voice | "You ate six donuts." |
| 2. Passive Voice | "Six donuts were eaten by you." |
| 3. Passive-Aggressive Voice | "You ate six donuts and I didn't get any. Don't worry, it's cool. I can see donuts are very important to you." |

TENSE

- **Present tense:** expresses anything that is happening now, or is ongoing, constant, or habitual
- **Past tense:** indicates past events, prior conditions, or completed processes
- **Future tense:** indicates actions or events that will happen in the future
- Investigation reports are a narrative of events which have previously occurred
 - Written in past tense as an industry convention
 - Avoid changing tenses
 - Exception: Investigator actions for the present or future

POINT OF VIEW

- What and how much the reader learns about the events, people, and locations in an investigation report depends on the Investigator's point of view
 - How much does the Investigator know and understand?
 - How much does the Investigator want the reader to know?
 - How would the report be different if someone else were writing it?
- Point of view is determined by the role the Investigator plays in the events being recounted
- Does the Investigator **describe** what parties and witnesses told them, or do they **repeat** what they were told by parties and witnesses?

FIVE POINTS OF VIEW

First Person

The author is involved in the story and recounts their own feelings, impressions, and experiences

Second Person

The author is speaking directly to the reader

Third Person Objective

The author is outside the story and remains a neutral, detached observer that is not privy to individuals' thoughts and feelings

Third Person Limited

The author is outside the story and has limited knowledge of individuals' thoughts and feelings


Third Person Omniscient

The author is outside the story and has unlimited knowledge and can describe every person's thoughts and interpret their behaviors



WRITING CLARITY

- Format & Structure
- Quotations
- Sensitive Information
- Redaction
- Word Choice
- Bias-Free Writing
- Footnotes
- Attachments, Appendices, Exhibits, etc.



“Your ethical duty
to the person
being interviewed
is to present
[their] position
accurately...but
after that your
duty is to the
reader. [They]
deserve[] the
tightest
package.”
- William Zinsser

FORMAT AND STRUCTURE

- Verbatim transcripts vs. summarized interviews
- Narrative vs. bulleted format
 - Headnotes are a great summary device for a long narrative that follows
- Parties' comments on the draft report
- Report or Appendix?
 - Transcribe texts/social media/audio recordings
 - Description of video content
 - E-mail or other writing description or transcript/excerpt
 - Expert statements

DIRECT QUOTATIONS

“[Their] own words will always be better than your words...this is a person talking to the reader directly, not through the filter of a writer.”
- William Zinsser, *On Writing Well*

- The inclusion of direct quotations and commentary from parties and witnesses can help to more accurately convey their experiences and perceptions
 - What are ways that these narratives are supported in investigation work?
 - How do Investigators account for quotations that are unclear, wordy, or otherwise strange?
 - What quotations or phrases should otherwise be omitted?
Example: “You feel me?”
- Statements by Advisors should not be attributed to a party as their own words
- Care must be taken to indicate whether a quote is something a witness told Investigator(s) or something another person said to a witness

FOUR WAYS TO INTEGRATE QUOTATIONS

Introduce the quotation with a complete sentence

Cole described how his relationship with Devyn evolved over time: “We were friends, and then we became friends with benefits.”

Use an introductory or explanatory phrase

When asked to describe his relationship with Devyn, Cole responded, “We are friends with benefits.”

Incorporate the quotation part of the sentence

Cole described his relationship with Devyn as “friends with benefits.”

Use a short phrase as part of the sentence

Cole used the term “friends with benefits” to describe his relationship with Devyn.

PUNCTUATION FOR QUOTATIONS

- If words are omitted from a quotation, use an ellipsis
 - Use three dots (...) to indicate an omission of words in a sentence or sentences in a paragraph unless the ellipsis is at the end of one sentence and the quote continues to the next sentence, then use four dots (....)
 - An ellipsis is not needed at the beginning or end of a quotation unless it provides clarity
 - Examples:
 - “Where sentence one ends....Sentence two begins.”
 - “You’ve heard it before...there’s only one reason someone comes back to your place.”
- Make sure when you omit text you do not change the meaning of the sentence

PUNCTUATION FOR QUOTATIONS (CONT.)

- If words are inserted or altered in a quotation, use square brackets [] to indicate the change
 - May include:
 - Letter case or verb tense
 - Replacing a word to clarify meaning
 - Example:
 - Original: “He made me question if I was imagining everything that happened.”
 - Revised: “[The Respondent] made me question if I was imagining everything that happened.”

PUNCTUATION FOR QUOTATIONS (CONT.)

- Enclose “sic” in square brackets to indicate that the quote is verbatim, even if there are spelling or other syntax errors
 - Example:
 - “I notified [sic] that she was starting to feel the effects of alcohol.”
- When a quote includes an error in word choice or grammar, there is no need to identify the error or include [sic] unless the meaning is unclear as a result, in which case, the Investigator should clarify as in the example above, or check with the interviewee to ensure they correctly captured the meaning.
 - This will occur most often in transcription of recorded interviews, but if Investigator notes are unclear, clarify

SENSITIVE INFORMATION

- Title IX investigations are inherently sensitive and personal
- Accounting for the fact that investigation reports will include details of private exchanges between others, what considerations should be made in report writing?
 - Use of offensive, triggering, or explicit language (i.e., slurs)
 - Graphic images*
 - Forensic photographs
 - Nude images
 - Medical information, including test results
 - Sex assigned at birth vs. gender identity
 - Chosen name vs. legal name

REDACTION PRACTICES

- Full redaction vs. replacement with an identifier
 - Example:
 - Original: Teagan stated that Jesse smacked her with an open hand.
 - Full: [REDACTED] stated that [REDACTED] smacked her with an open hand.
 - Identifier: Complainant stated that Respondent smacked her with an open hand.
- Other options:
 - Include full name for first mention
 - Use initials
 - Use one or two-letter identifiers (C, R, W1, W2, etc.)

REDACTION PRACTICES (CONT.)

ATIXA's recommended practice:

1. Create a full version of the report and evidence file that includes all names and personally identifiable information (PII)
 - This version goes to the Decision-maker(s)/Panel and is for the comprehensive file (including any review by the TIXC and/or legal counsel)
2. Create redacted versions of the report and evidence file that remove all names and PII, substituting identifiers
 - This version goes to all parties/Advisors
 - Create an answer key that separately explains all identifiers that also goes to all parties/Advisors

WORD CHOICE

- Conclusory words
- Unnecessary adverbs and adjectives
- Bias language
- Common Pitfalls
 - Repetition
 - Absolutes
 - Generalizations
 - Value-laden terms & phrases
 - Cliches
 - Exaggerations
 - Jargon
 - Abbreviations, initialisms, and acronyms

"What's wrong with adverbs in dialogue tags?" John asked inquisitively.

"They're unnecessary and irritating," Marsha said judgmentally.

"Says who?" John said defensively.

"The poor reader," Marsha said authoritatively.

WORD CHOICE (CONT.)

- Investigation report construction is largely built with the first-person accounts of the parties and witnesses
 - What are ways in which these voices are included that does not minimize their experiences or indicate bias?
 - Example: pejorative use of the term “female” by a party in an interview
 - How is this communicated in a report?
 - What if it is used in a hearing?
- How can we also strive to use accessible language in interviews and in report writing?
 - For example, “rush” vs. “new member process”

BIAS-FREE WRITING

- Words communicate ideas, but also reflect power, status, and privilege
- Language can reflect social capital
- Conscious and purposeful use of language can promote equity, justice, and inclusion
- The use of bias-free language ensures the content does not exclude, demean, or offend groups
- Bias-free communication attempts to include all identities of people in a way that doesn't make assumptions about the receiver of the communication
- Bias-free writing does not discriminate

TIPS FOR BIAS-FREE WRITING

- Know your own biases
 - Have your writing proofread by others
 - Read your own work to recognize language that is part of your everyday speech
- Focus on what's relevant
 - Only include information on identities when applicable
- Recognize and acknowledge differences
 - Not supposed to imply differences don't exist
- Think small
 - Be as specific as possible
 - Specificity is preferred over generalization
 - Example: Avoid using “students of color” generally when you are really referring to a specific racial group

TIPS FOR BIAS-FREE WRITING (CONT.)

- Avoid Labels
 - Describe identities and group connections as the individuals have described them
- When in doubt, ask
 - Do your research
 - Get a second opinion
- Use nouns, objectives, and adjectives properly
 - Avoid using language that refers to people in objectifying ways

BIAS AND BIAS-FREE LANGUAGE EXAMPLES

| Biased Language | Bias-Free Language |
|--|--|
| Chairman | Chairperson |
| Ray is mentally disabled | Ray has Attention Deficit Disorder |
| The elderly are our biggest customers | Adults aged 65 and older are our most frequent customers |
| The new Black kid on the team is the captain | James is the captain |
| Poor kids qualify for those scholarships | Students with a household income below \$20,000 qualify for those scholarships |

FOOTNOTES

- Footnotes provide definitions, context, or source information that would otherwise disrupt the flow of the investigation report
 - Slang terms, regionalisms, campus-specific language
 - Ex. Talking (v): when two people have established that they are mutually interested in each other and are getting to know each other better, but are both still considered to be single and not a couple
 - Description of electronic applications
 - References to appendices
 - Background information
 - May also be its own separate section depending upon length and complexity

FOOTNOTES (CONT.)

- Be mindful of assuming “common knowledge,” and if the Investigator is offering context from their own knowledge, make sure it is clearly indicated as such
- Consider who will be reading the report now and potentially in the future
 - Technology evolves
 - Slang shifts
 - Pop culture references change
 - Businesses come and go
 - Generational differences
 - Cultural differences

FOOTNOTES (CONT.)

- In text, the footnote follows punctuation except for the m-dash (—)
 - Example: The parties agreed that the sexual activity on the couch was consensual.¹
- ATIXA recommends using footnotes to indicate the source of relevant information incorporated in the report when summarizing or synthesizing multiple sources of evidence

FOOTNOTES FOR RELEVANT INFORMATION EXAMPLE

SUMMARY OF EVIDENCE

The parties agree that they met the prior semester at a party when Complainant was an admitted student but had not yet started classes. Complainant's brother was one of the party hosts. The Complainant and Respondent exchanged contact information and frequently communicated over text or Snapchat.⁵ Neither party has record of this prior communication. Complainant has since blocked and deleted all messages.⁶ Respondent destroyed his phone by accidentally dropping it over a cliff while hiking.⁷ Neither can recover Snapchat communication due to the nature of the social media application.⁸

Through their communication, they resolved to spend the evening of September 5, 2020 together. They went to Marty's (a local convenience store) to purchase wine, beer, and bread. Afterward, they walked to Respondent's on-campus apartment.⁹

The parties agree that they returned to Respondent's apartment and no one else was present in the apartment when they arrived.¹⁰ They turned on Netflix and began drinking the beverages purchased at Marty's. The parties agree that Complainant drank most (if not all) of the bottle of wine and one beer –

⁵ Evidence File pgs. 4-5, 28, & 30

⁶ Evidence File pg. 21-22

⁷ Evidence File pg. 29

⁸ Evidence File pg. 21 & 30

⁹ Evidence File pgs. 5-6 & 28

¹⁰ Evidence File pgs. 2 & 28

ATTACHMENTS, APPENDICES, & EXHIBITS

- Complete versions of information that is incorporated into the body of the investigation report by reference or in excerpt form
 - Photographs
 - Video stills
 - Screenshots of text messages/social media
 - Access logs, card swipe logs, phone records
 - Academic course schedules
 - Floorplan diagrams
 - Others
- Provide source and submission date information
- Separates relevant from directly related evidence

APPENDIX “C”

- Questions suggested or requested to be asked by the parties should be documented and included as an appendix in these sections:
 - **Section 1:** Questions the party wanted asked specifically but were not because the answers were gained in a narrative or otherwise volunteered. The question posed and the answer should be noted here.
 - **Section 2:** Questions the party wanted asked specifically that were asked in the manner the party wanted.
 - Document: The question they wanted, how it was asked, and the answer.

APPENDIX “C” (CONT.)

- **Section 3:** Questions the party wanted asked specifically that were asked but not in the manner the party wanted
 - Document: The question they wanted, the one that was asked, the answer, and the rationale for changing the form of the question (e.g., argumentative, blaming, improper form, etc.).
- **Section 4:** Questions the party wanted asked specifically that were not asked
 - Document: The rationale for not asking the question (e.g., irrelevant, already asked and answered, etc.).

POST-REVIEW PARTY FEEDBACK

- When the parties/Advisors provide written review and comment on the report or evidence file, include the entirety of that feedback and any responses from the Investigator(s)
- Include appropriate discussion if feedback impacts credibility
- Should the Investigator include new evidence in the report or appendix?
- What about clarification of earlier statements? Should the Investigator show two versions, or just go back and correct within the body of the report?
- How should shifts between relevant evidence and DRE that are made as a result of feedback be shown?
 - Track changes? How much back and forth should an Investigator have with the parties versus what should be resolved by the Decision-maker(s)?
- Appendix vs. evidence file



ABSENT INFORMATION

- Information Unable to be Obtained
- Questions Asked Yet Unanswered

INFORMATION UNABLE TO BE OBTAINED

- Seeking information that was not successfully secured for an investigation report should be equally documented to demonstrate the lengths through which details and data were sought, even if not obtained:
 - Did not exist at the time of the reported incident
 - Does not exist at the time of the investigation
 - Cannot be located at the time of the investigation
 - Party/witness not available to be interviewed or declines to respond to question(s)
 - Request for submission declined
 - Was otherwise deleted, destroyed, damaged
 - Unable to access without a court order
 - Information that cannot be released due to an ongoing criminal and/or agency investigation

QUESTIONS ASKED YET UNANSWERED

- It is important to include questions which were asked but unanswered during the investigation to:
 - 1) demonstrate a thorough investigation and attempts to obtain information, and
 - 2) help guide the Decision-maker to topics that may need further discussion during a hearing or other resolution process.
- If relevant, should be documented in the interview summary
 - Example: “Witness 2 declined to provide additional information regarding their text conversation with the Complainant on February 19, 2019. W2 was informed the Complainant voluntarily submitted screenshots of the text messages in question for purposes of this investigation.”



INVESTIGATION REPORT SECTIONS

- Complaint Information
- Executive Summary
- Relevant Background
- Jurisdiction & Scope of the Investigation
- Applicable Policies & Relevant Definitions
- Investigation Timeline
- Reported Incident(s) Timeline(s)
- Summary of Relevant Statements & Evidence

COMPLAINT INFORMATION

- Complaint date
- Complainant's name and recipient ID
- Initial notice date
- Initial notice received from
- Respondent name and recipient ID
- Date assigned to Investigator(s)
- Assigned Investigator(s)
- NOIA date
- Final investigation report date

COMPLAINT INFORMATION EXAMPLE

[RECIPIENT] INVESTIGATION REPORT

CONFIDENTIAL

Complaint Date: [Date]

Complainant: [Complainant's Full Name] ([RecipientID])

Initial Notice Date: [Date]
(if different)

Initial Notice Received From: [Third Party's Full Name] ([RecipientID])
(if different)

Respondent: [Respondent's Full Name] ([RecipientID])

Date Assigned: [Date]

Investigator(s): [Investigator(s)' Full Name(s) and Titles]

Investigation Report Date: [Date]

EXECUTIVE SUMMARY

- Date, time, and manner of formal complaint
- Complainant's identity
- Description of alleged misconduct
- Request for a formal investigation or TIX Coordinator's decision to sign a formal complaint
- Who investigated the complaint and in accordance with which law(s) and/or policies the investigation was conducted
- Detailed account of undisputed facts
- Detailed account of disputed facts
- Status of the complaint (e.g., dismissal or referral to Decision-maker(s))
- Sections of the investigation report

EXECUTIVE SUMMARY EXAMPLE

INTRODUCTION

On Tuesday, October 6, 2020, the Title IX Coordinator (TIXC) met with Complainant and her advisor, the Sexual Assault Victim's Advocate. The Complainant reported that on Saturday, September 5, 2020 the Respondent sexually assaulted her while the Complainant was in a state rendering the Complainant unable to give consent. The Complainant requested to file a Formal Complaint and completed the form during the meeting.¹

As a result of this allegation and additional evidence presented at the time of intake, the TIXC asked the Title IX Investigator to conduct a thorough and impartial investigation using the provisions outlined in the University's Equal Opportunity, Harassment, Nondiscrimination Grievance Policy (hereinafter, Grievance Policy) and in accordance with Title IX and following guidelines from the U.S. Department of Education's Office for Civil Rights.

RELEVANT BACKGROUND

- Summarize when and how the report/formal complaint was made and received
- Summarize the allegations, including applicable policies
- Include additional background information as necessary to understand relationship history, context, etc.
 - Separate by topic

JURISDICTION

- Provide a statement of jurisdiction including:
 - Incident date, time, and location
 - Individuals involved
 - Relevant policies and procedures related to jurisdiction
 - Information and analysis for subject matter jurisdiction
 - Institutional control of the context of the alleged misconduct
 - Indicate whether Title IX requires the institution to investigate, or whether jurisdiction is discretionary and Title IX does not apply

JURISDICTION EXAMPLE

According to available information, the Respondent is currently a full-time administrative employee in the College of Human Performance, and the Complainant is currently a third-year doctoral student in the physical therapy program. Both parties maintained the same institutional affiliations at the time of the reported incident.

The reported incident occurred in Parking Garage Six on the University of the Northwest campus in Mulkey, Washington, United States. If proven, the allegations would constitute sexual assault under University policy and Title IX.

The University controls the location of the reported incident. The Respondent is an employee, and the Complainant is participating in the institution's educational program as a student; therefore, the University has jurisdiction over this complaint pursuant to Grievance Policy Section 2(b).

SCOPE OF THE INVESTIGATION

- **Scope:** the purpose of and parameters around the investigation
 - Allegations it will explore
 - Timeframe being considered
 - Who will be involved
 - Outcome
- The Title IX Coordinator or designee will determine the scope of the investigation
- Most investigations will originate from a formal complaint, but the content of the complaint is not the sole determiner of the scope of the investigation

SCOPE OF THE INVESTIGATION (CONT.)

- List the parties and relevant witnesses, while providing basic context for who the witness is in relation to the institution and the parties
- Include when each individual was interviewed and by whom
 - If there were witnesses or parties who were contacted and were either nonresponsive or declined to participate, include that information as well

SCOPE OF THE INVESTIGATION EXAMPLE

The Office of Institutional Equity, which oversees Title IX and VAWA compliance, commenced an investigation to determine:

1. If the Respondent engaged in behavior which constitutes sexual assault under University policy in an on-campus apartment on April 7, 2021
2. If the Respondent engaged in behavior which constitutes sexual exploitation under University policy in an on-campus apartment on April 7, 2021

Investigator(s) Felicia Morris conducted an investigation in accordance with guidelines and requirements set forth by the U.S. Department of Education Office for Civil Rights for Title IX investigations, the Violence Against Women Act Section 304, and University policy. Her efforts were overseen by Melanie Wallace, Title IX Coordinator. Witnesses interviewed include current students and non-students.

This investigation was designed to collect all available information and to determine if the complaint should be dismissed or referred to a decision-maker for a formal hearing.

SCOPE OF THE INVESTIGATION EXAMPLE (CONT.)

EXAMPLE

Complainant is *(e.g., a first-year undergraduate male residing in the residence halls).*

Respondent is *(e.g., a female graduate student and a residence advisor in the residence halls).*

JM is *(e.g., a freshman male residing in the residence halls and Complainant's roommate).*

JC is *(e.g., a female undergraduate student living off-campus and a classmate and friend of Complainant).*

RH is *(e.g., a female employee of Name local bar; employee is not affiliated with the university).*

DISCUSSION:

**Does including demographic information potentially bias the
Decision-maker(s)?**

APPLICABLE POLICIES AND RELEVANT DEFINITIONS

- Include the full text of ALL applicable policy sections
 - Alleged violation(s)
 - Relevant definitions (e.g., consent)
 - Standard of Evidence
- This section should be consistent with the Notice of Investigation and Allegations (NOIA), including any amendments thereto

INVESTIGATION TIMELINE

- The Decision-maker or TIXC will need to include “a description of the procedural steps taken from the receipt of the formal complaint through the determination” in the written outcome letter provided to the parties following a hearing; this information is usually drawn from this section of the investigation report
 - Notifications to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence
 - Hearings held
- Note any process delays, including rationale

INVESTIGATION TIMELINE EXAMPLE

| Date | Action |
|----------|--|
| 10/26/19 | <ul style="list-style-type: none">Complainant notified [NAME] of allegations. |
| 10/27/19 | <ul style="list-style-type: none">No contact order put in place between parties. |
| 11/01/19 | <ul style="list-style-type: none">Meeting between Complainant and Title IX CoordinatorFormal complaint submitted by ComplainantAssigned to Investigators |
| 11/03/19 | <ul style="list-style-type: none">Parties sent Notice of Investigation and AllegationEmailed interview requests to parties and witnesses |
| 11/07/19 | <ul style="list-style-type: none">Investigators interview Complainant |
| 11/21/19 | <ul style="list-style-type: none">Parties and Advisors provided directly related evidence for response |
| 12/2/19 | <ul style="list-style-type: none">Review deadline; no response received from parties. |
| 12/3/19 | <ul style="list-style-type: none">Parties and Advisors provided investigation report for review and response. |

REPORTED INCIDENT(S) TIMELINE(S)

- Timelines are a visual representation or list that shows events in chronological order
- Investigators should develop one timeline for the reported incident(s) based on all information collected during interviews and submitted as evidence
- Reference evidence which substantiates with the timeline (e.g., timestamped text messages, receipts, call logs)
- Timelines are especially helpful in cases where incapacitation may be involved

REPORTED INCIDENT(S) TIMELINE EXAMPLE 1

September 5-6, 2020



REPORTED INCIDENT(S) TIMELINE EXAMPLE 2

| Date/Time | Event |
|--------------------|---|
| 9/18/19 ~ 9:50 pm | Complainant goes to [name] house (Address) before [event]. |
| 9/18/19 ~ 10:45 pm | Complainant and [names] walk to [location]. |
| 9/18/19 ~ 11:00 pm | Complainant and [names] arrive at [location, plus brief description of activity.] |
| 9/18/19 ~ 11:30 pm | Complainant vomited [where]. |
| 9/18/19 ~ 12:15 am | Complainant starts [specific activity] with Respondent. They [engage in activity] for approximately [time frame]. [Add brief details re: drug/alcohol consumption, potential witnesses, etc.] |
| 9/18/19 ~ 1:30 am | Parties agree to leave and go back to [location.] |

SUMMARY OF RELEVANT STATEMENTS & EVIDENCE

- The content of the investigation may dictate the most logical organization structure for this section
 - Chronological by interview
 - Chronological by incident timeline
 - Parties first, then witnesses

CREDIBILITY ASSESSMENT

- Specific and detailed analysis of credibility of:
 - Each party
 - Each witness
 - Any other relevant evidence
- Point to specific details that you have considered that have aided in your assessments
- May or may not include conclusions about credibility, depending on institutional policy
- ATIXA does not recommend making conclusions

CREDIBILITY OVERVIEW

Corroboration

- Aligned testimony and/or physical evidence.

Inherent plausibility

- “Does this make sense?”
- Be careful of bias influencing sense of “logical.”

Motive to falsify

- Do they have a reason to lie?

Past record

- Is there a history of similar behavior?

Demeanor

- Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by
Supervisors*

EEOC (1999)

CREDIBILITY ASSESSMENT EXAMPLE 1

Respondent

Respondent stated that he received a text from his roommates when they were returning to the apartment.³² This is what led Respondent to move with Complainant to Respondent's bedroom. Witness 2 and 3 provided testimony consistent with Respondent's statements, and Witness 2 provided text screenshots.³³

Respondent stated he came out of the bedroom with a towel wrapped around his waist when his roommates returned to the apartment. Witness 3 recalled Respondent coming out of the bedroom with a towel around his waist, consistent with Respondent's statements.³⁴

Respondent stated when he returned to the bedroom Complainant appeared to be asleep. Witness 3 walked by Respondent's open bedroom door before Respondent returned to the bedroom and observed that Complainant was under the covers of the bed and "seemed to be very still as though they might be asleep."³⁵ This statement is consistent with Respondent's statements.

CREDIBILITY ASSESSMENT EXAMPLE 2

- Mark's testimony about X contrasts with Mariana's testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana's testimony, not Mark's, during the investigation.
- The decision-maker may benefit from looking carefully at Mark's assertions about having received consent and explore this more deeply with the parties and witnesses during the hearing.

CREDIBILITY ASSESSMENT EXAMPLE 3

Complainant stated that she felt confused and dizzy upon awaking in Respondent's room around 4:00 a.m. Witness 1 observed that Complainant seemed "totally out of it" when the two met immediately after Complainant texted Witness 1 around 4:00 am. Witness 1's statements are consistent with Complainant's, and screenshots provided by Complainant are consistent with both individuals' statements.

Complainant stated that she had bruising and hickeys on her neck, chest, shoulders and arms after waking up in Respondent's room. Photos provided by Complainant and statements by Respondent are consistent with Complainant's statements.

DISCUSSION & SYNTHESIS

- Discuss and synthesize the relevant information
 - Consider the elements of each policy at issue
 - Refer back to relevant evidence cited
 - Refer to the credibility assessment(s)
- Summarize all areas of contested and uncontested facts/evidence
- Institutional procedure may allow the Investigator(s) to conduct analysis and make recommended findings or may limit the Investigator(s) to synthesis
- ATIXA does not recommend making recommendations for findings or final determination

DISCUSSION AND SYNTHESIS EXAMPLE

The parties agree on the order of events on the night of the reported incident including communicating via text message, meeting at an off-campus convenience store, walking to the Respondent's on-campus apartment, consuming alcohol, and engaging in sexual activity.

The parties disagree about the following:

- The amount of alcohol the Complainant consumed and whether she was incapacitated and unable to consent to sexual activity
- Whether the Respondent's actions caused the bruises on the Complainant documented via photographs

DISCUSSION AND SYNTHESIS EXAMPLE (CONT.)

During her interview, the Complainant alleged that the Respondent may have either videorecorded or taken photos of her without her consent while engaged in intimate activity on the couch in the Respondent's residence. The Respondent denies these allegations and no evidence was provided or available to corroborate or refute this allegation.

The Complainant also alleged that the Respondent may have caused her to unknowingly ingest an unknown substance that affected her capacity on the night of the reported incident. The Respondent denies these allegations. The Investigators were unable to obtain a copy of the SANE report; however, a verbal conversation with the SANE provider indicated that drug and alcohol screening at the time of the exam did not indicate the presence of any substance other than alcohol; however, the screen does not test for all substances that could impact capacity.

RECOMMENDED FINDINGS

- This section is only applicable if permitted by institutional policy
- Did the conduct occur as alleged?
 - List recommended findings by the standard of evidence for each alleged policy violation
- Include a statement that the recommended findings are not binding on the Decision-maker(s)

RECOMMENDED FINAL DETERMINATION

- This section is only applicable if permitted by institutional policy
- Did the conduct violate policy?
 - List recommended final determination by the standard of evidence for each alleged policy violation
- Include a statement that the recommended determination is not binding on the Decision-maker(s)

CONCLUSION

- Guide for the Decision-maker(s) determination
- Akin to jury instructions

CONCLUSION EXAMPLE PART 1

Complainant's allegations describe misconduct that implicates [Institution]'s prohibition of sexual harassment as well as several provisions of prohibited conduct outlined in [Institution]'s Student Conduct Code. Some provisions of the policies, like the prohibition of sexual harassment, require a threshold determination regarding the severity and pervasiveness of the alleged behavior in order to support a determination of a policy violation. Other provisions, such as the prohibition against providing alcohol to minors, may be determined by the decision-maker to be satisfied by a single occurrence.

CONCLUSION EXAMPLE PART 2

Analysis of the allegations for the purpose of determining whether a preponderance of the evidence supports a determination that one or more of [Institution]’s policies were violated should proceed by first determining whether each allegation is supported by a preponderance of the evidence. In this particular situation, an analysis of whether consent was given, as well as whether it was withdrawn, is appropriate.

Allegations are presented separately and relevant evidence supporting and refuting each allegation is outlined within each respective section of the report. Because most, if not all, of the allegations are supported and refuted solely by the testimony of the parties and witnesses, the decision-maker should carefully evaluate the credibility of the testimony offered as well as the credibility of the individual providing the testimony.

CONCLUSION EXAMPLE PART 3

This report is intended to provide an exhaustive summary of the relevant evidence related to the allegations made by the Complainant. It is not intended to draw any conclusions regarding the accuracy of the allegations or the credibility of the parties and witnesses. The investigators submit this report for consideration by a decision-maker appointed by [Institution] and remain available to answer any questions regarding the investigation or information contained in this report.

EVIDENCE FILE (PROCESS A) / APPENDICES(PROCESS B)

- Include all applicable evidence and documentation
 - Formal complaint
 - Verified full transcript or complete notes from each interview
 - Any written statements, photos, screenshots, etc.
 - Always include a copy of the full policies in place at the time of the incident(s) and investigation

EVIDENCE FILE/APPENDICES EXAMPLE

- A. Formal Complaint Submitted [Date]
- B. Verified Transcript of Complainant's Interview on [Date]
- C. Verified Transcript of Respondent's Interview on [Date]
- D. Questions Submitted by Complainant
- E. Questions Submitted by Respondent
- F. Complainant's Response to Draft Investigation Report
- G. Respondent's Response to Draft Investigation Report
- H. Applicable Institutional Policy (provided by link)

SECTION/APPENDIX COVER PAGE EXAMPLE

APPENDIX A

| | |
|----------------------------|---|
| Description: | Formal Complaint Submitted by Complainant |
| Date Received: | 11/1/2019 |
| Submitted By: | [Complainant's Full Name] |
| Received By: | TIXC's Full Name, Title |
| [Authenticated By]: | [Full Name, Title, and Means] |

[Additional context or explanatory information]



Association of
Title IX Administrators

Questions?



Association of
Title IX Administrators

LIMITED LICENSE AND COPYRIGHT. By purchasing, and/or receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensed to the licensee only, for its use. This license permits the licensee to use the materials personally and/or internally to the licensee's organization for training purposes, only. These materials may be used to train Title IX personnel, and thus are subject to 34 CFR Part 106.45(b)(10), requiring all training materials to be posted publicly on a website. No public display, sharing, or publication of these materials by a licensee/purchaser is permitted by ATIXA. You are not authorized to copy or adapt these materials without explicit written permission from ATIXA. No one may remove this license language from any version of ATIXA materials. Licensees will receive a link to their materials from ATIXA. That link, and that link only, may be posted to the licensee's website for purposes of permitting public access of the materials for review/inspection, only. Should any licensee post or permit someone to post these materials to a public website outside of the authorized materials link, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.



NAVIGATING CREDIBILITY, RELIABILITY & AUTHENTICITY WHEN ASSESSING EVIDENCE

Jody Shipper
Co-Founder & Managing Director

GRAND RIVER | SOLUTIONS

EVIDENCE: WEIGHING, ANALYZING

Avoiding Common Errors

EVIDENCE

Testimony

Text Messages

Social Media Posts
and Messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera Footage

Swipe Records

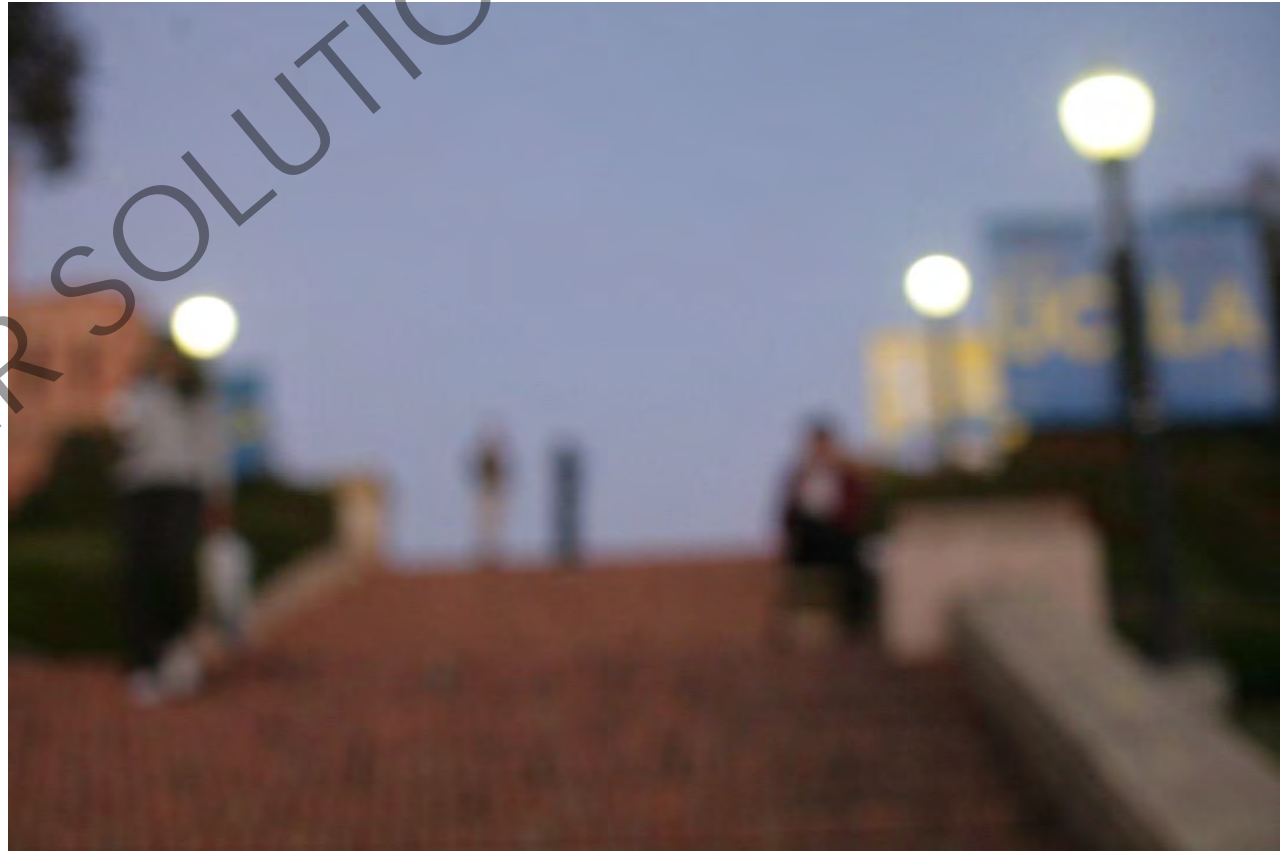
Medical Records

Phone
Records

Audio
Recordings

CAN YOU RELY ON THE EVIDENCE GATHERED?

- Thorough? (Does it tell whole picture?)
- Authenticated?
- Is there an explanation for what was omitted?



SHE TEXTED ME “ALL THE TIME”

Do you have those texts?

May I have those texts?

Oh, they weren't “texts,” they were DMs?

Who else might have seen them?

Was anyone else copied?



THE “HARD” QUESTIONS: YOU CANNOT WEIGH IT IF NO ONE ASKED IT

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

YOU CANNOT WEIGH IT IF NO ONE ASKED

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...

WEIGHING EVIDENCE

GRAND RIVER SOLUTIONS



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.

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/reliable?

Is the evidence worthy of belief?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

AUTHENTICATING EVIDENCE

1. At 1:18 am, Pat captured a video of Elliott and Sam. In the video, Sam had one arm around Elliott's shoulders, and Elliott's head was resting on Sam's shoulder. In the video, both Sam and Elliott, and at least 2 others, were loudly singing Happy Birthday, although the video cut out before the singers said the name of the person to whom they were singing.
2. Elliott alleged that Sam later sent him a threatening message, and the next day showed up at his dorm, uninvited, twice. Elliott stated he did not have the message, because it was on SnapChat, but had kept a screenshot of the message, although the screenshot cut off part of the message. Sam denied sending any threatening message, and also stated that he never used SnapChat.

IS IT AUTHENTIC?

Question The Person Who Offered The Evidence

Request Originals

Obtain Originals From The Source

Have Others Review And Comment On Authenticity

Are There Other Records That Would Corroborate?

CREDIBILITY AND RELIABILITY

- Do you really need to assess either?
- Why they are different
- How to write about it
- When a party attacks credibility of the other, but on a non-issue (delay in reporting, did not go to law enforcement, minimized the report in comments to a friend or family)
- How to ask questions to get to the bottom of it without being offensive
- How to apply your conclusions to the process

YOU BELIEVE ONE PARTY'S VERSION OF EVENTS OVER ANOTHER – WHY?

- Corroboration?
- Plausibility?
- They were convincing when they shared their story?
- They could not have seen what they said they saw?
- That makes no sense?
- They seemed more trustworthy?
- Some combination of the above?

CREDIBILITY: IT IS
CONVINCING

RELIABILITY: YOU
CAN TRUST IT

GRAND RIVER SOLUTIONS

CREDIBILITY? OR 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.

**A CREDIBLE
WITNESS MAY GIVE
UNRELIABLE
TESTIMONY**



RELIABILITY

- Did the witness correctly observe, process, interpret and recall the information?
Is there corroboration?
- vs. Credibility: bias, collusion, motive in outcome, outright (proven) lying, judging the person

FACTORS WE WERE TAUGHT TO USE: ARE THESE STILL THE RIGHT ONES?

- Corroborating evidence
- Inconsistencies
- Sufficient or insufficient explanation of inconsistencies
- Logic, plausibility
- Pattern or history
- Past record
- Motive to falsify
- Bias for/against a party
- Material omission
- Ability to recollect events

ARE YOU WORTHY?

- Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).
- *Courtroom Psychology for Trial Lawyers* (1985): People with enlarged pupils are compassionate and those with beady eyes use cold logic; a person who looks up and to the left while thinking is metaphorical . . . a low pitched voice indicates confidence, while a high-pitched voice reduces believability.

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, &
training

Coaching

Bias

CREDIBILITY/RELIABILITY ANALYSIS

STEP BY STEP

1. Determine the material facts – focus only on material facts.
2. Determine which material facts are:
 - Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g., Marcy and Jack attended a fraternity party on April 5, 2019]
 - Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g., Marcy alleged that Jack kissed her without her consent around 1am at the party, and Jack asserted he never kissed Marcy and went home early]
 - State clearly which facts are accepted, and which are rejected, and state the reasons why.
- “While Jack maintained that he never kissed Marcy and went home early, several witnesses corroborated that he was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Jack kissing Marcy. Therefore, I find that Jack’s version of events cannot be credited as being more likely than not to be true.”

PRACTICE ON WEIGHING EVIDENCE

- Expert testimony
- Polygraph examiner's report
- News article that the college has a history of covering up sex assaults
- Case involves DV and allegation of strangulation. Witness discusses respondent's repeated angry outbursts in social situations and class settings.

REMEMBER – CREDIBILITY IS NOT FIRST

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/reliable?

Is the evidence worthy of belief?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

QUESTIONS?

GRAND RIVER SOLUTIONS



GRAND RIVER | SOLUTIONS

THANKS FOR JOINING US!

CONNECT WITH US



info@grandriversolutions.com



[/Grand-River-Solutions](#)



[/GrandRiverSolutions](#)



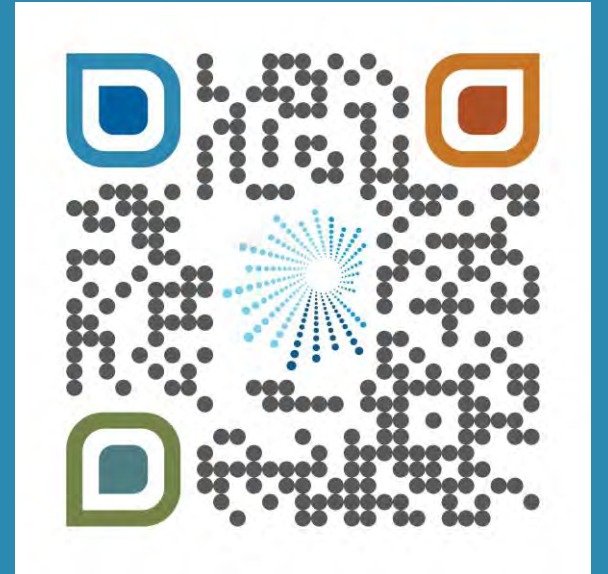
[/GrandRiverSolutions](#)



Grandriversolutions.com

GRAND RIVER | SOLUTIONS

WE LOVE FEEDBACK
Your Opinion Is Invaluable!



**CONDUCTING TRAUMA-INFORMED INVESTIGATIONS
FOR SEXUAL MISCONDUCT CASES**

Cheryl Wayne, M.Ed, JD

CWayne & Associates, LLC | cwayneassociates@gmail.com



LEARNING OUTCOME

After participating...

...you will be better able to account more completely for the
role trauma plays in your investigation process.



■ Agenda

- Overview of the Neurobiological Impact of Trauma
- How Trauma Could Impact Title IX Investigations
- Conducting Trauma-Informed Investigations
- Preparing the Final Investigation Report



■ Trauma Informed Approach

- Check your biases (we all have them)
- Avoid appearing impatient
- Emphasize these points
 - Safe place/comfort
 - Personal support
 - Available services
 - Always remain neutral on the facts
 - Trust and transparency



■ Trauma Informed Approach

- Build rapport immediately
- Provide information to the Party
- Acknowledge the difficult situation
- Provide as many options as possible
- The Process
 - Your role (impartial, neutral, fact-finder)
 - Policy
 - Communication
 - Rapport



CHAT

**What would happen if we did not
apply trauma-informed training to
our investigations?**

■ Value of this Approach

1. Avoid unnecessary biased and unfounded conclusions.
2. Understand how trauma impacts the brain and response of a Complainant during an attack.
3. Strategize to get the most complete story from the Complainant.
4. Trauma informed approach does not rely on a timeline in chronological order.



■ Neurobiological Impact of Trauma

- Physical Reaction:
 - Brain detects a threat to the body
 - Trauma triggers chemical reaction which impacts
 - Perception
 - Ability to react
 - Memory (fragmented- can't provide narrative- misinterpreted as lying
 - Each individual reacts differently (highly subjective)



■ Neurobiological impact of Trauma (cont.)

- Sympathetic
 - “fight,”
 - “flight,”
 - “freeze”
- Focus on survival
- A feeling of dissociation, often described as an “out of body” experience



9

■ “Rules of the road”



- Stay in your lane
- Don't put your blinkers on
- Remember your role
- Remain neutral



QUESTIONS



CHAT

What might be some of the range of emotions that a sexual assault survivor may experience?



ONE SIZE DOES
not FIT ALL



■ Trauma - the possible impact

- Shock
- Denial
- Self-Blame
- Embarrassment
- Fear
- Angry
- Confused
- Degraded
- Humiliated
- Demeanor (lack of emotion, misinterpreted as lying)



■ Trauma Informed Approach

- Complainants may experience certain responses during and after the assault
- Traumatic memory is fragmented, can't provide narrative - misinterpreted as lying
- Demeanor: lack of emotion or odd or inappropriate affect - misinterpreted as lying or "not being upset"
- Sensory memories may be more detailed



■ Trauma Informed Approach

The trauma informed approach changes the way we respond and investigate, and most importantly the way we interview Complainants.



■ Trauma Informed Approach

- Important to focus on two concepts:
 - What are you able to tell me about your experience?
 - Where would you like to begin?
 - Provide space to allow Complainant to begin where he/she wants.
 - If Complainant has a run-on statement, let it run.
 - Use follow-up questions (non-leading) for example, "You mentioned that you told him/her "no", can you tell me what you were experiencing at the time?"



■ Trauma Informed Approach

- Instead of asking "why", ask about what the Complainant was thinking during the experience
- Ask about memories associated with the senses such as: sight, smells, feelings.
- Avoid "Victim Blaming"
Questions to avoid: Why did you...? Why didn't you...? or ask...



Trauma Informed Approach

- Quote Complainant's exact words on key elements
- Identify Witnesses:
 - Who was there before and after?
 - Who else knows anything about the sexual misconduct?
- Expect fragmented memory

Current Events



■ “Rules of the road”



- Stay in your lane
- Don't put your blinkers on
- Remember your role
- Remain neutral



QUESTIONS

■ Trauma-Informed Approach Wrap up

- Clarify information and details
- Focus on the Respondent
- Ask how the experience has affected the Complainant physically and emotionally
- Ask what has been the most difficult part of the experience
- Ask if there is anything the Complainant cannot forget
- Outline communication expectations



■ Trauma-Informed Investigation Reports

It is important to integrate interview details into the investigation report.



■ Trauma-Informed Investigation Reports

Documenting the survivors experience:

- What did "no" look like? (absence of yes)
- What did fear feel like? (paint the picture)
- How did that make you feel?
- What did you think was going to happen?
- What was your thought process...?



■ Trauma-Informed Investigation Reports

Documenting the Complainant's experience

Interviewing for sensory and peripheral details

What did you see, hear, smell, taste, touch

What were your reactions to this experience?

Physically and emotionally

Documenting the psychological after effects of trauma

What has changed / family & friends observations?



■ “Rules of the road”



- Stay in your lane
- Don't put your blinkers on
- Remember your role
- Remain neutral

■ Promoting Fairness in Trauma-Informed Investigations

- Equitable and appropriate to use the trauma informed interview approach with Respondent.
- Opportunity to describe the events as to what the Respondent was able to recall about the event.
- Allow Respondent describe their thought and sensor perception regarding the alleged event.
- Questioned respectfully and professionally, non-judgmental manner

■ Promoting Fairness in Trauma-Informed Investigations

- Crucial to ask follow-up and clarifying questions to complainant without victim blaming:

Can you please help me understand the contradictory evidence or counter intuitive behavior ?



TAKEAWAYS

- Traumatic event - brain is in survival mode.
- One size does NOT fit all.
- Your words and reactions matter.
 - *Revictimization will silence a Complainant.*
- Stay in your lane, don't put your blinkers on, remember your role - remain neutral.
- Apply similar strategy to a Respondent.



QUESTIONS

References

- Strand, Russell, The Forensic Experiential Trauma Interview
- Campbell, Rebecca, Neurobiology of Sexual Assault. National Institute of Justice.
- Salko, Heather A, Tools for Trauma Informed investigations. National Sexual Violence Center.
- Dinse, Jeff-Podcast on Promoting Fairness in Trauma Informed Investigations



EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.

© Copyright 2018 Academic Impressions

Follow us:



33