



# **Title IX Higher Education Workshops**

## Level 2 – Title IX Investigator Training



# DISCLAIMERS

We can't help ourselves. We're Lawyers.

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- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- If you did not receive your slides by email, we will post a link in the chat box. Please download and save them!

# Presentation Rules

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## **Seriously – questions are encouraged!**

- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Posting These Training Materials?

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## Yes!

- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post



# Additional information available at:

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Title IX Resource Center at  
[www.bricker.com/titleix](http://www.bricker.com/titleix)



Find us on **Twitter** at  
[www.bricker.com/titleix](http://www.bricker.com/titleix)

# Required Training for Investigators

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Definition of Sexual Harassment (Level 1)

Scope of Institution's Education Program or Activity (Level 1)

How to conduct an Investigation

Steps of the Grievance Process (Level 1)

Serving Impartially and without Bias

Issues of Relevance

# Topics for This Training

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- The role of investigators
  - Investigative Techniques
  - Relevancy
- Relevancy Continued
  - Writing a report
  - Impartiality & Bias

# Aspirational Agenda

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*All times EST/EDT*

## **Day 1**

- 2:00-2:30 Introduction, Investigator's Role
- 2:30-3:15 Investigative Techniques
- 3:15-3:30 Break
- 3:30-5:00 Investigative Techniques Continued  
Intro to Relevance

## **Day 2**

- 2:00-3:30 Relevance Continued and Relevance Hypotheticals
- 3:30-3:45 Break
- 3:45-5:00 Writing the Report/ Impartiality and Bias



# The Investigator's Role

# No Single-Investigator Model for Title IX

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- The roles of investigator and decision-maker MUST be separate.
- The investigator does not make decisions.



# The Investigation and Report

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- The investigator has the burden of asking the parties for and collecting all relevant evidence.
- Relevancy may be institution-determined, but we will discuss it further later today.
- Parties have the right to present fact and expert witnesses.
- Issues of relevancy will often not be made until the decision-maker is involved (after your involvement).

# The Investigator's Roles

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The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.



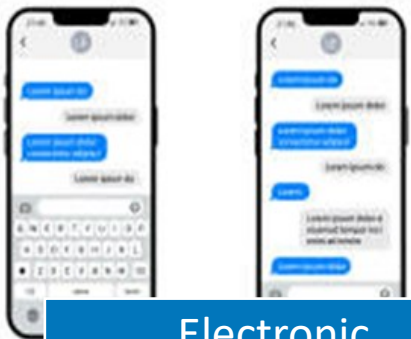
# **Introduction to Investigative Techniques**

# Initial Review

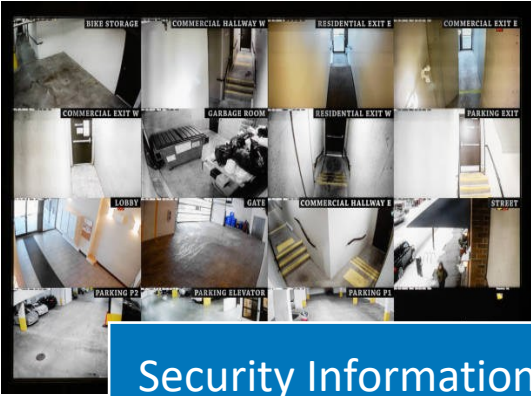
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- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
  - What elements do you think will be disputed?
  - Agreed upon?

# Begin Evidence List



Electronic Communications



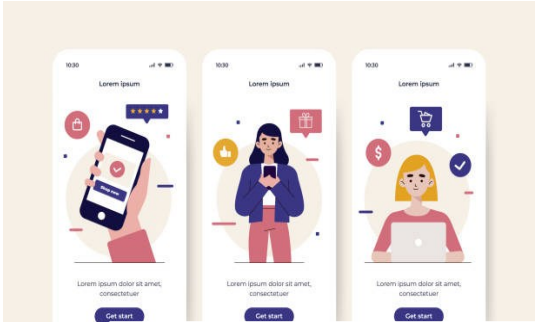
Security Information



Police Reports



Personnel Files,  
Student Records



Pictures, Videos,  
Audio



If there is a criminal investigation, work with law enforcement to collect and preserve evidence

# Begin Witness List

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- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

# Craft Questions for Each Witness

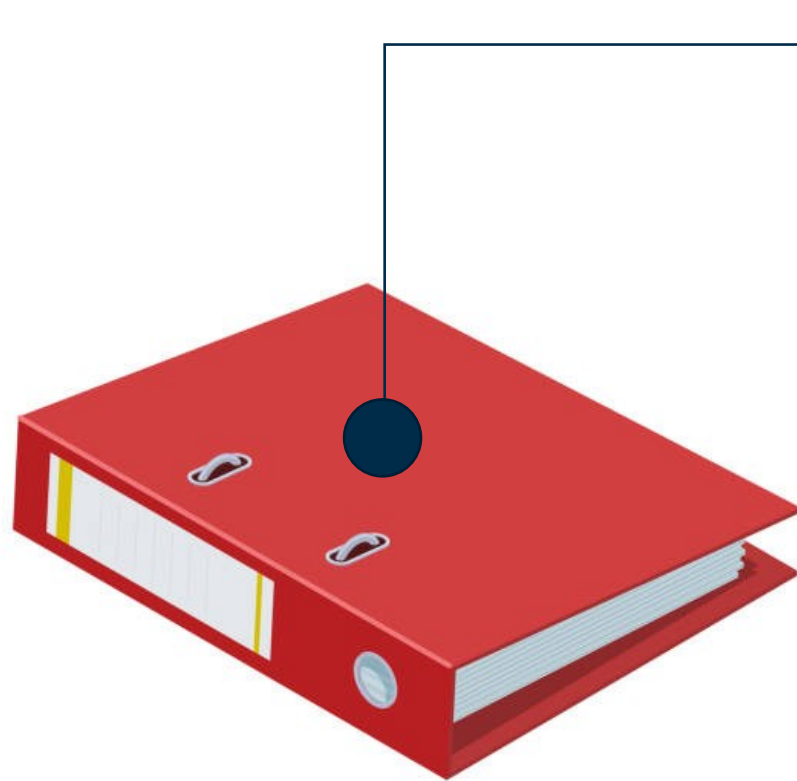
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- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible



# Organizing for the Interview

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## What should you have with you?

- Intake Report
- Written notice with allegations
- Investigation log
- Investigation notes cover sheet
- Pre-prepared questions
- Evidence you may need to reference or show witness
- Policy or Handbook

# Note-taking Tips

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- Use predictable symbols in the margin to easily skim during the interview:
  - ? ← Follow-up questions
  - \* ← Potential evidence
  - W** ← Potential witness
- Try to record exact quotes when possible
- Interview notes are now required to be produced as part of the record

# Simultaneous Criminal Matter

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- Is it okay to proceed with the investigation?
- **If not, could be interfering with a police investigation**
- Communicate with your Title IX Coordinator
- May require calling the local police department and/or detective



# Remember: The gatherer of relevant evidence

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- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

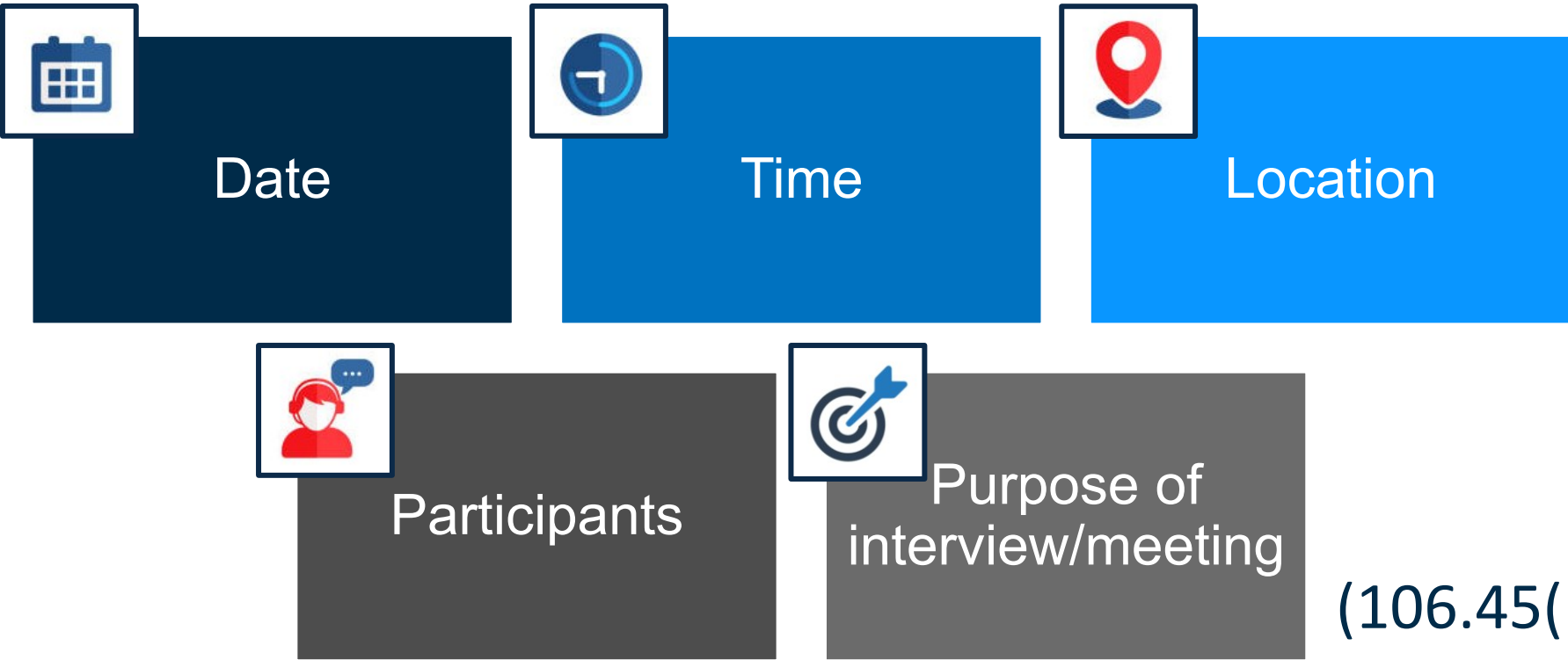
# Setting Up the Interview 1 of 2

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- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods (if available)

# Setting Up the Interview 2 of 2

You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:



# Set the Stage

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- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

# Begin Broadly

## Elicit a monologue about the incident

What happened earlier that day before the incident?

What happened with regard to the incident?

What happened next?

Open-ended follow-up questions

Specific questions

# Ask Follow-Up Questions

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- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?



# Freeze Frames

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- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

# When Consent is at Issue

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- **Common concern of Title IX Coordinator: investigators not asking the questions to get details needed for incapacitation analysis**
- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent
- See Level 1 slides for a list of questions to get you started

# Credibility

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- Gather facts to assist **decision-maker**
- **Your job:** Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

# Questions about Credibility - Bias

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- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

# Questions about Credibility – Perception and Recall

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- What is the witness's perception of the facts?
  - Has **time** impacted recall or ability to remember clearly?
  - How many times has the **witnesses talked to the other party** about this case?
  - Was there **anything** that impacts the person's physical or mental ability to perceive or recall facts accurately?
- Does the witness form a conclusion without knowing certain information?

# Questions about Credibility – Inconsistency in Statements

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## **Only happens if you interview the parties or witnesses multiple times**

- If a fact was very important, why is the hearing the first time it has come up?
- What possible reasons might the witness have for changing their testimony?
- Did a witness receive coaching from the party or others between making one statement and another?
- Has the witness's perspective or motive changed between statements?
- Does changing this fact help the other party's case?

# Questions about Credibility – Example

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## **Example: Intoxication level information from witness.**

- You did not see the consumption, or keep track of how long the party was consuming alcohol?
- You did not measure the alcohol poured by \_\_\_\_\_ or the party?
- Your statements are based on information provided by others? the other party?
- Party's statements were made after they had been drinking alcohol (consuming other drugs, etc.)?

**Remember: Is the person speaking from personal knowledge?**

# Closing the Interview

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- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

# After the Witness Leaves (1 of 2)

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- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email



## After the Witness Leaves (2 of 2)

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- Consider whether there are additional allegations that you need to bring to the Title IX Coordinator
  - Remember: notice of allegations must be sent out before you can ask questions of a respondent.
- Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))

# Physical Evidence

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- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log. Chain of custody is important!



# What about advisors or support persons in interviews?

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## Must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties

(106.45(b)(5)(iv))

# Inspection and Review of Evidence

## Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

## Preliminary Investigation Report



# Create Investigative Report

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing
- We will discuss report writing later today

## Final Investigation Report





# Issues of Relevance

# What is Relevant? 1 of 3

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**The regulations don't really tell us directly.**

But it may include evidence that is:

**“ probative of any material fact concerning the allegations ”**

- Preamble, 30343

# What is Relevant? 2 of 3

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The preamble also tells us:

“ evidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (i.e., on what is relevant) ”

- Preamble, 30343

# What is Relevant? 3 of 3

Does this question, topic, evidence help **move the dial** under the standard of evidence?



**Preponderance  
of the evidence:**

A fact is more  
likely than not to  
be true

(30373 fn. 1409)



**Clear and  
convincing:**

a fact is highly  
probable to be  
true

(30373 fn. 1409)

FACT: \_\_\_\_\_



LESS LIKELY

MORE LIKELY

# Issues of Relevancy (NOT Rules of Evidence) 1 of 2

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The Rules of Evidence do **NOT** apply and **CANNOT** apply



# Issues of Relevancy (NOT Rules of Evidence) 2 of 2

“[A] recipient may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g., **lie detector test results**, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred for use under 106.45 (as is, for instance, information protected by a legally recognized privilege).”



# This means: 1 of 2

✘ Cannot exclude redundant evidence

✘ Cannot exclude character evidence

✘ Cannot exclude hearsay

✘ Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (30294)



# Relevancy Hypotheticals

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**Disclaimer:** The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

# Relevancy Hypotheticals: Scenario Review

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- The following hypotheticals are all based upon the scenario we provided in advance of today. We will go through it together now before we go through the hypotheticals.
- You are the investigator who has been handed this information from the Title IX Coordinator.

# Hypothetical Report

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**Reporter Name:** Cameron “Cam” Carter

**Received:** February 10, 2026, 10:00 a.m.

**Intake Format:** Compliance System Report

**Parties Identified:** Cam Carter, Dr. Rowan Reed

**Narrative:** I’ve been a student in Dr. Reed’s course since the start of the Fall 2025 school year. I also applied and was selected for an undergraduate research role in Dr. Reed’s lab. Since November 2025, Dr. Reed has interacted with me in ways that have felt inappropriate and uncomfortable. Most recently, he insisted I come to his apartment to work on a lab assigned. While I was there, he kept touching my forearm, and he hugged me and rubbed my back before I left. I’ve dropped out of Dr. Reed’s lab but remained enrolled in course. I’m filing this report because I just found out that Dr. Reed is going to be in charge of next semester’s lab placements.

# Notices of Allegations

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## February 13, 2026

Title IX Office sent Notices of Allegations to the parties that Cam had filed a formal complaint that Dr. Reed engaged in prohibited conduct that could violate Title IX for sexual harassment and stalking and that the Title IX Office was initiating an investigation



# Mock Interview Part 1

# Summary of Allegations

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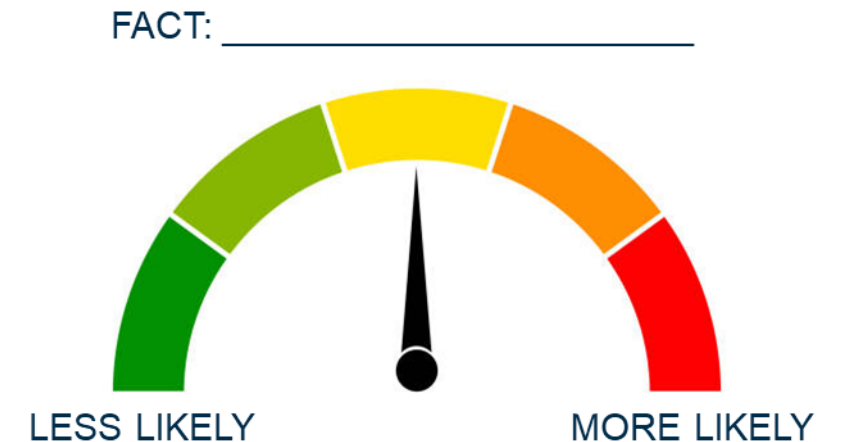
- Referred to Complainant by the nickname, “Cammy”
- Messaged Complainant outside of business hours and in a manner that became more informal over time.
  - Sometimes messaged Complainant late at night, including several sent after 10:00 p.m.
  - Sometimes messaged Complainant jokes that could be considered sexual in nature
  - Often replied quickly and used informal punctuation and emojis
  - On one occasion, Complainant made a joke to Respondent about how two students in the program, who are in a dating relationship, should “get a room” because they were overly flirtatious during a lab session. Respondent texted back, “Or at least a supply closet” with a wink emoji. Complainant noted that they’d heard a rumor that, a couple of years ago, a faculty member and student were caught having sex in a supply closet on campus.
  - During finals week in December 2025, when Complainant was feeling overwhelmed, Respondent sent supportive messages like, “I’ve got you” and “Don’t worry, we’ll get you through this.” Complainant said they initially appreciated the messages but now feels that they were too personal given the power dynamic between the parties

# HYPOTHETICAL ONE

## Late night messages and “jokes”

The investigator has screenshots showing that after 10:00 p.m., Dr. Reed sent multiple messages using emojis and a “wink” in response to a suggestive joke about a “supply closet,” and that the tone became more informal over time.

Should the investigation include the **full thread**, including messages about research deadlines and conference logistics, **or only the “joking” portion?**

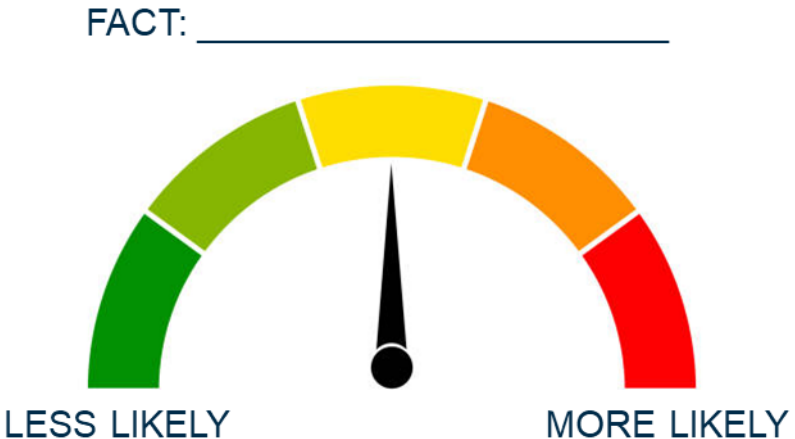


# HYPOTHETICAL TWO

## Rumor

A witness says they heard a rumor that “a couple years ago a faculty member and student were caught having sex in a supply closet,” but they cannot identify who or when. Cam wants this included to show why the “supply closet” text felt sexual; Dr. Reed denies knowing the rumor.

**Is the rumor itself relevant evidence?**



# Mock Interview Part 2

# SUMMARY OF ALLEGATIONS (1)

## Additional Facts

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- Offered to “walk and talk” with Complainant after class, rather than meeting during posted office hours
- Between September and November 2025, approached Complainant in the hallway on several occasions after class to ask how Complainant was doing and whether Complainant had time to “grab a coffee” to discuss research. Complainant estimated that these conversations lasted 2-5 minutes. Complainant stated that the conversations always occurred in public spaces.
- Complimented Complainant’s appearance, such as by saying, “You look really put together today,” or “That color looks great on you.”
- During at least three one-on-one meetings between November 2025 and February 2026, Respondent sat closer to Complainant than expected and sometimes leaned in to look at Complainant’s laptop screen, causing Complainant to shift positions. Complainant estimated that these meetings lasted 45-60 minutes.
- Sometime between November 2025 and February 2026, on one occasion in the lab room, Respondent twice squeezed Complainant’s shoulder to redirect Complainant’s attention to a printed chart or to move around equipment in a tight space. Complainant noted that he did not say anything to Respondent in the moment but that he felt uncomfortable by the contact.

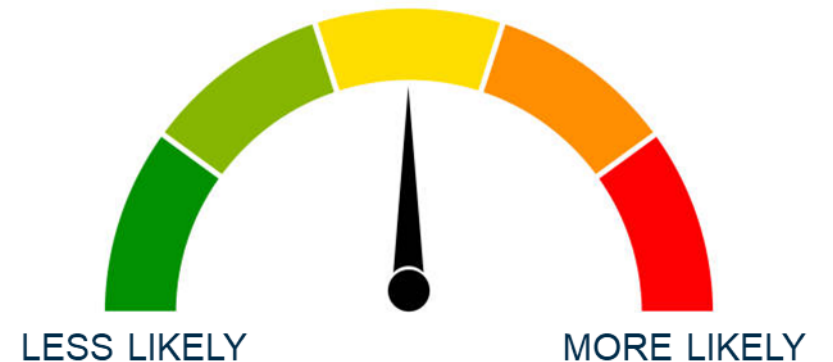
# HYPOTHETICAL THREE

## Lab Photos

Cam reports Dr. Reed leaned in close during 45–60-minute meetings and twice squeezed Cam’s shoulder in a lab. Dr. Reed claims this was normal mentoring and incidental contact in tight lab space.

Dr. Reed provides photographs of the lab space during the investigation. **Are these photographs relevant?**

FACT: \_\_\_\_\_



# Mock Interview Part 3

# SUMMARY OF ALLEGATIONS (2)

## Additional Facts

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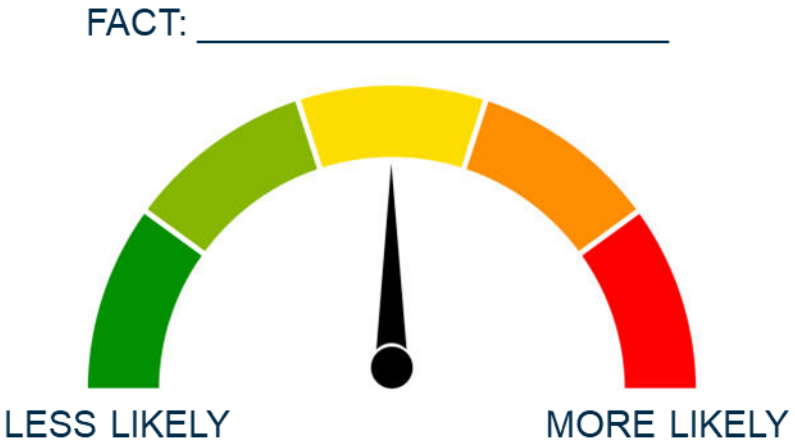
On January 16, 2026, Complainant received a departmental email regarding hotel block reservations for an upcoming conference. Complainant realized he had missed the deadline for booking his hotel. Complainant reported that, during a 1:1 meeting with Respondent, Respondent said something like, “If rooms are sold out or too expensive, we can make it work – worst case, we could share a room to keep costs down.” Complainant felt the comment was startling and inappropriate. Complainant said he replied that he would “figure it out.” Complainant reported that Respondent later texted them to repeat the offer and emphasizing that the department wanted to keep costs reasonable. Complainant said he did not reply to the message and that their conversation switched to a different topic. Complainant ultimately booked his own hotel room and traveled with Respondent, another faculty member, and two other students to the conference.

# HYPOTHETICAL FOUR

## News Articles

Dr. Reed allegedly suggested sharing a hotel room “to keep costs down” after a department reminder about booking within a hotel block; Cam felt startled and later received a follow-up text repeating the offer.

Dr. Reed sends the investigator a series of news articles about the dire financial situation at the University. **Are the articles relevant?**



# HYPOTHETICAL FIVE

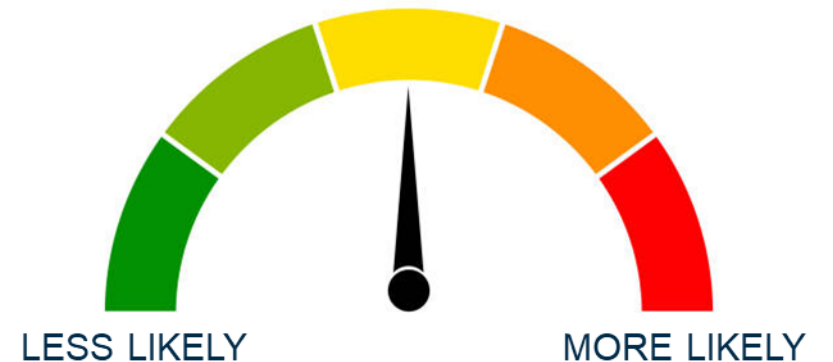
## Additional Witness Interviews

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Dr. Reed allegedly suggested sharing a hotel room “to keep costs down” after a department reminder about booking within a hotel block; Cam felt startled and later received a follow-up text repeating the offer.

Dr. Reed wants the investigator to interview the President and Director of Finance at the University to establish that the University is in a dire financial position. **Do you conduct the interview?**

FACT: \_\_\_\_\_



# Mock Interview Part 4

# SUMMARY OF ALLEGATIONS (3)

## Additional Facts

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After the conference, Respondent offered to assist Complainant in reviewing Complainant's research paper for journal submission. Respondent suggested meeting at his apartment because his office on campus was being renovated and conference rooms on campus were "hard to reserve." Complainant went to Respondent's apartment later that evening. Complainant said he and Respondent reviewed the draft on Respondent's laptop at a small table. Complainant said Respondent then sat beside Complainant on a couch to continue reviewing. Complainant alleged that Respondent touched Complainant's forearm while emphasizing a point on the screen and Complainant shifted away. Complainant reported that Respondent again touched their forearm and said something like, "You're doing great, don't be so tense." Complainant said he stood up and said, "Please don't," and that he needed to leave. Complainant said that, as he moved toward the door, Respondent initiated a hug. Complainant reported feeling "cornered" near the entryway. Complainant said Respondent held the hug several seconds longer than expected and rubbed his hand up and down Complainant's back. Complainant left thereafter and immediately texted a friend.

Complainant reported that he did not attend the next research meeting and asked another student to tell Respondent that Complainant was "taking a break." Complainant reported that his grades in Respondent's class remained strong but that he dropped the research initiative for "personal reasons."

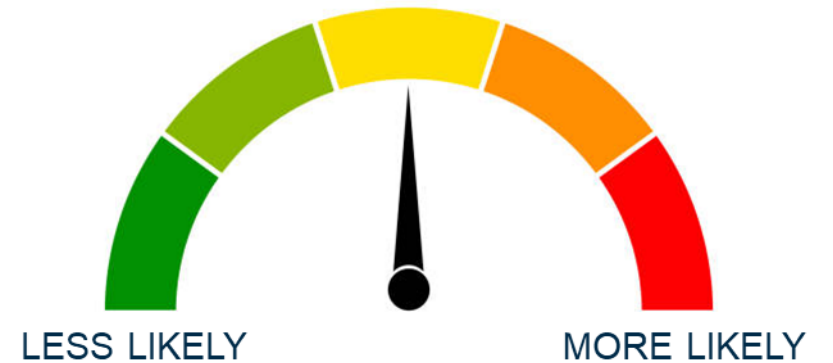
# HYPOTHETICAL SIX

## Text Message Screenshots

Cam says Dr. Reed placed a hand on Cam's forearm twice, then initiated a prolonged hug at the doorway; Cam texted a friend afterward saying they felt shaken.

Cam provides screenshots of his message to the friend and the friend's response. Messages sent before and after this specific exchange have been redacted by Cam. Dr. Reed reviews the text during the evidence review period and tells the investigator that the messages must be included in their entirety to understand context or not included in the evidence at all. **Do you direct Cam to provide the entire text chain?**

FACT: \_\_\_\_\_



# Issues of Relevancy: What isn't relevant?

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Party's medical, psychological, and similar records (unless voluntary written consent)



Information protected by a legally recognized privilege

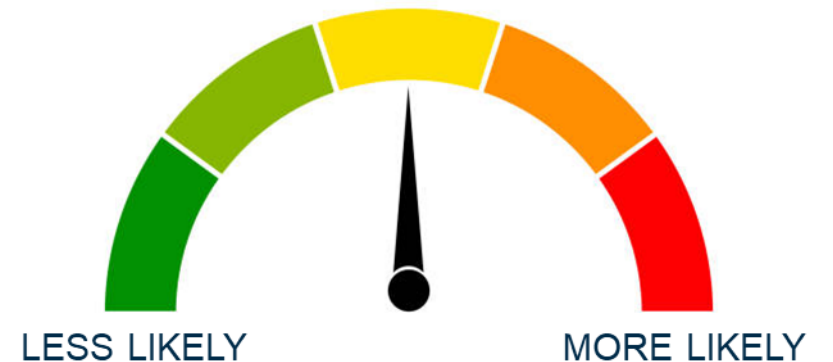
# HYPOTHETICAL SEVEN

## Counseling Center Notes

During his interview, Cam tells you that he attended counseling at the campus health center after the apartment meeting. Cam said that he told his counselor about the hug and the counsel diagnosed Cam with anxiety caused by Dr. Reed's actions. After reviewing the summary of Cam's interview during the evidence review period, Dr. Reed requests that the investigator gather "all counseling records" to challenge Cam's memory and credibility.

**How do you respond to this request from Dr. Reed?**

FACT: \_\_\_\_\_



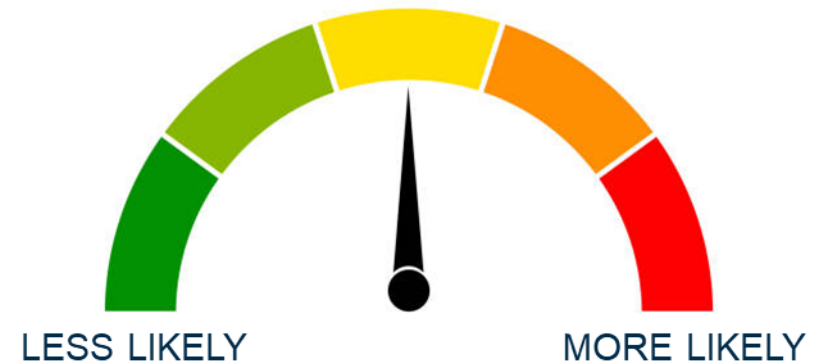
# HYPOTHETICAL EIGHT

## Cam's Confidential Advocate Notes

Cam spoke with a confidential advocate who is covered by a legally recognized privilege under state law. The advocate has notes that arguably support Cam's account. Cam wants the advocate to submit those notes.

**How do you respond to this request from Cam?**

FACT: \_\_\_\_\_





# Relevancy: Medical treatment and Investigations

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**Section 106.45(b)(5)(i):** when **investigating** a formal complaint, **recipient:**

- “[C]annot access, consider, disclose, or otherwise use a party’s records **that are made or maintained by** a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.**”



# Relevancy: Legally Privileged Information

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## Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.



# RELEVANCY: Legally Privileged Info

What does this include?

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- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
  - Attorney-client communications
  - Implicating oneself in a crime
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

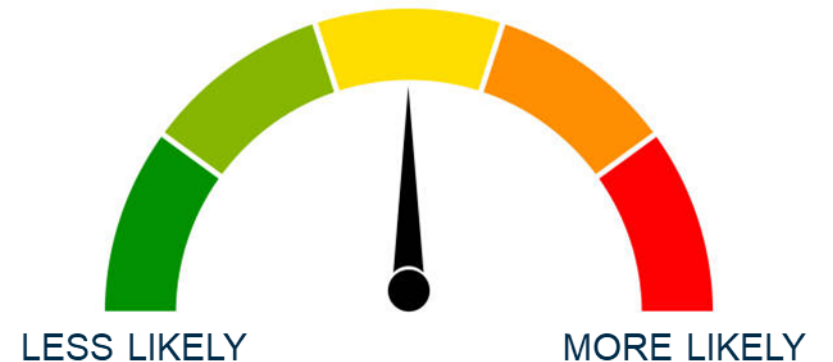
# HYPOTHETICAL NINE

## Prior Sexual Relationship with Another Faculty Member

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Dr. Reed seeks to introduce evidence that Cam previously had a sexual relationship with a faculty member in the past and sometimes flirts at lab socials, arguing it shows Cam is “comfortable with sexual banter” and “is overly sensitive” because of his past sexual relationship.

FACT: \_\_\_\_\_



**Is Cam’s prior sexual relationship with a faculty member relevant?**

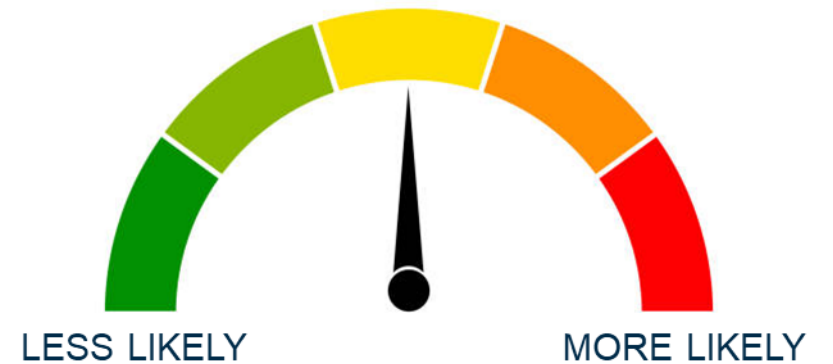
# HYPOTHETICAL TEN

## Prior Intimate Encounter with Respondent

Dr. Reed alleges that months earlier, Cam and Dr. Reed had a consensual intimate encounter off-campus (which Cam denies). Dr. Reed argues this “proves consent” for the hug at the apartment.

Is evidence of **specific incidents** of prior sexual conduct between Cam and Dr. Reed potentially relevant?

FACT: \_\_\_\_\_



# ISSUES OF RELEVANCY: What isn't Relevant? (1 of 2)



## Rape Shield Provision

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- Evidence about **complainant's** prior sexual history (must exclude) unless such questions/ evidence:
  - are offered to prove that someone other than the respondent committed the conduct, or
  - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

# ISSUES OF RELEVANCY: What isn't Relevant? (2 of 2)



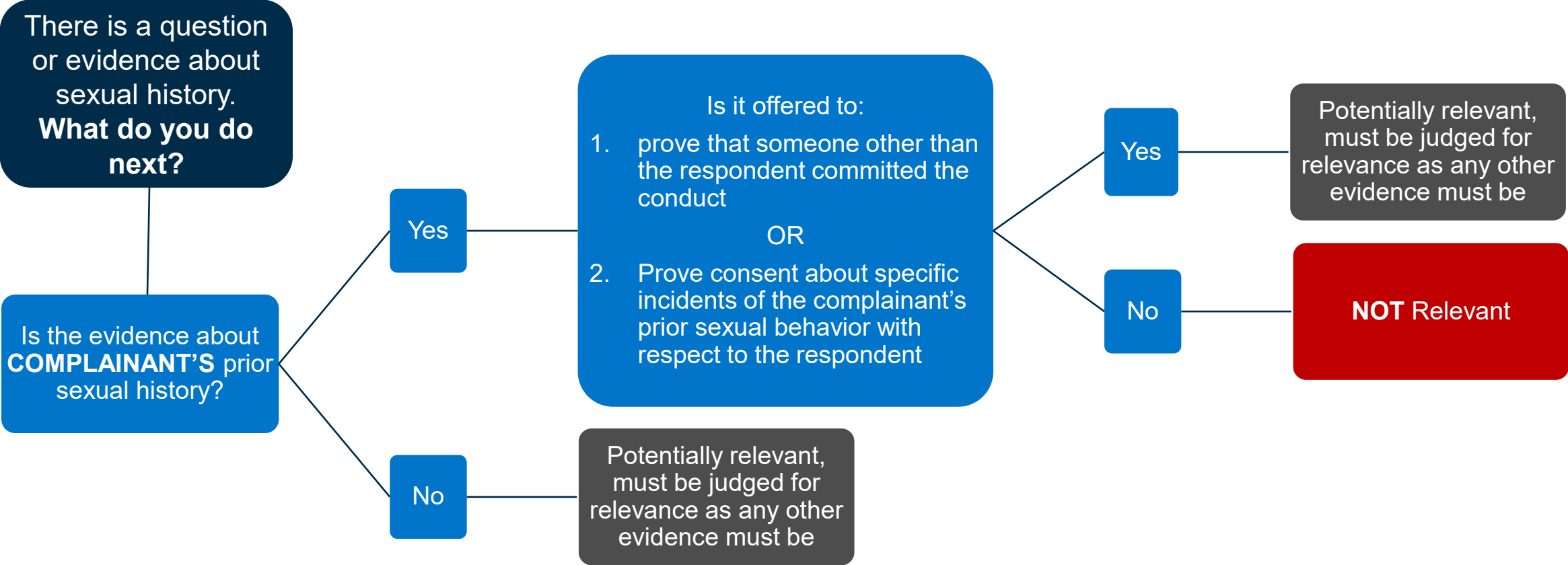
## Rape Shield Provision

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- Rape shield protections do not apply to Respondents
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be.**”
- Guidance from Sept. 2021 Q&A: no party’s sexual history is usually relevant



# Rape Shield Provision Flowchart



# Retaliation

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- When parties elect not to participate, a recipient cannot retaliate against them (30322)
- It is the right of any party or witness not to participate in the investigation

# Relevancy and the Investigator

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## The gatherer of all relevant evidence

“ Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”

”

- Preamble, 30331

# Relevancy and the Investigation and Report 1 of 2



Summarize



Evaluate



The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.)



# Relevancy and the Investigation and Report 2 of 2

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The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.



**Writing the Report**

# REMEMBER: (1 of 2)

## The Organizer of all Relevant Evidence

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The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.



Here are some tools for how to best organize all the relevant evidence.

# REMEMBER: (2 of 2)

## The Organizer of all Relevant Evidence

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### **The Regulations provide that the investigator must create a report that:**

- Fairly summarizes relevant evidence

(106.45(b)(5)(vii))

### **What does this mean?**

# Start with the basic information

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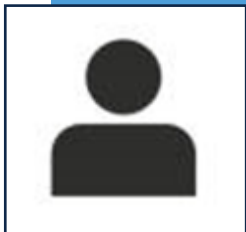
Identify factual information:



**Complainant**



**Respondent**



**Investigator**



**Witnesses**

- Perhaps organize by fact v. expert witnesses or by party whom requested the witness

# Consider general organization

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## Natural and neutral organization suggestions:

- Chronological order
- By topic or allegation
  - Perhaps by chronology within each topic or allegation
- By chronology of how the information came in to the investigation
- By witness summary

# Explain how organized

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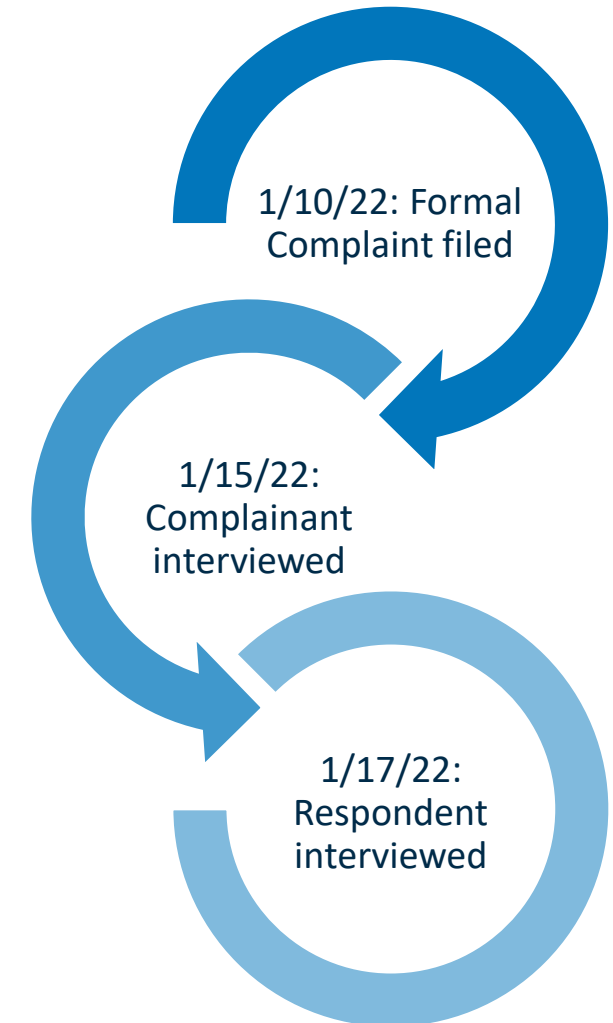
## Explain your structure.

**Example:** *“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”*

# Other basic information to include

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- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?



# Identification of witness sign-off

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## If this is your practice:

“Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”

**Did everyone do so?**

# A statement regarding relevant evidence

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**“All relevant information gathered during the course of the investigation has been included in this report.”**

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence



# Identify and include all alleged policy violations

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- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety



# What to do with evidence



**Give an overview of  
evidence collected**

**AND**



**Attach as appendices  
any statements and  
important evidence**

# BE HELPFUL TO REVIEWERS

Keep it Transparent!

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## Citations to the record – always

- Be helpful for your fact-finders!

**Hearing packet or exhibits – helpful to number the pages sequentially for easy citation**

# Include screenshots/pictures in the report?

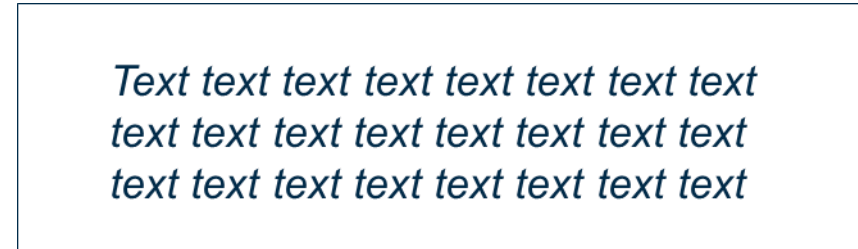
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## YES (and also in appendix)

**Pros:** can be illustrative and forefront; reviewer doesn't have to flip to the appendix

**Cons:** can make the report bulky



## NO (just include in appendix)

**Pros:** can keep the report neat and concise

**Cons:** may lose impact if the viewer doesn't jump back and forth between the appendix and text, which can also be annoying for reviewers

# What not to include in report

(but note requested and why not included) 1 of 3

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## The specific type of evidence deemed not relevant in the Regulations:



Information protected by a legally recognized privilege



Party's medical, psychological, and similar records unless voluntary written consent



Rape Shield protection for Complainant

# What not to include in report

(but note requested and why not included) 2 of 3

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If evidence is requested by a party and/or you determine it is not relevant, always explain that it was requested and why you determined it was not relevant.

# What not to include in report

(but note requested and why not included) 3 of 3

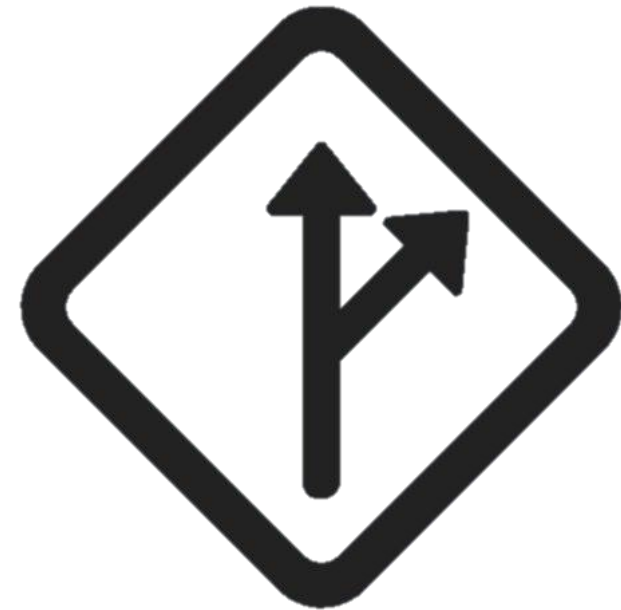
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If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations—i.e. because you did not think it was probative of material fact—explain and consider attaching in an Appendix

# Helpful synthesis

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- If you can, synthesize the information from multiple parties and witnesses
- Where the stories diverge:
  - “Information from [Complainant]”
  - “Information from [Respondent]”



# Summary of Information 1 of 2

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## Don't forget to summarize impact on **complainant** if the charges require consideration as an element

*“The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”*

# Summary of Information 2 of 2

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## Undisputed Facts

- Series of numbered sentences

## Disputed Facts

- Series of numbered sentences

**Make sure you have facts for each element of each charge.**

**Do not make credibility determinations.**

# Bad vs. neutral and clear writing examples



# Writing examples

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**Disclaimer:** The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

# Example 1

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**Bad example:** Complainant was very believable when he said he had been cornered by Dr. Rowan.



**Neutral and clear correction:** Complainant stated that, as he moved towards the front door, Respondent initiated a hug that made Complainant feel “cornered” because Respondent’s body was blocking the door during the hug.

## Example 2

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**Bad example:** Cam stated that they didn't think she had witnessed anything, but that I should check with her.



**Neutral and clear correction:** Cam stated that Cam did not believe that their classmate, Wendy, had witnessed anything during the hallway interaction with Dr. Rowan. Cam asked the investigator to follow up with Wendy to verify what, if anything, Wendy witnessed.

## Example 3

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**Bad example:** Dr. Rowan seemed nervous at the interview and wasn't consistent with the information.



**Neutral and clear correction:** Respondent provided the following information at the interview: that Complainant had made the suggestion to come to Respondent's apartment; and that Respondent had offered his apartment as a meeting space after Complainant mentioned feeling distracted in the on-campus conference rooms.

## Example 4

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**Bad example:** Dr. Rowan requested that I follow up with the financial director, but I did not because the evidence seemed not relevant.



**Neutral and clear correction:** Dr. Rowan requested the investigator follow up with the University Financial Director regarding the University's financial position. The investigator determined that this information was not directly relevant to the allegations because the parties do not dispute that Dr. Rowan suggested to Cam that the parties could share a hotel room if needed.

# **Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts**

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 1 of 2

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Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias**, and
- be trained **to serve impartially** and **without prejudging facts**.
- (30053)

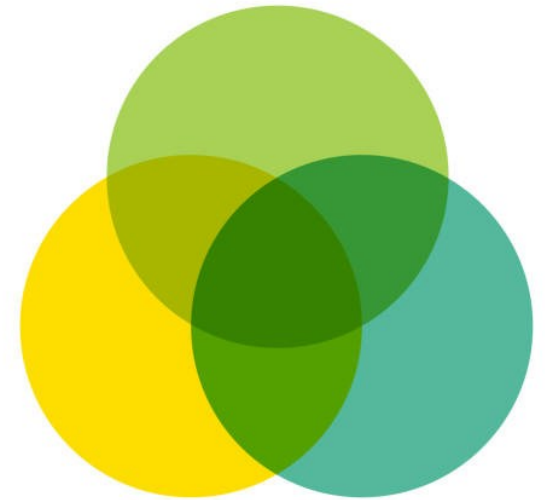
# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 2 of 2

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We will discuss each of these individually and provide examples, but some of the factors for each overlap.

**For example, being impartial is greatly aided by not pre-judging facts.**

(30249-30257; 30496)



# Impartiality

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- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

# Bias: Concerns raised in comments in preamble

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- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist



# Perceived v. Actual Bias

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- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

# How the Department tried to prevent bias

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## **No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):**

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion 1 of 2

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“[R]ecipients *should* have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (30250)

# Bias: Objective Rules and Discretion 2 of 2

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**Discretionary:** Recipients have the discretion to have a process to raise bias during the investigation.

**Mandatory:** Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

# CONFLICT OF INTEREST

## Concerns raised in comments in preamble

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- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

# Preamble Discussion on Bias and Conflict of Interest 1 of 3

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- Final regulations “leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

# Preamble Discussion on Bias and Conflict of Interest 2 of 3

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- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30252-30253)

# Preamble Discussion on Bias and Conflict of Interest 3 of 3

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**Example:** it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)

Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists.

# Example of Unreasonable Conclusion that Bias Exists

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“[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

# Training, Bias, and Past Professional Experience

This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)



# Department: Review of Outcomes Alone Does Not Show Bias

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- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

# Examples of Bias

- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)



# Avoiding Prejudgment of Facts at Issue

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## **A good way to ensure impartiality and avoid bias:**

- Keep an open mind and actively listen
- Each case is unique and different

# Hypotheticals 1 of 2

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Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

# Hypotheticals 2 of 2

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## **Scenario for the next several hypotheticals:**

You are an investigator for your Title IX Office. You have just been handed a formal complaint to investigate. An initial review did not identify you as having any conflict of interest or bias. But you will need to assess the following situations based on additional information you have.

# Hypothetical 1

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You review the report and realize that the name of one of the parties seems familiar to you from a past and unrelated investigation. You don't have any real memory of the case or any thoughts you have of that party, but you realize that could change when you meet the party.

**What should you do?**

# Hypothetical 2

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Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students by name for continuity of care for students and to ensure everyone is on the same page. As a result, you have heard other employees discuss the parties in the case handed to you and some of it seemed to indicate that the Complainant may be dramatic.

**What should you do?**

# Hypothetical 3

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The formal complaint you are handed includes a former coworker from the Title IX Office who now works in a different office at the institution. You do not like this former coworker. You do not know the other party involved.

What should you do?

# Hypothetical 4

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During your investigation, the Respondent's attorney accuses you of bias because of your former work as a victim advocate.

**What should you do?**

# The Bottom Line

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**Be Human & Be a Blank Slate**

Questions?



# Thank you for attending!

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