Title IX Training

Investigations

Darren G. Gibson
Shareholder, Littler Mendelson P.C.

January 19, 2022
Condemnation without investigation is the height of ignorance.

Albert Einstein
Agenda

- Strategy for planning an investigation
- Documenting the investigation
- Gathering evidence
- Interviews and interviewing techniques
- Handling Special Situations
  - Delicate Subject Matters
  - Emotional Interviews
  - Hostile Parties and/or Advisors
Agenda

• Drafting the Report
• Testifying at the Live Hearing: Investigator as a Witness
• Ensuring Equitable Treatment of the Parties
• Trauma-Informed Investigations
• Dealing with Consent, Coercion, and Incapacitation
A “Good” Investigation Defined:

- Backed by policy with compliant procedure
- Timely investigation
- Speak with Complainant
- Interview witnesses
- Speak with Respondent
- Documented interviews
- Documents collected and secured
- Thorough report based on objective facts
Visualizing the Investigation Process

1. Complaint Received
2. Correct Policy Identified
3. Create Investigation Plan
4. Notify Parties
5. Gather Evidence
   - Complainant Interviewed
   - Witnesses Interviewed
6. Respondent Interviewed
   - Supplement Evidence
   - Follow-up Interviews
7. Summarize Investigation
8. Receive Responses
9. Draft Report
Planning the Investigation: A Written Plan

- Who are the Parties; What is alleged?
  - *E.g.*, Student stalking Student; Teaching Assistant sexually harassed Student; Supervising Faculty retaliates against Staff for opposing Sex Discrimination
- Determine applicable policies and procedures.
  - Is this a Title IX or Non-Title IX Investigation?
- Identify evidence for preservation/collection and relevant custodians.
  - Human Resources, IT Department, Campus Security
- Identify interviewees, set proposed order, and schedule.
  - *E.g.*, Parties, fact witnesses, background witnesses
- Identify required notices, deadlines, and events.
Step 1: Identify the Issues

Specific allegation(s) → TSUS Policy & Applicable law(s)

Select the Means

Documents → Interviews → Other means
Step 2: Identify Material Evidence

- Emails on TSUS email system
- Text messages, social media posts, emails, and documents in possession of parties (if material)
- Personnel files
- Student disciplinary records
- Video surveillance of buildings
- Police and medical records (if available)

Materiality depends on the specific allegations.
Step 3: Identify Material Witnesses for Interviews

- Complainant
- Respondent
- Witnesses to actual event
- Witnesses to related events before or after the actual event
- Witnessed identified by parties with *material* knowledge
- Persons outside of Component
  - *E.g.*, Police officers, SANE nurse, family
- Experts in specific area
  - *E.g.*, sexual assault, alcohol induced amnesia
## Step 4: Begin the Chronology

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/1/20</td>
<td>Complainant hired into Chair’s department as admin. assistant.</td>
<td>C’s Personnel File</td>
</tr>
<tr>
<td>12/15/20</td>
<td>Chair flirts with Complainant at the department’s holiday party.</td>
<td>Complaint</td>
</tr>
<tr>
<td>01/10/21</td>
<td>Chair asks Complainant to lunch and suggests they see each other outside of work. He friends her on Facebook, but she does not accept.</td>
<td>Complaint</td>
</tr>
<tr>
<td>03/12/21</td>
<td>Chair rates Complainant as “Needs Improvement” on her 6-month review.</td>
<td>C’s Personnel File</td>
</tr>
<tr>
<td>04/01/21</td>
<td>While working late, Chair asks Complainant into his office, shows her porn on his computer, gropes her, and tries to kiss her. She stops him and leaves.</td>
<td>Complaint</td>
</tr>
<tr>
<td>04/01/21</td>
<td>Chair asks Complainant to work late on urgent grant project. Chair says she left without completing the project and work had to be redone.</td>
<td>Chair’s response</td>
</tr>
<tr>
<td>04/08/21</td>
<td>Chair fires Complainant for poor performance prior to end of six-month probationary period, after review of record and work product by HR.</td>
<td>Complaint/ C's Personnel file</td>
</tr>
<tr>
<td>04/08/21</td>
<td>Complaint makes a report to HR during her exit interview.</td>
<td>HR Exit Interview Notes</td>
</tr>
</tbody>
</table>
Chronologies are extremely useful in investigations.

- Excellent way to:
  - Distill information;
  - Identify critical evidence; and
  - Spot inconsistencies in testimony.

- Helps avoid bias by presenting all information on equal footing.

- Helps in drafting report, as the story is in the chronology.
Complaint:

I am a faculty member in the Engineering Department. We are conducting solar power research in collaboration with SunPower Co. Last week, we held a kickoff meeting at SunPower’s headquarters in Oklahoma, followed by a dinner at the CEO’s home. Numerous Component and SunPower representatives were present. That night, our Department Chair drank too much, and I told him he needed to calm down before he did something stupid.

The next day, SunPower’s Business Manager and CFO informed me that the Chair went into the kitchen later in the evening and found the young, beautiful Business Manager cleaning up. He allegedly grabbed her butt and had to be forcibly removed from the situation by SunPower’s CFO, who observed the incident. He then made a derogatory comment to the CFO about him being Muslim and from the Middle East. The Business Manager and CFO are now very uncomfortable and do not want the Chair to come to our meetings. I don’t blame them. Something needs to be done, as the Chair’s conduct is threatening the research project.
Components bear burden of gathering adequate evidence to reach a determination.

- Gather records from the appropriate custodian;
- Gather records from the Parties;
  - Confidential treatment records require record holder’s consent.
- Gather electronic evidence:
  - System e-mail
  - Stored email
  - Instant/Text Messages
  - Phone logs
  - Video footage
  - Social media
  - Internet searches
  - Voicemail
Best Practices for Gathering Electronic Evidence

• If TSUS email is important evidence, work with your IT department to preserve and search emails using search terms and date restrictions.

• Preserve and search other **material** electronic evidence.
  – TSUS document system.
  – TSUS-issued computers and phones.
  – Search history while using TSUS network.

• Work with facilities to determine if relevant video surveillance exists.
Best Practices for Gathering Electronic Evidence

• For text messages, request each party provide the entire text conversation for a given period.

• Establish a protocol with your IT department for best practices to provide texts from iMessage or third-party apps to investigators.
  – Develop clear written instructions you can provide to parties and witnesses.

• Establish similar protocols for social media.
• Even though the burden is on the Component to gather sufficient evidence, the Parties must be given an equal opportunity to present **exculpatory** and **inculpatory** evidence.

**Inculpatory**: Supports a finding of responsibility.

**Exculpatory**: Supports a lack of responsibility.
### Scenario: What Electronic Evidence Do You Gather?

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/1/20</td>
<td>Complainant hired into Chair’s department as admin. assistant.</td>
<td>C’s Personnel File</td>
</tr>
<tr>
<td>12/15/20</td>
<td>Chair flirts with Complainant at the department’s holiday party.</td>
<td>Complaint</td>
</tr>
<tr>
<td>01/10/21</td>
<td>Chair asks Complainant to lunch and suggests they see each other outside of work. He friends her on Facebook, but she does not accept.</td>
<td>Complaint</td>
</tr>
<tr>
<td>03/12/21</td>
<td>Chair rates Complainant as “Needs Improvement” on her 6-month review.</td>
<td>C’s Personnel File</td>
</tr>
<tr>
<td>04/01/21</td>
<td>While working late, Chair asks Complainant into his office, shows her porn on his computer, gropes her, and tries to kiss her. She stops him and leaves.</td>
<td>Complaint</td>
</tr>
<tr>
<td>04/01/21</td>
<td>Chair asks Complainant to work late on urgent grant project. Chair says she left without completing the project and work had to be redone.</td>
<td>Chair’s response</td>
</tr>
<tr>
<td>04/08/21</td>
<td>Chair fires Complainant for poor performance prior to end of six-month probationary period, after review of record and work product by HR.</td>
<td>Complaint/ C’s Personnel file</td>
</tr>
<tr>
<td>04/08/21</td>
<td>Complaint makes a report to HR during her exit interview.</td>
<td>HR Exit Interview Notes</td>
</tr>
</tbody>
</table>
Scenario: What Electronic Evidence Did You Gather?

- Text messages between Complainant and Respondent.
- Facebook communications between the Parties.
- Emails regarding staying late and quality of work product.
- Emails with HR regarding termination.
- Chair’s computer for pornography search.
Evidence Logs

• Create an evidence log to track evidence collected, where it was received from, and some information about the evidence.
  – Evidence logs help at the summarizing phase
  – Shows your work

<table>
<thead>
<tr>
<th>Date Collected</th>
<th>Description</th>
<th>Collected From</th>
<th>Relevant: Y/N</th>
</tr>
</thead>
<tbody>
<tr>
<td>06/01/2021</td>
<td>Personnel files for Respondent</td>
<td>HR: Sue Sample</td>
<td>Y</td>
</tr>
<tr>
<td>06/01/2021</td>
<td>Email logs for Complainant and Respondent</td>
<td>IT Department</td>
<td>Y</td>
</tr>
<tr>
<td>06/04/2021</td>
<td>Photograph Complainant took of Respondent eating lunch in Student Union</td>
<td>Complainant</td>
<td>N</td>
</tr>
<tr>
<td>06/10/2021</td>
<td>Screen capture of texts from Complainant asking Respondent on a date</td>
<td>Respondent</td>
<td>Y</td>
</tr>
</tbody>
</table>
Outline the discussion topics with specific questions on key points.

1. Introduction.
   - Context, roles, confidentiality, non-retaliation.

2. Background and connection to parties.

3. General understanding of parties’ relationship and history.

4. Timeline and details of specific allegations (and documents)

5. Additional material facts and context.
   - E.g., personal experience with Respondent.

6. Ask if there is anything else?

7. Conclusion.
Documenting the Interview

• Be prepared:
  – Written outline of allegations
  – Written list of basic questions organized by allegation
  – Space for “parking lot” issues
• Typed or hand-written?
• Record non-verbal information:
  – Body language
  – Cooperation level
  – Forthcoming or elusive
Documenting the Investigation

**DO**
- Write objectively
- Summarize knowledge
- Use quotes
- Document specific responses to key questions and evidence
- Document material facts about credibility

**DON’T**
- Make conclusions about facts and credibility
- Use quotes as shorthand
Key Issues in Interview

Who is in the room?
- Have two persons present for Complainant/Respondent interviews in delicate cases such as sexual assault or serious faculty misconduct.
- Interviewer gender diversity helps in M/F sexual harassment or sexual assault cases, particularly for Complainant and Respondent.

Order
- My preference is Complainant, Key Witnesses, Respondent, Additional Witnesses, and Follow-up.

Format
- In person preferred, particularly for Parties (but video if necessary).
- Other witnesses by video or telephone, as needed.
Introduction
• Tell interviewee your name, title, and role as a neutral factfinder for Component.
• Provide short statement of meeting’ purpose but maintain confidentiality.
• Explain to witness that they are not in trouble.

Address confidentiality
• Address confidentiality in context of investigation and the report.
• Explain witness confidentiality is not guaranteed; Report identifies witnesses.

Address non-retaliation
• Explain witnesses protected from retaliation and reporting process.

Questions
• Ask if there are any questions about the process before you get started.
Key Topics to Cover

- Interviewee name, title, position
- Interviewee’s background with the Parties
- Understanding of Complainant’s concerns/allegations
- Awareness of facts, documents, or persons related to allegations

- Who, what, when, where of incident
- Persons involved in incident, including names/relationships of other material witnesses
- Post-event communications with Complainant or Respondent
  - Any reason for bias against either Party
Use “Funneled” Questioning

- Open-ended phase
- Clarification phase
- Pinning-down phase
  \(i.e.,\) closing the door
Opening Questions

• Ask open-ended questions:
  – “How would you describe your relationship with your supervisor?”
  – “What do you remember about the party?”

• Aim for all **material** evidence about allegations.

• Identify ways to refresh witness’ memory:
  – *E.g.*, documents; emails.

• Make sure the witness fully answers questions.

• Ask: “Do you remember anything else?”
Clarification Questions

• What? Who? Where? When?
• Don’t disrupt a train of thought.
• Use active listening:
  – Don’t be wed to your outline.
  – Listen for subtle changes to answers and clarify.
• Follow up on cues:
  – Watch for eye contact and body language.
• Summarize so witness can offer facts that were left out.
Pinning Down the Interviewee’s Statements

- Close the door and exhaust subject.
- Get final answers.
- Ask whether there are any documents supporting witness’s testimony.
- Encircle knowledge with wrap-up questions:
  - “Is there anything else?”
  - “Is there anything you thought I would ask you about that we haven’t covered?”
Complaint from Emma:

Malik and I are undergrads in the same major, and we have been dating for three months. We were not having sex because of my strong religious beliefs against premarital sex. Malik has no concerns about premarital sex and would like to have sex with me but for my beliefs. On Saturday night, I went to a party at my sorority house and got pretty drunk from too many tequila shots. I live at home with my conservative parents and couldn’t go home. Malik’s apartment is close to the sorority house, so a sorority sister walked me to Malik’s apartment to sober up after the party. Shortly after I got to his apartment, I passed out and don’t remember anything else that happened that night. The next morning, I woke up and was naked in his bed and it was clear we had sex. When I confronted Malik, he told me we had sex. He had sex with me without my consent. I was passed out and don’t remember anything.
Assume you’re interviewing Emma and you’ve gotten through introductions, confidentiality, and background.

- How would you use the funnel method to ask her about the night in question?
- How would you start?
- What type of clarifying questions would you ask?
- How would you close the loop to ensure you have all material information?
- What type of “anything else” questions might you want to ask?
- What type of questions would you ask about other material evidence?
Malik’s Response:

I did not have sex with Emma without her consent. She’s my girlfriend, and we have been dating for about three months. Late Saturday night, she showed up at my apartment, with a smell of alcohol on her breath. She said she had been at a frat party and got “wasted” on tequila. She also said that being around all the guys at the frat party got her “really horny.” She told me that she wanted to stay the night and have sex with me. I told her I thought she wanted to wait for religious reasons, and she said she couldn’t wait any longer and wanted to take our relationship to the next level. While she had clearly been drinking, she was aware of her surroundings and was asking me to have sex with her. I agreed, and we had sex and went to sleep. The next morning, Emma got up and said that she did not remember anything after she left the fraternity house. When I told her what happened, she accused me of taking advantage of her and having sex without her consent.
Now assume you’re interviewing Malik and you’ve gotten through introductions and background.

- How would you use the funnel method to ask the him about the night in question?
- Where would you start?
- What type of clarifying questions would you ask?
- How are they different than questions you asked Emma?
- What type of “anything else” questions might you want to ask him?
Useful Questions

**QUESTION**

“Let me give you this information so that you can respond.”

“Is there anything else that you would like to add to this?”

**PURPOSE**

Refreshes recollection and provides a chance to respond.

Gather full story, including context and background.
Useful Questions

QUESTION

“Is there any other evidence that would help us resolve this?”

“Is there anyone else we should speak with about this claim?”

PURPOSE

Uncover documents and seals off “universe of facts”

Chance to provide response and create witness list
Useful Questions

**QUESTION**

“It’s been reported that you said X, Y, or Z.”

“Why would someone make these allegations if they are not true?”

**PURPOSE**

Responding to denial; corroboration

Uncover bias and potential credibility issues with witness
Closing the Interview

- **Thank the Interviewee**
  - Thank you for your time in this serious and important process.
  - Your participation helps support Component’s compliance in this area and ensures we address serious allegations promptly and fairly.

- **Keep Communication Open**
  - Please feel free to contact me if you recall any other details or information.

- **Preserve Evidence**
  - Please remember you are not to destroy or alter documents or information.

- **Confidentiality and Retaliation Reminder**
  - You are also protected by Component’s non-retaliation policy. Do not hesitate to contact me if you have any concerns in that regard.
  - Reminder of Component confidentiality policy.
Interviewing Best Practices

• Avoid confrontational or accusatory questions.
• Maintain objectivity: Do not admonish or reprimand even if troubling conduct is revealed.
• Don’t agree or disagree with what you’re hearing.
  – Instead, use a non-binding, non-committal clause such as “I understand.”
• Don’t lead witnesses.
  – E.g., “. . . And then you heard Bud say . . .”
• Repeat important questions with different wording.
  – Tests witness credibility: Does the witness provide the same answer?
• Use silence after a question as a technique to encourage reticent witnesses to start talking; People often feel a need to "fill" silence.
Interview Minefields, Curveballs, and Delicate Situations
Personal Topics, Emotional Interviews, Hostility

• Stay levelheaded and rework your strategy.
• When an Interviewee does not answer a question, ask more:
  – Would you like me to phrase the question another way?
  – What do you think I am asking you?
  – Will you tell me why you do not wish to answer?
  – Do you need a moment to gather your thoughts?
• Remember effects of trauma can impact the interview or the interviewee may be embarrassed.
• Remind disruptive Advisors of their role in the proceedings. End the interview if disruptions persist.
Employee Interviews: Garrity Warnings

*Garrity v. New Jersey* and its progeny outline boundaries for public employers when conducting employee witness interviews in internal investigations that raise potential criminal liability.

- Garrity rights protect public employees from compelled self-incrimination during investigatory interviews conducted by their employers.
  - “The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”
Practically, *Garrity* prohibits public employers from *both*:  

1. Compelled cooperation with internal investigations by threat of job loss; 
2. Requiring employees waive Fifth Amendment rights against self-incrimination by allowing use of interview information in criminal proceedings.

Two options. Employers can either:

- Compel cooperation by providing immunity from use of testimony in criminal proceedings, but terminate employees still refusing to answer questions; or
- Make it clear that participation in the questioning is voluntary and the employee will not be disciplined for failing to answer questions, but any answers may be used in criminal proceedings.
Garrity Warnings

• Employers cannot draw adverse inferences with respect to underlying conduct to justify termination merely based on the failure to testify alone.
  – However, employers may draw adverse inferences where probative evidence of guilt is not otherwise addressed by the employee.

• Precedent supports suits against state actors who inflict constitutional injury by violating employees’ Garrity rights in internal investigations thus resulting in improper use of statements in criminal proceedings.

• Law enforcement requests for documents and witness statements created during internal investigations may raise Garrity concerns.
  – Be cautious about sharing interview notes with criminal authorities. Consult with attorneys.
Components must provide Parties and their Advisors an equal opportunity to inspect and review all obtained evidence **directly relating** to the allegations once fact gathering concludes.

- “Directly relating” includes more than just relevant evidence.

Parties have a right to respond to evidence in a meaningful way, so summaries must provide enough information to facilitate response.

Use your Chronology to build the summary.
The Investigative Report

Purpose:

• Record of investigation steps and evidence collected.

• Writing process can clarify analysis and uncover additional questions.

• Likely used to justify action based on findings.
  – E.g., dismissal, reprimand, etc.

• May be cited in legal proceeding, OCR investigation, or other related proceeding.

• Must consider a Party’s response to evidence.
Critical Tasks of an Investigative Report

• Third parties must be able to understand full picture without outside explanation.
• Document factual findings objectively and accurately.
• Avoid unnecessarily controversial commentary.
• Provide enough information for Decision Makers to make a determination. Discuss:
  – All allegations raised;
  – Applicable policies discussed;
  – Material evidence, findings, and reasoning for relevancy determinations.
I. Executive Summary
II. Summary of Allegations and Applicable Policies
III. Timeline of Investigation
IV. Witness Identified Interviewed
V. Witness Credibility Determination
VI. Additional Evidence Considered
VII. Summary of Witness Interviews and Evidence
   • Not copied interview notes.
VIII. Parties’ Response to Evidentiary Record
Drafting the Investigative Report

Basics
• Document investigation chronology: Note interviews conducted, documents reviewed, and evidence examined.

Summary of Evidence
• State facts, not conclusions.
  – Avoid opinions, rumors, hearsay.
  – Give concrete examples.
• Attach key evidence as exhibits; acknowledge conflicting evidence.
• Acknowledge when credibility assessment is required; explain basis.

Conclusions
• None. That is the Decision Maker’s job.
Drafting the Report

**DO**
- Use objective language.
- Be as detailed as possible.
- Group together logically.

**DON’T**
- Reach conclusions.
- Put words in a Party’s mouth.
- Rely on stereotypes.
Credibility Assessments

• Investigative report may contain Investigator’s credibility assessments
  – Go through applicable credibility factors in report when making credibility assessments.
    Inherent Plausibility  Demeanor
    Motive to Falsify     Corroboration
  – Apply factors to specific statements and/or witnesses.
  – Clearly explain why one party or witness appears more credible than another.
• Decision Maker not bound by Investigator’s assessments.
Common Issues with Investigative Reports

**Insufficient Structure**
- Use sections and headings to help guide readers and your own writing.
- Delineate between applicable policies, investigation process, outcome of interviews, and factual findings.

**Lack of citations to evidence**
- Cite only to key documents that tell the story; Attach as exhibits.

**Failure to clearly delineate the claims and conclusions**
- Identify each specific claim, definition, relevant facts and outcome.

**Doesn’t show policy was followed in conducting investigation**
- Go through process and show compliance with all notice and investigation requirements (with accompanying policy citations).
Common Issues with Investigative Reports

Failure to recognize both sides
• If there is a dispute in the facts, recognize it and address it.

Credibility determinations are not explained
• Recognize and discuss credibility assessment factors when credibility matters.
  – Citing jury instructions in footnotes provides reliability to credibility assessments.

No narrative of chronology of events
• Reports often merely repeat evidence gathered then make determination.
• Reports should tell the story of what happened using preponderance standard.
The Investigator can be called as a witness during the Live Hearing.

- Investigator’s role is limited to summarizing evidence in report and serving as a witness;
- Subject to being called as a witness and questioned by decision-maker and parties’ advisors;
- Not allowed to ask questions of witnesses during hearing.
Ensuring Equitable Treatment of the Parties

Treat Parties equitably throughout the Grievance Process.
• This does not mean Parties are asked identical questions or can only submit an equal amount of evidence.
• It means:
  – Acting without bias, conflict of interest, or stereotypes;
  – Adhering to established processes;
  – Applying investigation procedures equally;
    • *E.g.*, deadlines
  – Adhering to presumption of non-responsibility for Respondent;
  – Being mindful of unique stress and trauma each Party may be under.
What is a trauma-informed investigation?

• Considers the potential neurobiological effects of trauma.
• Goal: Objective and impartial investigation that minimizes reliance on sex stereotypes and generalizations.

Why follow trauma-informed practices?

• Safety:
  – Avoid re-traumatization and perpetuating a hostile environment.
• Accountability: Conduct better investigations
• Required by state law for university peace officers.
  – *Texas Education Code § 51.288 (HB 1735).*
DOE Statements on Trauma-Informed Practices

• “While the final regulations do not use the term ‘trauma-informed,’ nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.”
  – Preamble p. 591

• “While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties.”
  – Candice Jackson, Fmr. Deputy Ass’t. Sec., DOE, NACUA Briefing (Sept. 28, 2017)
September 2017, *The Bad Science Behind Campus Response to Sexual Assault*, The Atlantic:

- Argues trauma-informed, neurobiology-focused approach is based on “bad science.”
- Presents alternative views by scientists that “[h]igh levels of emotional stress enhance explicit, declarative memory for the trauma itself; they do not impair it.”
- Article elicited response from yet other scientists arguing in favor of psychological effects on trauma.

Psychological trauma is the unique individual experience of an event or enduring conditions, in which:

• The individual’s ability to integrate his/her emotional experience is overwhelmed, or
• The individual experiences (subjectively) a threat to life, bodily integrity, or sanity.

“[T]rauma is defined by the experience of the survivor. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.”

Potential Effects of Trauma

• Scientists have proposed that neurobiological effects of trauma result in brain chemistry interfering with the brain function in encoding of memory.

• Theory states individuals who experience trauma may be unable to recall events in chronological order; may not recall some details at all; ability to recall details may improve over time; and affect may initially seem evasive or counterintuitive.

• Response to trauma may include fighting, fleeing, or freezing.

• Campus investigators and adjudicators need not determine precise effects of trauma in a particular case.
  – They need to understand the potential effects of trauma and check personal biases regarding potential impact.

• Avoid assuming individuals are “lying” based if unable to recall every detail in chronological manner.
  – However, if investigation shows behaviors that may be related to trauma, that doesn’t equate to policy violation.
• DO NOT accept everything Complainant recalls as absolutely “true.”
• DO examine inconsistencies.
• Avoid assigning truthfulness or responsibility based on conventions of “victim” and “perpetrator.”
• Some interviewees’ behavior during interviews may appear odd.
  • Remember that they may continue to be affected by trauma when recalling a traumatic event
  • Various “normal” responses include:
    – Emotional, crying, hysterical
    – Flat affect – seeming numb
    – Laughing, light-heartedness, inappropriate
    – Cycling of emotions
Trauma and Memory

• If you find yourself thinking this:
  – She can’t get her story straight…
  – How could they not remember something as significant as that?
  – He is obviously making it up as he goes along…

• Remember this:
  – Extreme stress interrupts the brain’s process for sorting memories.
    • Memories formed during trauma stored in amygdala.
    • Memories of non-traumatic events stored in the hippocampus.
  – Storage impacts recall.
    • Traumatic memories tend to be non-linear, fuzzy, and lack recall of context.
Trauma-Informed Interview Tips

• Think about presentation and atmosphere.

• Be mindful of first impressions.
  – How do you present yourself?
  – Where is the interview occurring?
  – Consider privacy, light, noise, accessibility, etc.

• Allow for variety of reactions to trauma.
Dealing with Consent, Coercion, and Incapacitation

• More than 90% of sexual assault victims on college campuses do not report the assault.
  – Cullen, F., Fisher, B., & Turner, M., 2000

• About 1 in 3 women and 1 in 6 men have been the victim of a contact sexual assault.
  – CDC NIPSVS, 2011

• In 8 out of 10 cases of rape, the victim knew the perpetrator.

• More than 25% of transgender individuals had been sexually assaulted after the age of 13.
Many victims do not characterize their experience as a crime due to:

- Embarrassment;
- Lack of understanding of the legal definition of rape;
- Sympathy for the rapist; and
- Self-blame.

The most common reason for not reporting incidents of sexual assault and sexual misconduct was that it was not considered serious enough.

- Other reasons included because they were “embarrassed, ashamed or that it would be too emotionally difficult;” and because they “did not think anything would be done about it.”

AAU Campus Climate Survey on Sexual Misconduct, 2015
Participants receiving a definition of affirmative consent are more likely to:

- Assign more responsibility, endorse greater consequences for perpetrators;
- Perceive a higher degree of victim suffering;
- Be willing to intervene and provide victim support; and
- Report consent was not granted and label the encounter as a sexual assault.

These effects will be greater for those who read a vignette in which consent is less ambiguous.
Consent is an informed and freely and affirmatively communicated willingness to participate in particular sexual activity. Consent can be expressed either by words or by clear and unambiguous actions, as long as those words or actions create mutually understandable permission regarding the conditions of each instance of sexual activity. It is the responsibility of the person who wants to engage in the sexual activity to ensure that s/he has the consent of the other to engage in each instance of sexual activity.

Sexual Misconduct Policy, Glossary at pages 52-53
Component-Considered Consent Factors

- Consent is a voluntary agreement/assent to engage in sexual activity;
- Someone who is incapacitated cannot consent;
- Consent can be withdrawn at any time;
- Past consent does not imply future consent;
- Silence or absence of resistance does not imply consent;
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.
- Coercion, force, or threat invalidates consent; and
- Being intoxicated or under the influence is never an excuse for engaging in Sexual Misconduct.

Sexual Misconduct Policy, Glossary at page 53
Consent and Beverages

• You can think of consent and offering beverages to guests similarly
  • Provide the drink if your guests accept your offer;
  • Don’t make them drink it if they change their mind;
  • If the decline the offer, don’t give them a drink;
  • Don’t guilt them for not wanting the drink.

• https://youtu.be/fGoWLWS4-kU
Consent is not consent unless it is truly voluntary.

“Involuntary consent” = Coercion.

https://youtu.be/laMtr-rUEmY
Indications of a Lack of Consent

- Physical force is used or there is a reasonable belief of the threat of physical force;
- When duress is present;
- When one person overcomes the physical limitations of another person; and
- When a person is incapable of making an intentional decision to participate in a sexual act, which could include instances of incapacitation.
Incapacity

• The state when a person cannot rationally decide whether to engage in sexual activity because he or she lacks ability to give knowing Consent.
  – *E.g.*, understanding the "who, what, when, where, why, or how" of the sexual interaction.

• The temporary or permanent inability to give Consent because drug or alcohol consumption, voluntary or involuntary, renders the individual mentally and/or physically helpless, unconscious, asleep, or otherwise unaware that sexual activity is occurring.
  – Incapacitation is determined through consideration of all relevant indicators of an individual’s state.
  – **NOT** synonymous with intoxication, impairment, blackout, or being drunk.
  – Incapacitation is a step beyond drunkenness or intoxication.
Indicators of Incapacity

- Lack of control over physical movement;
- Lack of awareness of circumstances or surroundings; or
- Inability to communicate for any reason.

An individual in a blackout state may appear to give consent while lacking the ability to consent or conscious awareness. Therefore, it is especially important that anyone engaging in sexual activity be aware of their partner’s intoxication level.
No: What It Looks and Sounds Like

• Lying there in fear.
• Pushing away.
• Turning away.
• Passed out.
• Sleeping.
• Crying.
• Silence.
• Shaking.
• Screaming.
• Pushing away.

I’d rather be alone right now.
• Let’s just go to sleep.
• I changed my mind.
  • Don’t touch me.
  • I’m not ready.
  • Not now.
  • Maybe later.
• I don’t feel like it.
• I have a boyfriend/girlfriend/partner.
  • STOP!
Questions