



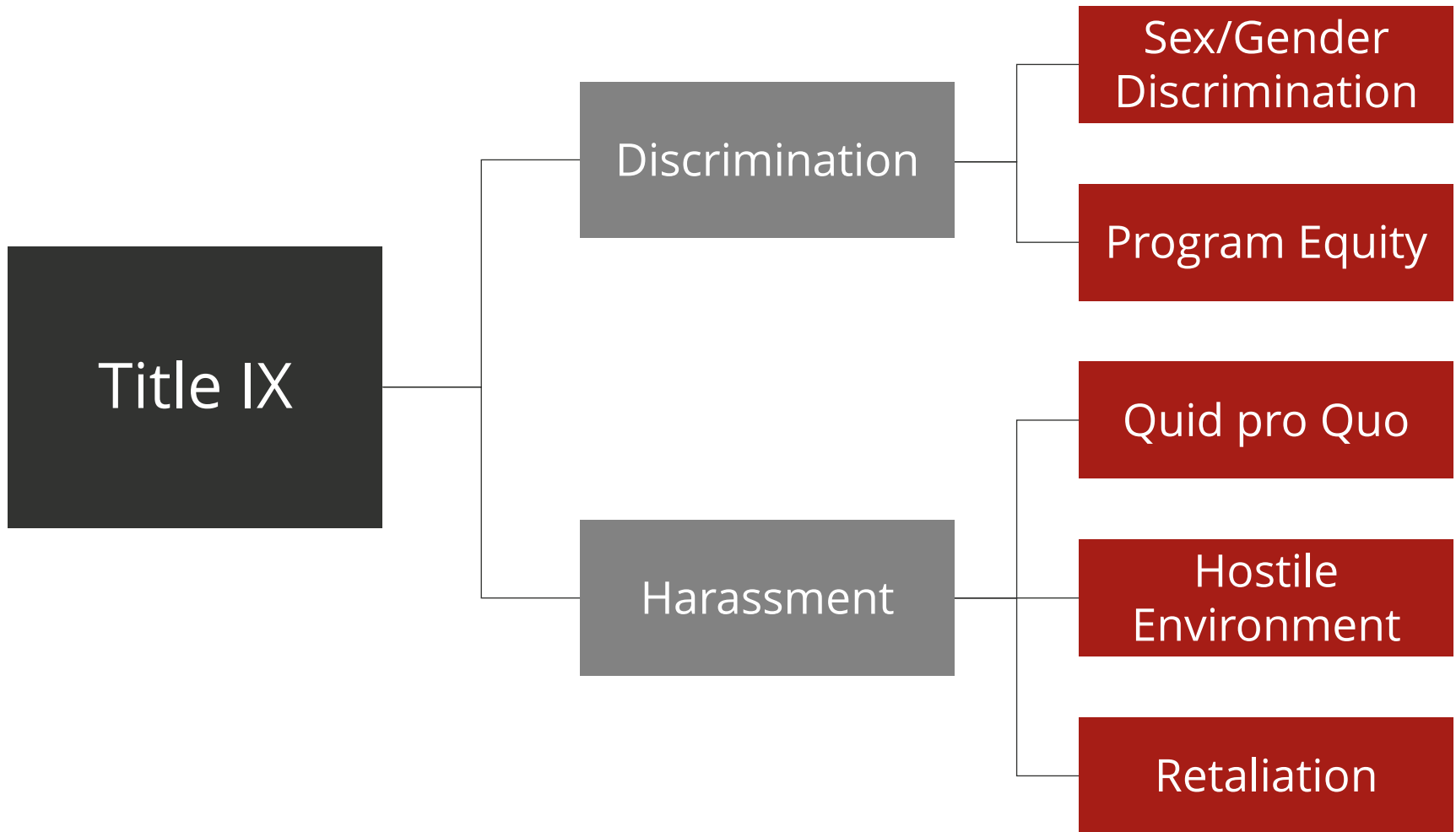
TITLE IX TRAINING

Utah State University
June 2021

*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.”





TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



- Upon receipt of actual notice/knowledge USU must:
 - Take immediate and appropriate steps to **investigate** what occurred.
 - The obligation to investigate is absolute, even if just a preliminary inquiry (see **Davis**).

NOTE: This is regardless of whether or not the Claimant makes a complaint or asks the school to take action.

STEPS OF AN INVESTIGATION



1. Receive formal complaint.
2. Prompt review and initial assessment (initial issue-spotting).
3. Safety assessment (when allegations deem necessary).
4. In conjunction with Title IX Coordinator, investigator determines jurisdiction.
5. Notice of investigation to both parties with formal complaint.
6. Issue spotting by investigators (will continue as new information is added).
7. Preliminary investigation strategy.

STEPS OF AN INVESTIGATION



8. Formal comprehensive investigation.
 - Witness interviews
 - Evidence gathering.
9. Share record with parties and their process advisors.
10. Write report including synthesizing and analyzing evidence.
11. Meet with Title IX Coordinator, and then parties, to review report & evidence (follow-up as needed).

- In conjunction with the Title IX Coordinator, the investigator determines jurisdiction, which policy applies, the extent and development of the investigation, moving it from preliminary to full investigation and identifying timing for charges and strategy development.
 - Equity, due process, essential fairness, and equal dignity all demand substantiating evidence before engaging a claimant in the entire process.
 - A formal complaint must be supported by reasonable cause to permit its **full** pursuit.

NOTICE TO THE INSTITUTION



- In the new Regs, “Actual Knowledge” is defined as:
 - “Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.”

- And the school must investigate upon receipt of a “Formal Complaint”
 - Defined by USU Policy 339 as, “A signed document that indicates the University will proceed with a formal investigation of sexual misconduct. A formal complaint may be signed by the Claimant or by the Title IX Coordinator.

WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal, written, signed complaint.
- When a university-driven investigation has been authorized.
- Rumors, gossip, social media, etc.?
 - Investigating on these bases is discretionary (but often recommended)
- Once actual notice/knowledge exists, the duty to investigate is absolute.

WHEN TO USE INTERIM/SUPPORTIVE MEASURES?



- Risk Assessment by Risk Review Panel
- Equity will gather information and will work with the Appropriate Administrator(s) to evaluate whether temporary Interim Measures are necessary to:
 - Address safety concerns
 - Prevent further allegations from arising during the pendency of the investigation,
 - Prevent allegations of Interference with an investigation and/or
 - Retaliation from arising during the investigation, and/or
 - To protect the integrity of the investigation

A dark grey chalkboard with the phrase 'Show Your Work' written in white, cursive chalk. The text is centered and occupies most of the board's width.

Show Your Work

DOCUMENTATION



- Formal complaint
- Incident report
- Investigation notes
- Recordings, transcripts, and notes from interviews
- Evidence provided by the parties, witnesses and other evidence gathered
- Contacts and Correspondence with parties, advisors and witnesses
- Notice Letters: allegation, investigation, hearing, appeal, etc.
- What else?
- *Always keep in mind that your documentation may be seen by both parties, the DOJ, and perhaps even a court.*

- Taking notes may slow down the interview in a good way – may help detect deception.
- Use pre-prepared numbered questions as a framework, but be flexible.
- Note-taking should occur throughout the entire interview, not just when the responding party makes a pertinent disclosure or an “incriminating” remark.
- Documentation is critical: you are creating the record of the complaint.
- Remember that students have the right to inspect their education record under FERPA.

- Notes should be complete and detailed.
 - Important for assessing credibility.
 - Decision may turn on small details.
- Where possible, include verbatim statements on critical issues – Use their words, not yours.
- Keep notes on what is told to the reporting party, responding party, and witnesses.
- You may want to summarize perceptions of credibility, honesty, etc.
 - Recognize, however, that all notes and evidence may be subject to review

- Identify

- Review intake information and Formal Complaint & identify evidence you will seek or for which you will ask
 - Emails and other electronic communication, text messages, social media postings, photos, videos, audio recordings, external records (e.g.: police report, SANE kit, etc.), medical and counseling records (with appropriate release), physical evidence, receipts, etc.
- Strategize whom, to interview and when

- Collect
 - Ask the parties and witnesses directly for evidence
 - Gather electronic communications from all involved in the communication (corroborate what is provided)
 - Search social media, emails (with appropriate IT permission), video footage on-campus, card swipe information, disciplinary records
 - Prepare questions in advance of interviews and a list of information and evidence you want from the interviewee

- Analyze
 - Examine only conduct that has a direct relation to the incident under review or a pattern of incidents.
 - Explore motivation, attitude, and behavior of claimant, respondent, and witnesses.
 - Apply relevant standards:
 - Force, incapacitation, and consent.
 - Unwelcomeness, reasonable person, and discriminatory effect.
 - Make a determination of each and every violation alleged, element by element.

- Analyze
 - Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?



Maintain impartiality throughout

- Analyze
 - Find an opportunity to let your subconscious work on the gaps in information (e.g. yoga, meditation, etc.).
 - Look for evidence that should be there that is not, for some reason.

MAKING AN INVESTIGATION REPORT



- Review the relevant university policies in play.
- Parse the policy.
 - Specific evidence for each policy with regard to each Respondent.
- Pose key questions.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Cite concretely the reasons for your conclusions.

USING EXTERNAL EVIDENCE



- Police Reports
- SANE/PERK evidence
- Medical Records
 - Mental Health/Counseling
 - Physical Health
- Photos or video footage
- Witnesses not affiliated with USU
- Social Media
- ***Discussion: Relevance of external evidence***

CREDIBILITY

WHAT IS CREDIBILITY?



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

CREDIBILITY



- Inherent plausibility
 - “Does this make sense?”
 - Be careful of bias influencing sense of “logical”
- Demeanor
 - Do they seem to be lying or telling the truth?
- 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?

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

EEOC (1999)

Key Issues

- Conscious vs. unconscious.
- Positive vs. negative.
- Social & cultural capital.
- Stereotyping.
- Cultural competence.
- Multi-partiality.
- Social justice.
- Confirmation Bias

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

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)

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?

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"

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

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

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

- 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.

Factors that do NOT add/detract from credibility

- Character witness/evidence
- Likeability/Popularity
- Academic or Clinical performance
- Tenure
- Lack of prior misconduct history
- Clothing and Appearance
- Sex/Gender

TRAUMA INFORMED INTERVIEWING

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Considerations for Interviewing

ATIXA POSITION STATEMENT



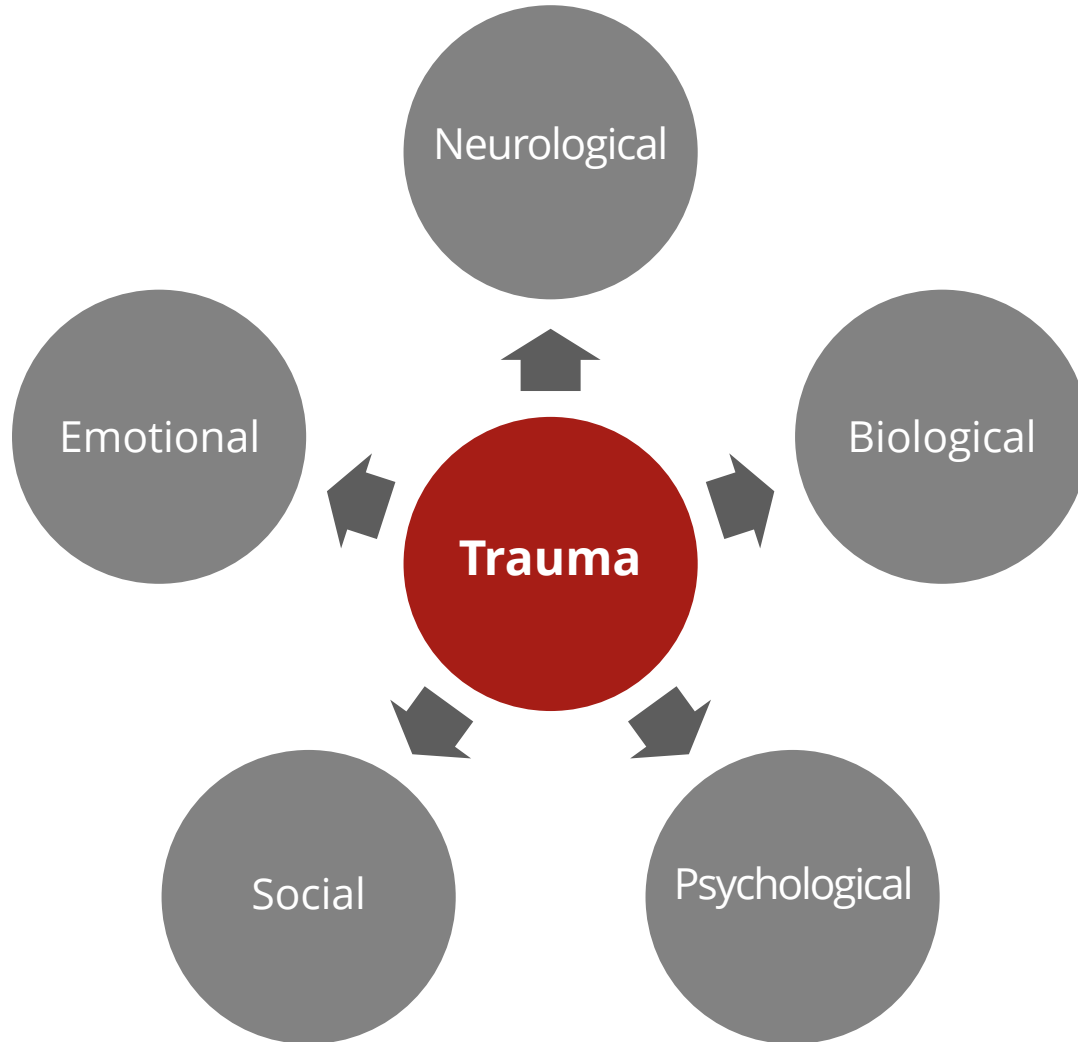
- Worry that application of the knowledge obtained by practitioners in our field has gotten way ahead of the actual science
- The body of knowledge is being misapplied
- Some purveyors of this knowledge are politically motivated to extrapolate well beyond any reasonable empirical conclusions currently supported by the science
- The field needs to incorporate trauma-informed investigation and interviewing methods into its best practices provided that they do not compromise the ability to obtain credible, relevant evidence
- However, the “Neurobiology of Trauma” should not significantly influence the way that colleges and schools evaluate evidence

ATIXA POSITION STATEMENT



- We can be trauma-informed in our investigations without allowing trauma to unduly influence our interpretation of evidence
- Wise administrators are vetting their training materials for potential indications of bias to ensure the best possible defense to a claim of a biased resolution process
- Not suggesting that you forego trauma training, but that you balance your trainings, or, better yet, obtain training from a balanced source

IMPACT OF TRAUMA ON FUNCTIONING



HORMONAL FLOOD

These hormones affect the body's ability to....

React physically

Think rationally

Consolidate or
group memories

This is a neurobiological response, not a choice.

MEMORY AND TRAUMA



- Memory is formed in two steps:
 - Encoding: organizing sensory information coming into brain.
 - Consolidation: grouping into memories and storing the stimulus.
- Trauma can interfere with the encoding and/or the consolidation of memory.
- May create fragmented memories.
- Recall can be slow and difficult.
- Drugs (including some prescriptions) and/or Alcohol may interfere further with memory.
- However, sensory information (smell, sound, etc.), may still function properly.

- A non-linear account, with jumping around and scattered memories is not uncommon.
- If drugs or alcohol are an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Be patient during the interview and allow time.

TRAUMA & INTERVIEWING



- Empathy is critical.
 - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
 - 5 senses
- What were your reactions to this experience?
 - Physically
 - Emotionally

Source: Partially drawn from Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

- Trauma may help explain elements that negatively impact a party's credibility
 - Inconsistencies in a claimant's statement.
 - Lack of linearity in a claimant's account or statement.
 - Claimant's lack of memory about an incident.
 - Memory errors by the claimant.
 - Claimant's demeanor or affect.
 - Claimant's brief answers, or answers lacking in detail.

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them.
 - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties.
 - If, for example, a claimant’s account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility.
 - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment.
- Use caution because actual or perceived trauma may have little or nothing to do with consent.

LAW ENFORCEMENT & CIVIL CASES

CONCURRENT LAW ENFORCEMENT INVESTIGATIONS



- New Regulations
 - OCR Commentary: “The Department acknowledges that the criminal justice system and the Title IX grievance process serve distinct purposes.”
 - OCR Commentary: Recipients’ obligations under Title IX are independent of recipients’ obligations to cooperate or coordinate with law enforcement with respect to investigations or proceedings affecting the recipient’s students or employees.
 - Only permits “Temporary delays” or “limited extensions of time” for good cause.
 - The Regs Commentary notes that “concurrent law enforcement activity may constitute good cause for short-term delays or extensions of a recipient’s designated time frames”, but those extensions are limited
 - If law enforcement requests a delay, or an MOU with law enforcement says you will delay, OCR’s commentary says that is insufficient justification for more than a temporary delay.

CONCURRENT LAW ENFORCEMENT INVESTIGATIONS



- MOU?
- Investigation
 - Timing; Sharing of Evidence/Information
 - Concurrent Investigations
- Supportive measures
- Remedies
- Cross-Training
 - E.g.: Training for law enforcement on Clery/VAWA, Title IX, FERPA, ADA/504 etc.
- Point of Contact

THE INVESTIGATION REPORT

UK

YOUR UNIVERSITY
LOGO HERE

SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the **Policy Name(s)** of the University of Knowledge. **Names of Investigators** conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:

(Summarize findings here.)

Procedural History:

Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On **Month XX, 20XX**, **Reporting Party** met with **Name Here** in the Office of Victim Assistance at University of Knowledge along with **Name Other Present Parties**. **Reporting Party** reported that **General Allegations** occurred on **Month XX, 20XX**. **Reporting Party** has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators **Name Here** and **Name Here** on **Month XX, 20XX**. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on **Month XX, 20XX**.

Involved Parties:

Reporting Party is *(e.g., a first-year undergraduate female residing in the residence halls)*.

1. **Responding Party** is *(e.g., a male graduate student and a residence advisor in the residence halls)*.
 2. **Witness 1** is *(e.g., a freshman female residing in the residence halls and Reporting Party's roommate)*.
 3. **Witness 2** is *(e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party)*.
 4. **Witness 3** is *(e.g., an employee of Nearby Bar; employee is not affiliated with the university)*.
-

THE INVESTIGATION REPORT



- Use the USU investigation report template.
- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Detail the allegations and how they were reported.
 - Explain the role of the parties and witnesses, and any relationships between them.
 - Results of interviews with parties and witnesses.
 - Results of interviews with experts.
 - Summary of other information collected (e.g. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

THE INVESTIGATION REPORT



- Explain unsuccessful attempts to collect information and/or interview witnesses.
- Highlight key factual findings for each allegation.
- The report should reference or contain all policies and procedures currently applicable.

CONSENT CONSTRUCT

-
- Force
 - Incapacitation
 - Consent
 - Case Study

KEY DEFINITIONS: CONSENT



- Sexual assault occurs when at least one party does not consent to the sexual activity. Consent is an understandable exchange of words or actions, which indicate a willingness to participate in mutually agreed upon sexual activity. Consent is an agreement to do the same thing at the same time in the same way. Consent can be withdrawn or modified at any time, as long as it is clearly communicated. Consent cannot be assumed based on silence, the absence of “no” or “stop,” or the existence of a prior or current relationship or prior sexual activity.
- There is no consent in the presence of coercion, incapacitation, force, or where the sexual activity violates state law relating to age of consent.

CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be assumed through silence.
- Cannot be obtained by use of:
 - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the respondent to obtain sexual access?
2. Was the claimant incapacitated?
 - a. Did the respondent know, or
 - b. Should s/he have known that the claimant was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the claimant gave the respondent permission for the specific sexual activity that took place?

KEY DEFINITIONS: FORCE



- Coercion may consist of intimidation, threats, or other severe conduct that causes a reasonable person to fear significant consequences if they refuse to engage in sexual contact.
- Force includes the use of physical force or threats of force that eliminate a person's ability to exercise their own free will to choose whether or not to have sexual contact.

INCAPACITATION



- Incapacitation is a state in which individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that should be made after the incident in light of all the facts available. If it is a question, investigator should gather evidence about it.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
 - Blackout ≠ incapacitation (automatically).
 - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how.
 - Partial blackout must be assessed as well.
- What if the respondent was drunk too?

USU POLICY ON INCAPACITATION



- Incapacitation is the inability, temporarily or permanently, to give consent because the person is mentally and/or physically helpless due to a disability, drug or alcohol consumption (either voluntarily or involuntarily), or the person is unconscious, asleep or otherwise unaware that the sexual activity is occurring.
- It is not an excuse that the party initiating sexual contact was intoxicated and therefore did not realize the incapacity of the other. In evaluating cases involving alleged incapacitation, the University considers whether the person initiating the sexual conduct knew or should have known the other person was incapacitated.

- What was the form of incapacity?
 - Alcohol or other drugs.
 - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
 - Incapacity = an extreme form of intoxication.
 - Administered voluntarily or without claimant's knowledge.
 - Rape drugs.
 - Mental/cognitive impairment.
 - Injury.
 - Asleep or unconscious.

SOME FACTS ABOUT ALCOHOL



- Most abused drug on college campuses.
- Most commonly used date rape drug.
- Time – the **only** sobering tool.
 - One “drink” per hour.
 - “Myth of puking.”
- Pace of consumption.
- Food in the stomach.
- Carbonation and alcohol.
- Medications and alcohol.

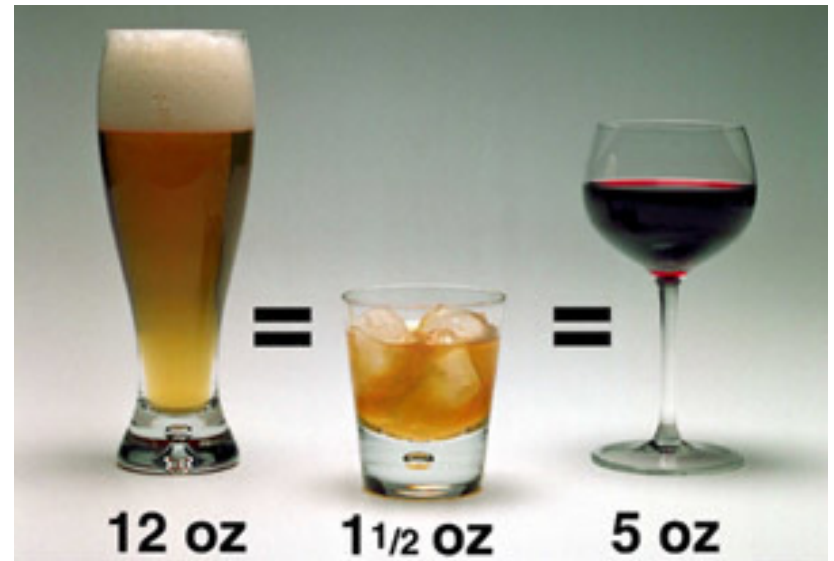
COMMON INTOXICATION FACTORS



- Rate of consumption.
- Strength of drink.
- Food in the stomach.
- Body weight.
- Body type – body fat percentage.
- Gender:
 - E.g. enzymes, hormones, body fat, and water in body.
- Functional tolerance.
- Medications.
- Illness and dehydration.
- Fatigue.
- Caffeine.
- Genetics.
- Ethnicity.

BAC/BAL

- One “drink” \approx .025 BAL.
 - 12 oz.
 - 5 oz. wine.
 - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
 - .015/hr. (avg.).
 - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



CREATE A TIMELINE



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
 - What were you drinking (e.g. wine, beer, or hard liquor)?
 - How much were you drinking (e.g. shot, 12 oz., or large cup)?
 - How many drinks did you have?
 - Were you using any recreational drugs?
 - When did you eat? What did you eat?
 - Are you on any personal medications?

TIMELINE CONSTRUCT



- Ask the respondent if the claimant was:
 - Slurring words?
 - Stumbling?
 - Acting unusual (e.g. not making sense, appearing drunk, etc.)?
 - Falling asleep?
 - Throwing up?
 - Disoriented?
 - And, if the respondent knows the claimant, was s/he acting different from the way s/he usually acts?

- Question 3 is the consent question: What clear words or actions by the claimant gave the respondent permission for the specific sexual activity that took place?
- Equity has a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone’s will, unwanted, someone unable to consent, etc.).

CONSENT: RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be clear, and must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.

QUESTIONS?

