



CIVIL RIGHTS INVESTIGATOR  
TRAINING & CERTIFICATION LEVEL FOUR

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# YOUR FACULTY



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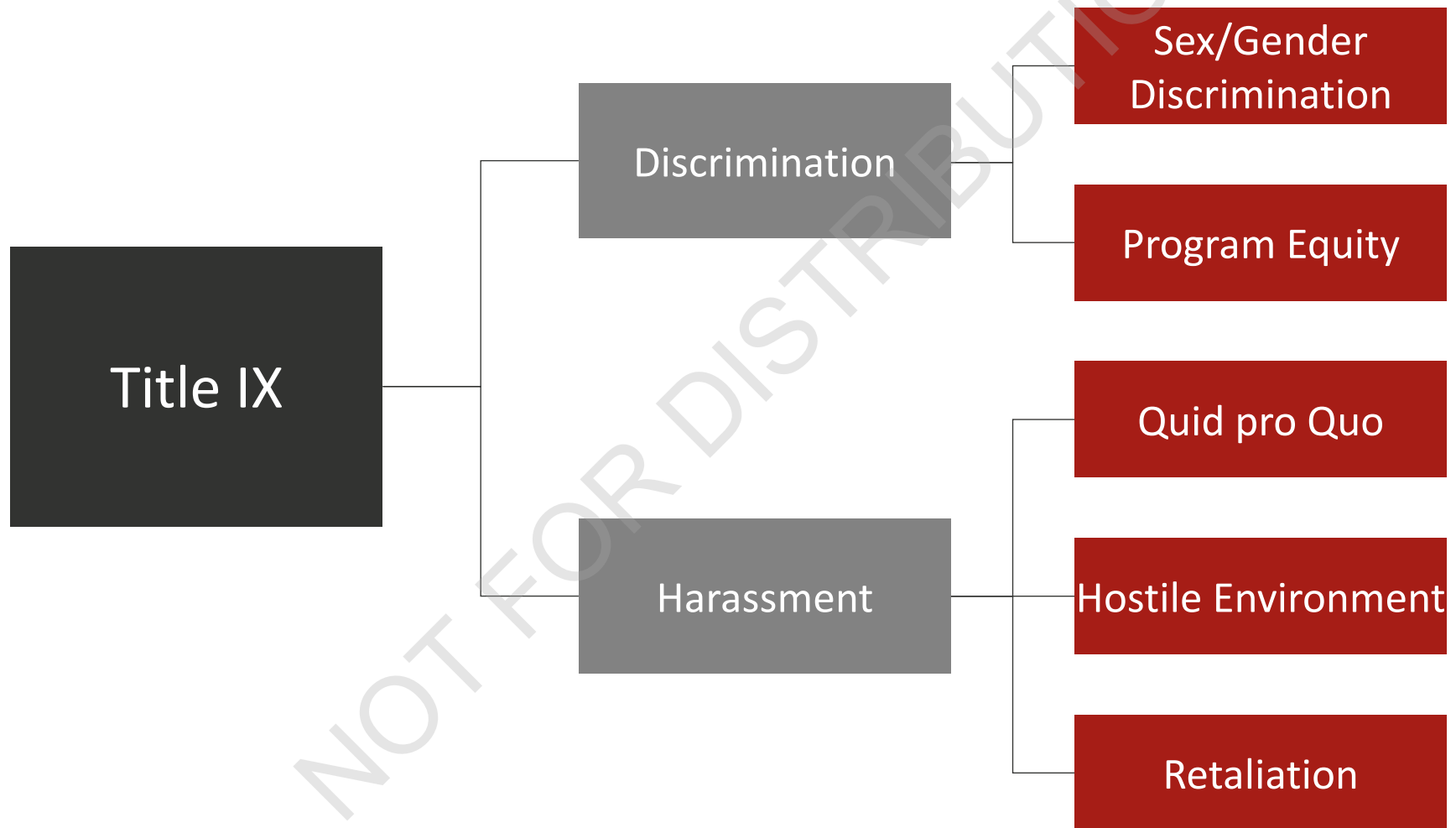


# TITLE IX



*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.”





# 2020 TITLE IX REGULATIONS



- Issued May 6<sup>th</sup>, 2020 (Publication date May 19<sup>th</sup>, 2020)
- Effective and enforceable August 14<sup>th</sup>, 2020
  - Amend the Code of Federal Regs. and have force and effect of law
  - Some provisions already mandated by due process case law in some jurisdictions
  - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
  - Lawsuits against regs
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5<sup>th</sup>/14<sup>th</sup> Amendment case law.

# NEUTRALITY AND OBJECTIVITY



- Grievance process must treat parties “equitably”
  - Must be designed to restore or preserve access to education programs
  - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest



# ADVISOR OF CHOICE



- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
  - May not restrict who may serve as advisor
  - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, the IHE must provide one
  - No fee or charge
  - Advisor of recipient's choice
  - May be an attorney
  - Can't be "fired" by party, but can be nullified by non-cooperation

# BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE



- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
  - So it's not required that a respondent prove welcomeness or consent, the recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement *or any other source*
- Contracted/outsourced investigators do not absolve the school of responsibility for this provision



# PARTY ACCESS TO EVIDENCE/REPORT



- Regulations mandate creation of an investigation report
  - Report fairly summarizes all relevant evidence
  - What should go into a report? See our recent [blog](#) on this topic.
- Prior to the completion of the report, all evidence related to allegations must be provided to parties
  - Parties must have at least 10 days to review and submit written responses prior to finalizing investigation report
  - Parties must receive finalized report to review and submit written responses 10 days prior to hearing
  - Essential to develop a clear protocol and workflow for these steps

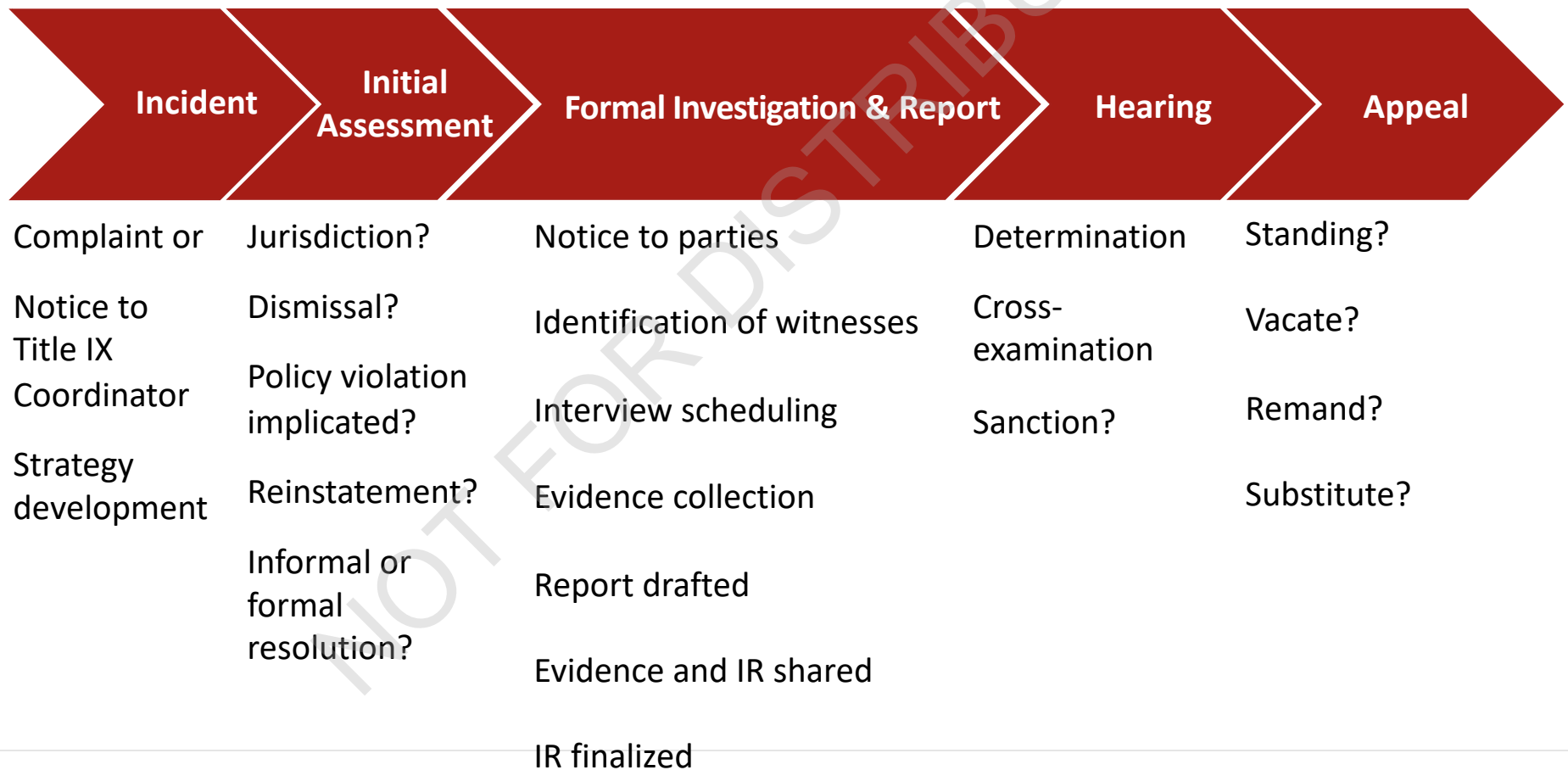
# THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation
Prompt	Effective	Equitable	Process
Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects	Remedies



# THE PROCESS



# 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 report 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 for review and written response at least 10 days prior to hearing

**As an investigator, you have  
no side other than the  
integrity of the process.**

## **Investigation is the cornerstone of resolution.**

- What happened?
- Who was affected?
- Stop and prevent
- Interim actions and supportive measures
- Scope, pattern, threats
- Documentation and recordkeeping
- “Not deliberately indifferent”



**Investigations serve an institutional purpose, but do not serve the institution.**

- Impartiality
- Transparency
- Equity
- Open and consistent communication
- Full and fair participation
- Published policy prohibitions
- Detailed procedures

# CIVIL RIGHTS INVESTIGATIONS



**Investigations are as broad as the allegations require.**

- Active identification and accumulation of evidence
- All relevant witnesses
- Evidence from all available sources
- Recommendations from parties
- Expert witnesses
- Prior substantially similar misconduct

## **Investigations turn on reliable information.**

- Party engagement
- Witness participation
- Corroborative evidence
- Thorough review
- Credibility assessment
- Evidentiary analysis
- Determination

**The best information comes from a party or witness who feels safe, unthreatened, and believes the process will work as promised.**

- Transparency
  - Investigation's purpose
  - Potential outcomes
- Information sharing
- Consistent communication
- Reciprocity

**Rapport is one of the best tools for gathering reliable information.**

- A relaxed interviewee (not on guard) is more forthcoming, less scripted, more introspective and thoughtful.
- Reduce anxiety
- Eliminate antagonism
- Lower guard

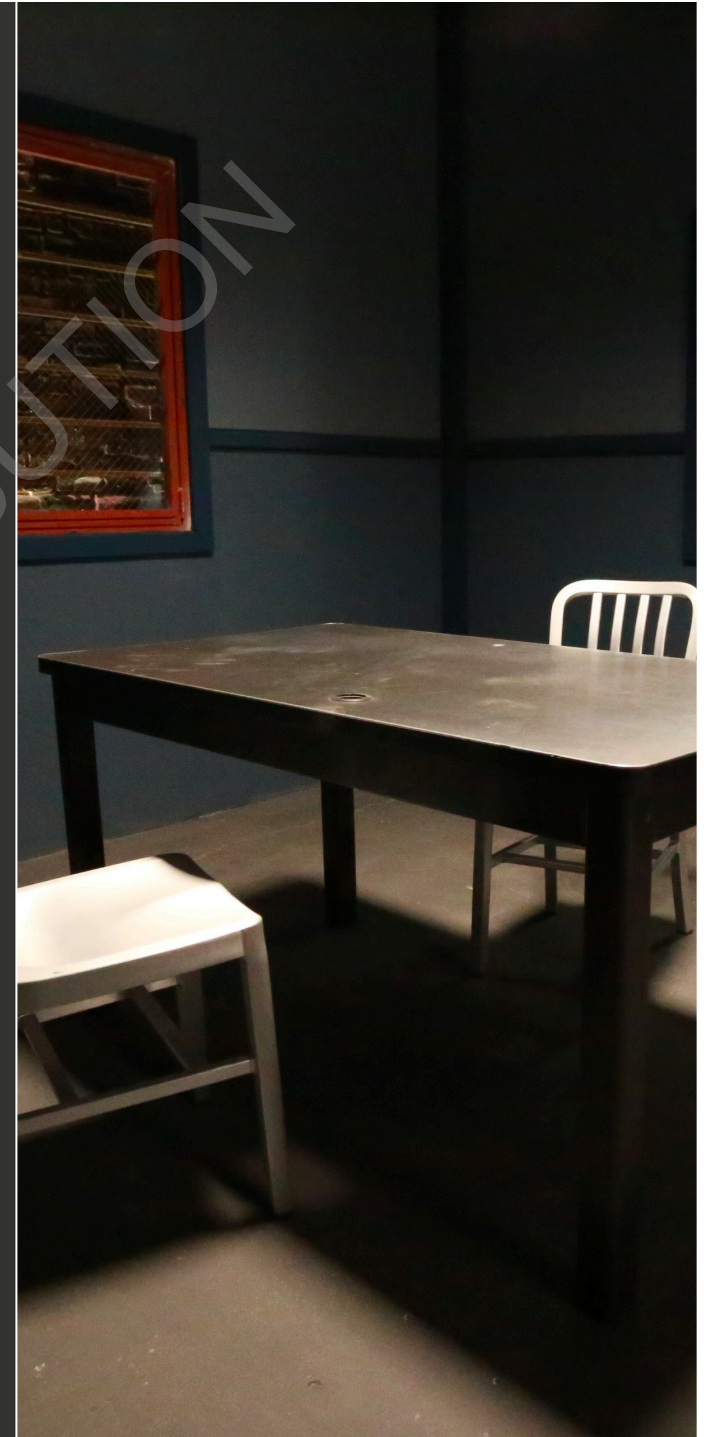
## **Cognitive interviewing depends on rapport.**

- “Enter someone else’s world and make them feel that you understand them”
- “Speak in such a way that they enjoy listening. Listen in such a way that they enjoy speaking.”
- “Build trust. Show you understand their needs and deliver on your promises.”
- “If you can develop rapport, you can fill their needs and they will be able to fill yours.”

# EVOLUTION OF INVESTIGATION TECHNIQUES

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- Trial by Ordeal
- Wickersham Commission
- *Brown v. Mississippi* (1936)
- Moran & Scharff
- HIG Post-911 Report





## **Trial by Ordeal**

- Guilt or innocence of the accused was determined by subjection to dangerous or painful tests (such as submersion in water) believed to be under divine control
- Floating in water
- Carrying a hot iron
- Combat
- Open to interpretation based on what community knew about the individual

## The Third Degree

- Willful infliction of pain and suffering on criminal suspects
- 1931-32 Wickersham Commission – *Lawlessness in Law Enforcement*
- Found widespread use of the third degree
- Led to nationwide police reform of investigation and interrogation tactics

# EVOLUTION OF INVESTIGATIONS



## ***Brown v. Mississippi, 297 U.S. 278 (1936)***

- Ellington hanged, let down, hanged again, whipped
- Other defendants “laid over chairs and their backs were cut to pieces with a leather strap with buckles on it”
- All three eventually confessed
- “The rack and torture chamber may not be substituted for the witness stand.”
- “use of the confessions...as the basis for conviction and sentence was a clear denial of due process”

## Sherwood Ford Moran

- 1943 memo on interrogating Japanese POWs
- Preferred “interviewers” over “interrogators”
- Intimidating or authoritative attitude is counterproductive
- "Deep human sympathy can go with a business-like, systematic, and ruthlessly persistent approach."

# EVOLUTION OF INVESTIGATIONS



## Hans Scharff

- German Luftwaffe interrogator
- Never used physical means to get information
- Seem as if he is the prisoner's greatest advocate
- Jokes, homemade food, alcohol, swimming, tea
- POWs often offered information rather than responding to questions
- Confirmation interviewing

# EVOLUTION OF INVESTIGATIONS



## UK P.E.A.C.E. Model

- Introduction & process explanation
- Cognitive interview approach
  - Mentally relive circumstances
  - Limited interviewer interference
  - Interviewee has greater control
- Agreement on summary of interview
- Final comments and thoughts
- Understanding of next procedural steps

# EVOLUTION OF INVESTIGATIONS



## High-Value Detainee Interrogation Group 2016 report

- Conducive context
- Develop and maintain rapport
- Elicit narratives, open-ended questions
- Assist memory recall
- Funnel questioning strategy
- Encourage highly detailed responses
- Strategically introduce evidence or information



# INTERVIEW CRITIQUE



Watch the  
interview.



What's good?  
What's not so good?



Discuss.

# ANATOMY OF A BAD CONFESSION



# EMPATHETIC & EQUITABLE INVESTIGATIONS

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## Rationale

- Relaxed interviewees give better information
- Non-adversarial investigators have more success
- Emphasis on human dignity
- Burden on investigators
- Non-prosecutorial
  - Confirmation bias
  - Like Me bias

## Fairness in...

- The investigation
- Supportive measures
- Interim actions
- Interviews
- Access to information and evidence
- Determination/Outcome

# INTERVIEWING



- Remember this same story may have been repeated to multiple individuals
- Focus on what you need to know
- Plan strategic approach to interview
- Do your homework
- Communicate roles, expectations, purpose, timeline
- Develop questions ahead of time
- Strategize for breaks, pauses, advisor conversation
- Choreograph interview start and conclusion

# STRATEGIZE



- How you will adapt to trauma indicators
- How you will build rapport with interviewee
- How you will assist in memory recall
- How you will test/assess credibility
- How you will evaluate and test evidence
- How you will handle disruptive advisors
- Communication with co-investigator



# THE INVESTIGATION STRATEGY

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# STRATEGY MEETING WITH COORDINATOR



- Review
  - Intake report
  - Other available information
  - Background info (as necessary)
    - Prior misconduct
    - Grades
    - Evaluations
    - Affiliations, allegiances, social groups
- Restrict meeting to the report/case at hand, avoid potential bias

# STRATEGY MEETING WITH COORDINATOR



- Clarify allegations
- Review applicable policies
- Identify appropriate procedures
- Ensure accurate notices
  - Who is responsible for NOIA?
  - Timing of formal complaint filing
  - Additional notices
- Communication through investigation
  - Updates to the parties throughout the process

# STRATEGY MEETING WITH COORDINATOR



- Clarify roles & responsibilities
- TIXC as investigation overseer
  - Information sharing restrictions
  - TIXC filling additional process role
  - Contact for advisors
- Who schedules interviews?
- What should investigator refer or defer to TIXC?

# STRATEGY MEETING WITH COORDINATOR



- Identify implicated policy provisions
- Distill into models of proof
- Define scope of investigation
- Identify interview goals
- Identify potential obstacles/challenges
- Pattern and/or predation considerations
- Culture and/or climate investigations

# STRATEGY MEETING WITH COORDINATOR



- Establish preliminary investigation timeline
- Develop initial witness list
- Order of interviews
- What information is needed?
- What information is available?
- Anticipate allegiances
- Disrupt collusion potential

## STRATEGY NOTE: DISABILITY CONSIDERATIONS



- Are there known or perceived disabilities for any of the parties or witnesses?
- Are appropriate communication services available?
- Does the plan accommodate for extra time if needed?
- Are materials accessible in a way that meets known or potential needs?
- Supportive measure availability
- Allowance of additional support persons (and equitable reciprocation)

# STRATEGY MEETING WITH COORDINATOR



- Post-strategy meeting, there should be a plan
- TIXC confirms details in writing
- Investigator develops investigation plan
- Avoid material deviations
- Communication to parties

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# STRATEGY EXERCISE



1. Read the intake report

2. Review institutional procedures

3. Identify important items to clarify with TIXC

4. Identify facts central to the allegations

5. Develop an initial witness list

6. Plan initial interview order and schedule

## STRATEGY EXERCISE



A former student of mine, Reese Smith, is harassing me and I am fearful for my safety. I have told him repeatedly to stop contacting me, but he keeps parking in front of my apartment and just watching it. He also waits for me after my classes and tries to talk to me. Reese and I met when I took a group of students to England on a study abroad trip last year for my Shakespeare class. On these trips, the group is small (around 10 people) and we all get very close to each other after spending days and evenings together. Reese and I became very close on the trip. It began as flirting on the flight to England and continued in my room one night. One evening Reese came to my hotel room to talk about a writing project for our course. I was winding down after a long day of touring and was enjoying a glass of wine.

## STRATEGY EXERCISE



I offered him one and he accepted. We worked through his outline for his paper and maybe had a few more glasses of wine. One thing led to another and we ended up having sex that night. We have continued to see each other over the past year when we could, even at my apartment when my roommates were out. There was a very strong attraction between us. He even took my Renaissance Literature class last spring so that we could see each other more often. You need to know I have a boyfriend from home and I told Reese about it. I said we needed to keep our relationship casual. Over the summer I was approached by the head of the English Department about applying for a tenure track teaching position. I was fearful the Department would find out about Reese and it would jeopardize my chance for the position.

## STRATEGY EXERCISE



I decided to break it off with Reese last month and told him we could not meet up any more. I thought I had made it clear this was just fun and games but he went ballistic and threatened to tell my boyfriend. He wants an explanation but I don't want to tell him about the job because I'm afraid he will use that to hold over my head. For the past month, he has sent me endless numbers of texts, and e-mails, drives past my apartment, sits in front of my apartment in his car, stands outside my class, and then yesterday I looked out and he was in the English Department office while I was talking with the Dean! I was so upset I couldn't concentrate. You should also know that two tires on my car were slashed. I don't know what to do. Can I keep my name out of this and just have someone talk to him? I don't want anyone else to know about it, but I want him to stop harassing me.

# STRATEGY EXERCISE



1. Read the intake report

2. Review institutional procedures

3. Identify important items to clarify with TIXC

4. Identify facts central to the allegations

5. Develop an initial witness list

6. Plan initial interview order and schedule

# INTERVIEWING CONSIDERATIONS



- Investigator bias
  - Approach to students, hourly employees
  - Stereotypical gender combinations
  - Sexual practices
- Cultural considerations
  - Presumptions attached to race, orientation, gender
  - Teams, clubs, affiliations
  - Courting rituals
  - Communication, deception, rapport

# INTERVIEWING CONSIDERATIONS



- The Spiel
  - What information is required?
  - What information do they need?
    - Process
    - Role, expectations
    - Retaliation, amnesty
    - Review
  - What would be helpful?
    - Clarify information source
    - Don't launder language
  - Anticipate reluctance, fear

# INTERVIEWING CONSIDERATIONS



- Prepare questions, but let them talk
  - Open-ended narratives
  - Listen for answers before additional questions are posed
    - Actively update list of questions
    - Note discrepancies or follow-up
- Active listening skills
  - Eye contact, head nodding, summarization
  - Avoid distractions (watch, computer, notes, phones)
- Questions posed by other parties



# INTERVIEWING MINORS



- Young v. very young students
  - High/middle/elementary
- Gender considerations
  - More important to align investigator with party?
- Parent/guardian involvement
  - Timing of notice, parent as advisor
- Interview locations
- K-12 v. Higher Education – differences in approach

# SPIEL EXERCISE



1. Consider what information *must* be in the spiel.

2. Consider what information *should* be in the spiel.

3. Make a topical list of all items to be covered.

4. Take turns delivering the spiel. Use your own style.

5. Critique and revise.

6. Repeat.

# COGNITIVE INTERVIEWING

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# FLAWS IN TRADITIONAL INTERVIEWING



- Asking an open-ended question and then interrupting
- Asking direct, short-answer questions at the outset
- Asking leading or suggestive questions
- Not assisting with efforts at recall
- Results in:
  - Withholding of information
  - Not providing any information that is not solicited
  - Abbreviated answers
  - Volunteering of uncertain answers
  - Interfering with memory retrieval

# COGNITIVE INTERVIEWING TECHNIQUES



- Based on:
  - Scientifically derived principles of memory and communication theory
  - Extensive analysis of law enforcement interviews
- Increases the amount of relevant information gathered
- Decreases the likelihood of recalling an event incorrectly
- Originally developed for use with victims and witnesses but since expanded

R. Edward Fisher Geiselman, Ronald P. Fisher, *Memory-enhancing techniques for Investigative Interviewing: The Cognitive Interview*, 1992.

# COGNITIVE INTERVIEWING



- Interview v. interrogation
- Focus on collecting best information
- The value of rapport
  - Willingness to talk openly
  - Reduced anxiety about sensitive subjects
    - Sexual misconduct creates defensiveness, mistrust
  - Reduced sense of feeling “judged”
  - Lowered defenses
- The Lies Children Tell

# QUESTIONING



Following v. Leading

Explaining v. Defending

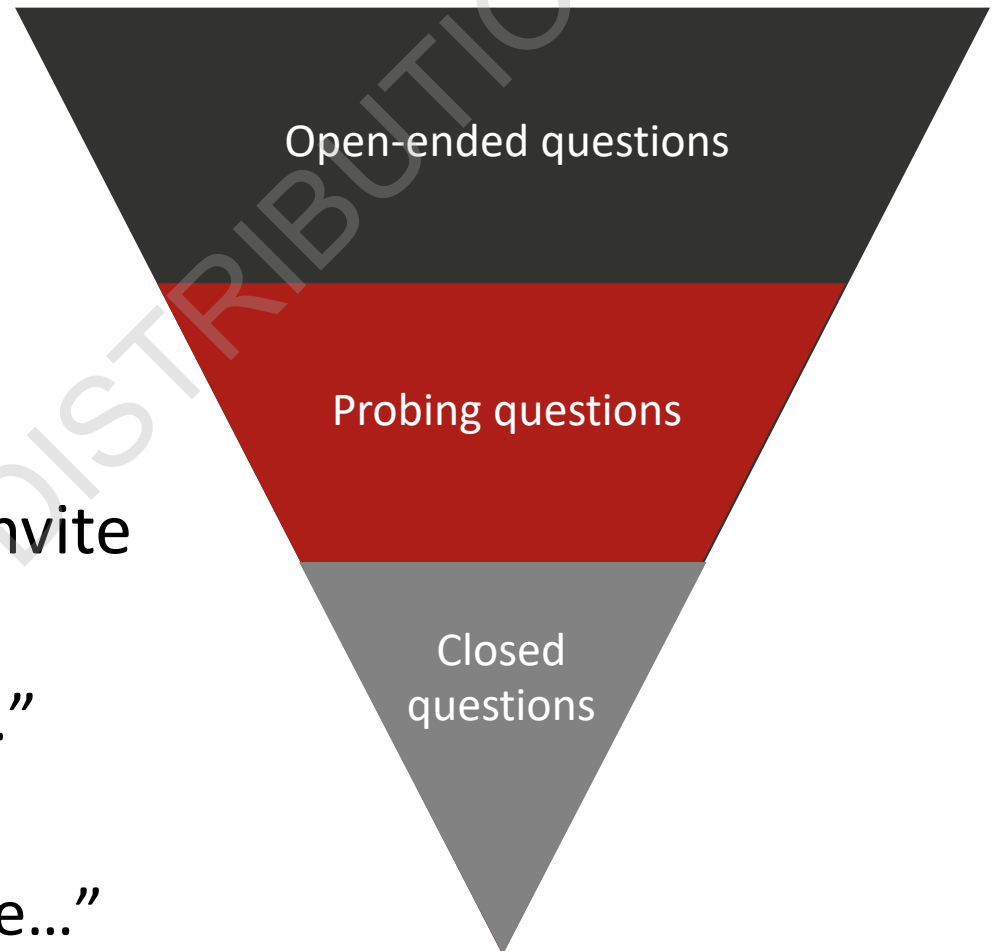
Clarifying v. Challenging

Curiosity v. Suspicion

# QUESTIONING



- Funnel questioning technique
  - Open
  - Probing
  - Closed
- Open-ended questions invite a narrative
  - “What happened when...”
  - “Where did you go...”
  - “How would you describe...”

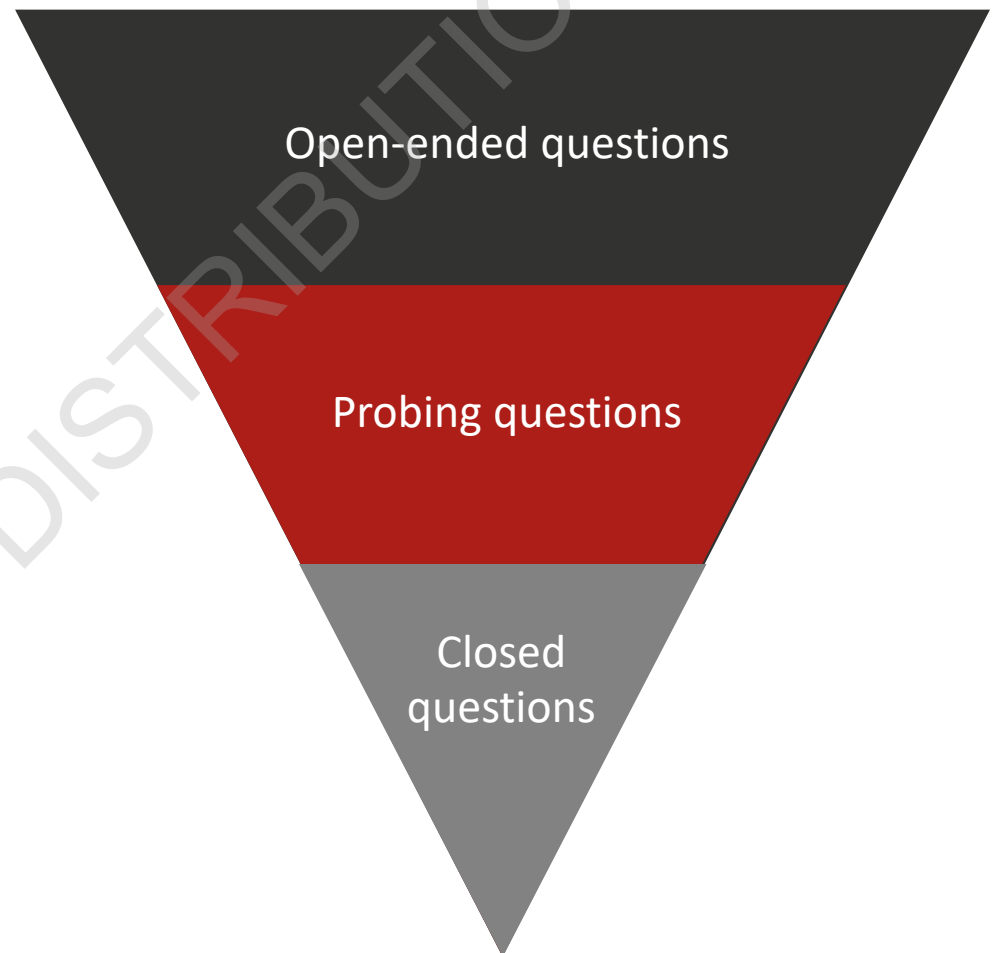




# QUESTIONING



- Probing focuses on areas of importance
  - Flesh out extra details
  - Explore motivations and intentions
- Closed questions establish and reestablish testimony
  - Test with repetition
  - Draw out disputed testimony



# THE STANDARD INTERVIEW



- Interviewers briefly established rapport with the witness
- Open-ended questions
- Narrative answers
  - “tell me what happened”
- Direct questions that focused on details
- Neutral delivery
- Little effort to facilitate memory recall
- Passively waiting for questions to answer

# THE STANDARD INTERVIEW



- Reduces amount of information collected
  - Witnesses withhold information
  - Witnesses do not provide unsolicited info
  - Answers tend to be abbreviated
  - Witnesses may provide answers they are unsure of
- Tends to disrupt the natural process of memory searching

# THE COGNITIVE INTERVIEW



- Based on principles of memory and communication theory
- Found to produce significantly more accurate information
- Supported by research in cognitive psychology – techniques for enhancing memory retrieval

*The cognitive interview is a “systematic approach to interviewing witnesses with the goal of increasing the amount of relevant information obtained without compromising the rate of accuracy.”*

# CORE ELEMENTS



Memory

Multiple retrieval strategies

Social Dynamics

Rapport

Active witness participation

Communication

Extensive, detailed responses

Verbal and non-verbal expression

## General considerations

- The recommended sequence is not a recipe for a cognitive interview
- Progress from open-ended questions to more specific follow-up
- Probing questions using multiple retrieval methods
- Interviewers must be flexible and able to adjust techniques as needed
- Toolbox to be used as necessary based on the witness and situation

# SEQUENCE



## Introduction

- Used to develop rapport
- Inform re: the process
- Establish baseline communication expectations
- Reinstatement of the context

## Transfer Control

- Witness directs the interview
- Active participation
- Volunteer information

## Probe

- Identify central issues
- Explore factual detail
- Funnel
- Triangulate
- Corroborate

## Recall

- Facilitate memory
- Verbal and non-verbal expressions
- Sensory exploration
- Extensive detail

# FOLLOW-UP



- Probe scenes and images
  - Go to the scene to jog recall (careful of retraumatizing)
- Recall of one detail can trigger recall of others
- Ask for information repeatedly using varied methods
  - Different perspectives
  - Different chronology (reverse order)
  - Facts, feelings, observations
- Describe the event from a different physical or conceptual perspective
  - Can you describe this from Annie's point of view? Put yourself where Annie was standing . . . describe what she saw.



- Draw a picture or review photos/schematics
- Jog recall through senses, not an event narrative:
  - “Are there specific scents or smells that remind you of X, or that you recall were present that night?”
  - “Are there specific sounds (music, noise, snoring, dialogue, sirens, phones, texts, etc.) that remind you of X, or that you recall hearing that night?”
  - “Are there specific tastes that remind you of X, or that you recall were present that night?”
  - “Are there specific tactile (touching) experiences that remind you of X, or that you recall were present that night?”
  - “Are there specific sights or things you see that remind you of X, or that you recall were present that night?”

# FOCUS ON SPECIFICS



- Deep dive into detailed recall
- Review
- Check for accuracy and consistency
- Read notes back
- Correct errors or omissions
- New recollections or details
- Clarify contradictions or ambiguities

- Contact you if they have new information
- Extends the life of the interview
- May result in more/better detail
- Anything else to add?
- Any individuals we should talk to?
- Any specific questions we should ask?

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# CONSIDERATIONS



- This method requires the interviewer to essentially take the witness back to the scene
- Raises concerns of re-traumatization
- Interviews will likely take more time – schedule accordingly
- Consider explaining the interview approach
- Improves promptness of process
- Two investigators – the person asking questions must focus and stay with the witness during the recall process

# RAPPORT



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# BUILDING RAPPORT



- Interviewer comfort level
- Self-awareness – personal prejudice/bias
  - Self-diagnosis
  - Self-correction
  - Self-improvement
- Trappings of authority
  - “Me” wall
- Proximity

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# ETHICAL CONSIDERATIONS



- Dignified approach v. friendship
- Understanding v. agreeing
- Sympathy v. empathy
- Maintaining neutrality
- Practice active listening statements
  - “I understand” instead of “that makes sense”
  - “I know this is difficult” instead of “I’m sorry”

# PRACTICAL CONSIDERATIONS



- Dress
- Location
- Taking notes
- Recording
- Responses to emotion
- Length
- Breaks
- Entry/exit
- Buffer time

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# DIFFICULT WITNESSES



- Collaborative interviewing
- “Mirroring”
  - “Help me understand”
- Review of factual evidence
- Accept what is shared
- Highlight conflicts
- Draw out contradictory statements
  - “Make this make sense for me”
- The Columbo approach

# MEMORY

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- Memories are stored in three ways: sensory, short-term, and long-term
  - Sensory information lasts just a few seconds
    - If the brain doesn't attach meaning, the information is lost
  - Short-term information lasts up to 30 seconds
    - Phone number, copying a sentence from one doc to another
  - Long-term information gets filed away
    - Meaningful connections vs. rote repetition

- Long-term storage is strengthened through association
  - Memory is not like a copy of a file – it gets filtered
    - Prior experiences (an individual's as well as others')
    - Beliefs
    - Education
    - Perspective
  - Accessing memory means traversing those association pathways
  - The result is a mix of factual recollection as well as filtered perception that may alter the facts

# MEMORY AND TRAUMA



- Trauma may cause the brain to block access
  - When an event is too painful, information is still stored
  - Access may be hindered or prohibited out of self-preservation
  - Trauma-informed interviewing techniques lower the brain's defensive measures
  - When the interviewee is in a safe environment, the brain is more willing to access and experience traumatic memories

# MEMORY AND TRAUMA



- Traumatic memories are highly filtered
  - Self-blaming
    - “Maybe I was too friendly.”
    - “I dressed cute because I wanted to look professional – maybe I gave them the wrong impression.”
  - Normalization
    - Engaging in subsequent consensual behaviors
    - Acting as though nothing is wrong
  - Lack of recall
  - Denial
- Trauma doesn’t discriminate – complainants, respondents, witnesses

- Repeated recollection can strengthen recall and improve accuracy
  - Access pathways literally thicken
  - CAUTION: holistic recall will yield far more accurate information
  - Isolated questioning on critical moments will yield a larger variation of factual information mixed with perception
  - Context improves accuracy
- Focus on broader recall, including innocuous details
- Use techniques to repeat events in different order, from different perspective

# QUESTIONING



- Be empathetic, but don't avoid repetition
- Tailor questions to take in the whole incident, not just pivotal moments
  - May require delaying closed-ended or funnel questioning
- Tie critical details to nonessential ones for continuity and improved factual accuracy
- Make space and time for recall to occur organically



# INTERVIEW EXERCISE



## Step 1

Interviewee  
Review the  
circumstances  
prompt.

Interviewer  
Read the interview  
outcomes sheet.

## Step 2

Do not share details  
from your  
respective prompts.

Interviewer  
Conduct interview  
and take notes  
related to interview  
outcomes sheet.

## Step 3

Interviewer  
What approaches  
did you use,  
effective/not  
effective, etc.

Interviewee  
What helped, what  
hindered, what  
distracted, etc.

Step 4

# TRAUMA BASICS

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- Brain responds to threat with defense cascade - not conscious decision making - beginning with freeze, which serves two purposes:
  - First: attempt to hide from detection, avoid threat/predator, but done as an evolutionary reaction, not a conscious strategy or logically determined decision.
  - Second: assess threat in preparation for response. (Pre-frontal cortex re-engages if assessment indicates threat has passed. Otherwise, the defense cascade continues.) Tie critical details to nonessential ones for continuity and improved factual accuracy

- Habitual behavior
  - Habitual (simplistic) speech/thoughts. The brain is not problem solving for speech or thoughts, rather, prioritizing the defense cascade.
  - Conflict/confusion between attachment circuitry and defense circuitry
  - When the first has been stimulated, the latter is less active. This delays defense engagement when the situation changes to threatening.

- Immobilization may occur due to three reactionary brain processes:
  - Dissociation: Disconnect from body and experience. A reflex when escape is not a perceived possibility.
  - Tonic immobility: Inability to move or talk. Often after a struggle or failed attempt to flee. “I tried to fight, but I couldn’t.”
  - Collapsed mobility: Inability to move or talk. Decrease in heart rate, of muscle tone. Some may describe “pretending to sleep” but it was actually not a conscious decision. May result in fainting. Offset is more gradual than with tonic.

## LONGER TERM



- Hyper vigilance
- Sensitivity to triggers and retraumatization
- Lower sense of safety
- Unreliable/decreased assessment of threat
- Brain reacts to threat
  - Material threat or re-experienced/triggered
- The brain is not just impaired by traumatic events, the complex processing is altered.

- Recipients have worked to account for trauma in resolution processes with mixed success.
- Some tendency to over- or under-compensate
  - Difficulty with recollection
  - Mixed up chronology
  - Absent or vague memory
  - Emerging memories
  - Variation in testimony or conflicting details
  - Total lack of recall
- *Doe v. Syracuse* (2019)

- “Trauma-infused” practices serve to better understand and communicate/interview.
- Signs of trauma and related speech/actions should not be used to prove or disprove statements made by an interviewee.
- The presence of trauma symptoms does not establish credibility
- The absence of “typical” signs does not equate to deception.



- Infusion of trauma-informed practices should inform investigators' approach
  - Understand what you're observing and why
  - Interview location and setup
  - Plan for use of time, breaks
  - Questioning strategy and techniques
  - Assessment of credibility
- This is not intended to diagnose or label behaviors
- Strictly avoid clinical classification and use descriptive verbiage in notes/reports

# RECALL AND CUES



- Memory
- Time perception
- Layers, gaps, delay
- Central vs. peripheral details
  - Perception of the individual, not any tangible standard
  - Not encoded in the brain the same way, some details are recalled while others may be lost, never encoded at all, or may even change/develop over time.
- Sensory cues
  - Sight, sound, smell, touch, taste. May serve to recall critical details.

# CREDIBILITY

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# WHAT IS CREDIBILITY?



- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading *may* impact
- Primary factor is corroboration
- Avoid *too much* focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

## SCOPE OF THE PROBLEM



Credibility Assessment: “The Complainant, Respondent, and all witnesses seemed credible during their interviews. Therefore we are unable to make a determination as to whether policy was violated.”

Credibility Assessment: “The Complainant appeared more credible, as she was cooperative and open, where the Respondent appeared agitated and annoyed during his interview.”

Credibility Assessment: “We found the Respondent not credible and found the Complainant credible.”

# DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)



- If a student at a public university is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension; and when the university's determination turns **on the credibility** of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.
- If **credibility** is in dispute and material to the outcome of a university student disciplinary proceeding, due process requires cross-examination.
- *See also – Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

# HAIDAK V. UNIVERSITY OF MASSACHUSETTS

933 F.3D 56 (1ST CIR. 2019)



- The [Sixth Circuit] took [its] conclusion one step further than we care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases turning **on credibility determinations**.
  - If the school chooses to question the accuser in place of the accused, it must sufficiently probe **the credibility** of the accuser and the accusations.
  - No reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.
  - Interrogation of the accuser by an independent fact-finder may be enough to satisfy the guarantee of due process.

## 2020 TITLE IX REGS



For IHEs, at the mandated hearing, the decision-maker must permit each party, through their advisor, to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

For K-12 schools, with or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigation report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.



# COMMON ERRORS IN ASSESSING CREDIBILITY



- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
  - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about Memory
  - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

# COMMON ERRORS IN ASSESSING CREDIBILITY



- Misplaced Focus on the Status of the Parties
  - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias In Interviews
  - Presumptions of guilt can influence credibility assessments

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# RESEARCH FINDINGS



- “Liars” experience greater cognitive overload
- Truth tellers generally can provide more detail/information than “liars”
- “Liars” prepare for questions they anticipate
- “Liars” develop a relatively fixed narrative that they can provide consistently
- Interview tactics that leverage differences in cognitive processing and strategy use between “liars” and truth tellers
- Verbal cues and elicitation of verifiable details are most diagnostic of credibility

# INTERVIEW TACTICS



- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways, e.g. sketch
- Asking interviewees for details that the investigator can check
  - Truth tellers generally add more “checkable” details
  - Liars provide details that are difficult to verify
- The Funnel

# CREDIBILITY



- Inherent plausibility
  - “Does this make sense?”
  - Be careful of bias influencing sense of “logical”
- Motive to falsify
  - Do they have a reason to lie?
- Corroboration
  - Aligned testimony and/or physical evidence
- 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)

# FACTORS TO CONSIDER FOR CREDIBILITY



## Corroborating evidence

- Strongest indicator of credibility
- Independent, objective authentication
  - Party says they went to dinner, provides receipt
  - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

# FACTORS TO CONSIDER FOR CREDIBILITY



## Corroborating evidence

- Can include contemporaneous witness accounts
  - More “separate” the witness, greater the credibility boost
- Outcry witnesses
  - Does what party said then line up with what they say now?
- Pay attention to allegiances
  - Friends, roommates, teammates, group membership
  - This can work both directions (ex. the honest roommate)

# FACTORS TO CONSIDER FOR CREDIBILITY



## Inherent plausibility

- Does what the party described make sense?
  - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness”
  - Would a reasonable person in the same scenario do the same things? Why or why not?
  - Are there more likely alternatives based on the evidence?



# FACTORS TO CONSIDER FOR CREDIBILITY



## Inherent plausibility

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
  - Could they have heard what they said they heard?
  - Were there other impediments? (darkness, obstructions)
- How good is their memory?
  - Temporal proximity based on age of allegations
  - “I think” “I’m pretty sure” “It would make sense”

# TRIANGULATING CREDIBILITY



- One of the least used and least understood methods of assessing credibility is the triangulation method, which is rooted in abductive reasoning.
- Analysis of credibility often ignores this approach because it is less dispositive than corroboration, but it can still be enough to meet the standard of proof.
- Triangulation is simply being faced with two plausible explanations (B & C) and deciding which is the more plausible (likely) based on the fact that you know A & D to be true.
- Based on what you know about A & D, B is more likely than C.

# TRIANGULATING CREDIBILITY



- It's called triangulation because ABC forms a more coherent triangle than ABD, based on knowing all four data points. It's more of a stretch to draw the line from A-to-D than A-to-C.
- Triangulation is more helpful when the standard of proof is preponderance, as opposed to clear and convincing evidence.
- Triangulation is the formal way of processing what leads you to determine why something is inherently plausible.
- When you determine inherent plausibility, it is because you are comparing, and deciding that B is more likely than C as an explanation or a fact to have occurred.

# FACTORS TO CONSIDER FOR CREDIBILITY



## Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
  - Think academic or career implications
  - Also personal or relationship consequences
- What if the allegations are false?
  - Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

# FACTORS TO CONSIDER FOR CREDIBILITY



## Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
  - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

# FACTORS TO CONSIDER FOR CREDIBILITY



## Demeanor

- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
  - Humans are excellent at picking up non-verbal cues
  - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

## OTHER FACTORS



- Credentials and expertise – established
- Neutrality
- Sobriety
- Continuation of the behavior
- Previous, similar, good faith allegations

# MAKING CREDIBILITY ASSESSMENTS



- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it...this is not Lie to Me.



# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Under the 2020 regs, the goal of investigators will be to assess credibility without rendering conclusions or making findings related to credibility, but to roadmap where decision-makers should look.
- NOT GOOD  
~~“The decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD  
“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.” – Yes
- Point the decision-maker without analysis or weighting

# CREDIBILITY EXERCISE



## Step 1

Read the fact pattern and statements from Omar and Devya.

Highlight elements that factor into credibility assessment.

## Step 2

What information boosts Omar or Devya's credibility?

What evidence could potentially bolster or detract from Omar or Devya's credibility?

## Step 3

Outline the evidence that impacts each party's credibility.

Itemize evidence you would like to collect related to credibility.

Step 4

## CREDIBILITY EXERCISE



Omar and Devya have been friends since freshman year. Devya texted Omar and they met up at Devya's apartment before a party one weekend and did several shots. Devya felt comfortable with Omar because he was openly gay, and she asked him to help her pick her outfit for the evening, taking her clothes off in front of him multiple times as she tried different combinations. Omar would pull on and adjust her clothes as he considered each outfit, but Devya wasn't bothered by the physical contact, even when he pressed her breasts together to try to improve the appearance of her cleavage in one shirt.

## CREDIBILITY EXERCISE



When they got to the party, Devya lost track of Omar for a bit. She was happy to find him a little later, and they had fun dancing. Devya said Omar “grinded” on her, which was fine, but then he started putting his hands on her and groping her, which she was not okay with. They had danced together before, but this night felt different to her. Devya said Omar was much more drunk than she had ever seen him, and even though she continued to pull his hands away from her he wouldn’t stop touching her body, including grabbing her breasts. Devya could feel Omar’s erect penis through his pants when he rubbed against her.

## CREDIBILITY EXERCISE



At one point, Devya took Omar's hands into hers so they would be off her body, shouted "stop!" and they danced while they were holding hands. After a little bit, he put his hands back on her and rubbed her butt and started pretending to spank her. He wasn't hitting her hard and it was clear he thought it was funny, but she didn't. She took his hands in hers and started dancing again. After a few minutes, a friend came up to Devya and asked if she was okay because she looked upset. Devya and her friend left the dance floor and her friend drove Devya home. During the drive, the friend mentioned that she saw what Omar was doing and that he seemed out of control. Devya talked to the same friend a little the next day, and they agreed that Devya should report Omar.

## CREDIBILITY EXERCISE



Omar denies the allegations. He agrees with Devya's account of the evening but does not remember the groping and grinding. He just remembers them dancing and having fun, and said that they were both touching each other, but "just in a fun, playful way." Omar doesn't remember Devya's friend, he just remembered that all of a sudden, Devya was gone. He texted to see where she went, but she never responded. Omar agrees that he drank a lot, but says he remembers the whole evening and thinks Devya is blowing it out of proportion. "Plus," he says, "I'm gay." One of Omar's texts to Devya from after the party said "Hey, where did you go? We were having sooo much fun. Want to grab sushi tonight?" Devya wants Omar to understand what he did is wrong. He was out of control and he made Devya feel like a piece of meat with no control over her own body. She wants Omar to stay away from her.

# CREDIBILITY EXERCISE



## Step 1

Read the fact pattern and statements from Omar and Devya.

Highlight elements that factor into credibility assessment.

## Step 2

What information boosts Omar or Devya's credibility?

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Step 4

# INCLUSIVE INVESTIGATIONS

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- Terminology
- Reluctance to Report
- Considerations for Interviews



# TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

# TERMINOLOGY



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

# TERMINOLOGY



- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

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## Sexual Violence and Intimate Partner Violence Can Happen to Anyone...

- regardless of sex, gender, gender identity, and gender expression.
- regardless of sexual orientation.

# RELUCTANCE TO REPORT



- Concern about a homophobic response.
- Concern about preconception that sexual assault cannot occur between same-sex partners.
- Fear of exposing LGBTQI community to negative stereotypes.
- Fear of the impact a report may have on a small, sometimes close-knit community at the school.
- Fear of reaction of family and friends.
- Fear of institution not understanding their identity, expression, or orientation.

# RELUCTANCE TO REPORT



- Fear of being outed and implications for medical treatment.
- Concern about how “systems” will respond, especially law enforcement.
- Previous negative experiences with school staff, the law, or community members.
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to “boys being boys.”

# CONSIDERATIONS FOR INTERVIEWS



- Educate yourself and your community
  - Do not expect parties to “educate you.” Stick to the facts.
  - Ask for additional education or training if needed.
- Be mindful of how power dynamics and targeting can come into play.
- Assume nothing and allow for self-identification.
- Provide a safe, non-judgmental, and respectful environment.

# CONSIDERATIONS FOR INTERVIEWS



- A visible reaction may negatively impact rapport.
- Use inclusive language; reflect language used by the parties during interviews and in all communication.
- Anticipate heightened confidentiality concerns.
- Use your school/campus/district/community-based experts.
- Be aware of your biases.



# INTERVIEWING CHILDREN

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## Forensic Interview Model – Key Phases

- Rapport-building phase
  - Introductions
  - Set expectations
  - Practice narrative telling
    - “Tell me something about yourself”
    - “What do you like to do for fun?”

## Forensic Interview Model – Key Phases (cont.)

- Substantive phase
  - Discussion of incident with details and clarification
- Closure phase
  - Address socio-economic needs of child
  - Connect with support and resources
  - Field questions from child

# INTERVIEWING CHILDREN



## Trauma

- Impact of past and/or current trauma
- Coordination with law enforcement, child protective services, etc.
  - Limit number of interviews and impact on child
  - Multiple interviews may be necessary for a child to feel comfortable enough to provide a complete narrative

# INTERVIEWING CHILDREN



## Memory

- Child-specific considerations that impact memory, recall, perception of an experience, ability to communicate, comprehension, attention span, etc.
  - Age
  - Physical and developmental disabilities
  - Cultural/language barriers
  - Emotional needs
  - Socioeconomic status

# INTERVIEWING CHILDREN



## Reluctance to Disclose

- Age of child
- Relationship to responding party
- Family relationships
- Level of parental support
- Fear
- Social and/or community influences

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# INTERVIEWING CHILDREN



## Environment

- Child-friendly
- Comfortable
- Neutral setting
- Consider access to paper and markers (age dependent)
- Who is present for interview?
  - Team investigator approach may not be ideal
  - Potential influence and/or disruption by others present

# INTERVIEWING CHILDREN



## The Interview

- Ask an open-ended, non-leading question that allows child to give you their narrative without interrupting
  - “Tell me why you came to talk to me today?”
  - “Do you know why I’m here to talk to you today?”
- If child acknowledges incident, follow-up with:
  - “Tell me everything that happened.”



# INTERVIEWING CHILDREN



## The Interview

- If child doesn't acknowledge incident, may need to ask more closed-ended, targeted questions
  - Utilize information you have as part of allegations
  - Incremental approach (talk about unrelated issues then ease into allegations)
  - Interview aids (e.g. Human figure drawings, dolls, etc.)

# INTERVIEWING CHILDREN



## The Interview

- Use reflection and paraphrasing
- Assess whether multiple incidents occurred
  - “Did this happen one time or more than one time?”
  - Use prompts to differentiate instances (e.g. first time, last time, etc.)
- Silence/hesitation is okay
- Assess any possible coaching
  - Ask about previous conversations
    - “Have you talked to anyone else about that?”
    - “How did you find out about that?”

# INTERVIEWING CHILDREN



## Ending the Interview

- “Is there anything else you want to share?”
- “Is there anything else I need to know?”
- “Do you have anything you want to ask me?”
- Thank child for speaking with you
- Assess and offer support and resources
  - In-school and community-based
  - Counselors, social workers, psychologists, etc.
  - Academic support
  - Safety planning
  - Etc.

# QUESTIONS?



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# CONTACT INFORMATION

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