



# AGENDA

**July 27, 2023**

6. Confronting Interviewing Challenges
7. Small Group Activity: Mock Interviews
8. Stages 3&4: Compile and Assess for Relevance
9. Stage 5: Drafting the Investigation Report
10. Testifying at the Hearing
11. Final Q&A and Conference Wrap up

# ACTIVITY



## ***Refresh & Reset***

**Please share one investigation strategy you learned yesterday that you can begin applying right away.**



# #6

## Confronting Interviewing Challenges



# Interviewing Challenges

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# Categories of Witnesses

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Willing to  
cooperate

Reluctant to  
cooperate

Refusal to  
cooperate



# Reluctance, generally

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- Fear of getting involved
  - Includes fear of getting in trouble
  - Guilty of something
- Mistrust of the University, the investigation process, the investigator
- Fear of retaliation
- Fear of not being believed
- Fear of re-traumatization (complainant)
- Fear/discomfort with subject matter





# Reluctant Complainants

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- May have important information connected to their own safety or campus safety
- Specific reasons:
  - Uncomfortable/trauma
  - Not wanting to get anyone (respondent) in trouble
  - Pressure not to report
  - Concern their report is “not serious enough” or their report will not meet the policy violation threshold
  - Concern about their own actions (underage drinking, etc.)
  - May not understand the investigation and grievance process



# Reluctant Respondents

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- Secured legal counsel
  - Advised not to give a statement
  - Statements given may be held against them in court
- Concern their testimony will not be believed
- May not understand the investigation and grievance process





# Reluctant Witnesses

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- Fear of getting involved
  - Includes fear of getting in trouble
  - Guilty of something
  - Taking sides
- Mistrust of the University, the investigation process, the investigator
- Fear of retaliation
- Fear of not being believed
- Fear of own misconduct (underage drinking, etc.)
- Fear/discomfort with subject matter



# Reluctant Party/Witness Interview Preparation

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- Importance of your initial contact
- Professional, respectful, and equitable for all parties involved
- Prepare for the interview- thought out- open ended questions
- Format of the interview: Zoom, Teams, or in-person – wherever they are most comfortable



# Control the Room

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Whoever is in the room, or not in the room can impact the interview – consider:

- How many investigators are present
- Advisor
- **Non-Advisor parent or other person**



# Transparency

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Explain	Explain your role as the investigator
Explain	Explain the process and its role
Do Not Make	Do not make promises you cannot keep and keep your promises
Set	Set realistic timelines and update
Explain	Explain you may need to follow up with them or re-interview them
Explain	Explain school policies about drug & alcohol use as well as any amnesty policy.



# Getting Parties and Witnesses Talking

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- Attempt to establish a personal connection
- If this is an in-person interview – candy
- Begin with the positive
- Appreciate their time and their assistance will help establish what happened or prevent another similar incident
- Flexibility
- Most people are comfortable in familiar settings and convenient times.
- If possible, give parties and witnesses the option of where/what format and when they will be interviewed.
- Record or not record – reluctant parties/witnesses do not like to be recorded. Ask permission and explain reason for recording!



# Getting Parties and Witnesses Talking (con't)

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- Remind a reluctant witness this isn't about them – it's about improving campus safety/workplace issues.
- Remind them the decision to participate is completely theirs – you are providing them with a degree of influence and control over the process.
- Draw diagram of the room, direction, distance, access, location
  - Leads to points of reference and allows for more detailed discussions



# The Hard Questions

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- Allow the party/witness to finish their narrative before you probe
- Say, "I want to back through this part slowly, so I understand."
- When asking the hard questions:
  - Say, "I would like to ask some hard questions, is that ok with you?"
  - Explain why you are asking the question.
  - Wait to confront the party/witness with adverse evidence – it may make them less willing to continue talking.
  - Let the party/witness know you are attempting to figure out what doesn't track and why.
  - Don't accuse
  - Be careful when asking "why?"





# The Untruthful Witness

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How do you know?

- What physical evidence do you have?
  - Video
  - Card swipe information
  - Text messages with date/time stamp

Treat testimony at face value unless the evidence suggests otherwise.



# Inconsistent/contradictory statements

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Three "C's" to confronting inconsistent or contradictory statements

1. Catch the inconsistent statement (statement that is different than the statement given before or different from the physical evidence)
2. Commit the interviewee to the statement being made
3. Confront with the inconsistency or contradiction using the prior statement or physical evidence



# What Not to Do

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- Use the “bad cop” approach. If the party or witness is reluctant, find out why.
- Get into a conflict with a party or witness about their reluctance to participate.
- Flattery when establishing rapport – it never goes well.
- Use the 20 questions approach.
- Cut off a statement so you can move on to your next pre-arranged question.



# Work with what is available

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- Take what you can get
  - Phone call conversations
  - Written statement
- An effective investigator can turn reluctance into cooperation with a non-combative and empathetic approach.

**QUESTIONS?**



# #7

## **Group Activity: Mock Interviews**

# ACTIVITY

## Fact Pattern

- Who will you interview?
- What information are you seeking from the interviewees?
- Order of Interviews
- Let the interviews begin!





# #8

## Stages 3 & 4: Compile and Assess the Evidence



## Stage 3: Compile the Evidence

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The investigator compiles all the information “directly related to” the allegations raised in the formal complaint into the “**Investigative File.**” §106.45(b)(5)(vi)

- The **Investigative File** is provided to the parties and their advisors for review and response (must provide at least 10 days for review and response).
- **Investigative File** must be made available at the hearing to allow the parties to refer to the evidence in the file, including for the purpose of cross-examination.



## Stage 4: Assessing evidence "directly related to" allegations

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Determining whether the evidence is "*directly related to*" the allegations:

- "*Directly related to*" undefined within the Final Regulations.
- Evidence directly related to the allegations isn't necessarily relevant evidence.
- Includes evidence that the school does not intend to rely on in reaching a determination.



## Stage 4: Assessing the “relevant” evidence

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- The investigator drafts an **Investigative Report** that fairly summarizes ONLY the relevant evidence within the **Investigative File**.
- At least 10 days before a hearing, the parties and their advisors must receive the **Investigative Report** for review and response.



# Investigative File v. Investigative Report

## Investigative File v. Investigative Report



**INVESTIGATIVE REPORT**  
*PERSONAL AND CONFIDENTIAL*

I. Introduction

[University] is a recipient of federal funding and must comply with Title IX of the Higher Education Act of 1972. Title IX is a federal civil rights law that prohibits discrimination based on sex in any federally funded education program or activity. It applies to students, faculty, and staff members of the university.

[University] Sexual Harassment and Discrimination Policy (the "Policy") prohibits Sexual Harassment and Sex Discrimination in the university's Programs and Activities. The Policy complies with the mandates set forth under Title IX, including the May 2020 Final Regulations issued by the United States Department of Education's Office for Civil Rights. *Sexual Harassment* is a broad term encompassing behaviors based on sex, including (1) Quid Pro Quo Sexual Harassment, (2) Hostile Environment Sexual Harassment, (3) Sexual Assault, (4) Dating Violence, (5) Domestic Violence, and (6) Stalking.

According to Title IX and the Policy, when [University] has actual knowledge of Sexual Harassment, or allegations thereof, and upon the filing of a Formal Complaint alleging Sexual Harassment, it must respond by following the Grievance Procedure and Grievance Process outlined within the Policy.

II. The Formal Complaint

The Complainant filed a Formal Complaint against Respondent. The Formal Complaint alleges that the Respondent engaged in Sexual Harassment, specifically [name offense(s)], in violation of the [University] Sexual Harassment and Discrimination Policy.

III. Jurisdictional Statement

The [University's] jurisdiction over a Formal Complaint attaches when the alleged Sexual Harassment occurred within a University Education Program or Activity and against a person in the United States.<sup>1</sup>

The Parties are both [university] students. The Complainant alleges that the Respondent sexually harassed them connected with and surrounding their participation within a university Program or Activity [name specific program or activity]. Accordingly, the Policy has jurisdiction over the Formal Complaint.

IV. Applicable Offense(s)

- List offenses and their definitions

V. Supportive Measures

- Explain supportive measures discussed and those put in place for each party.

<sup>1</sup> See 2020 Title IX Regulations, 34 C.F.R. § 106.30.



# What is "*Relevant Evidence*?"

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Evidence is *relevant* when...

*...it may aid a decisionmaker in determining whether the alleged sexual harassment/discrimination occurred.*

*\*See June 23, 2022, proposed regulations.*



# Evidence Not *Relevant*

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Evidence that is NOT *relevant* or is otherwise precluded from the grievance process:

- i. A Party's treatment records, unless have consent. §106.45(b)(5)(i)
- ii. Information protected by a legally recognized privilege, unless have consent. §106.45(b)(1)(x)



- iii. Questions or evidence about a Complainant's sexual predisposition, or about a Complainant's prior sexual behavior unless it meets one of two limited exceptions. §106.45(b)(6)(i)-(ii) ("Rape Shield" protections)
  1. That someone other than the Respondent committed the conduct alleged by the Complainant, or
  2. If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent.



# Cannot exclude *relevant* evidence

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*"...A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence."*

*Final Regulations, Preamble, p. 834-835 (Federal Register Version)*

## Relevance v. Weight



# ACTIVITY



## Scenario

What evidence will you include in the Investigative File?

**QUESTIONS?**



# #9

## Stage 5: Drafting the Investigation Report



# Report Outline

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## Outline of Investigative Report

- Explanation of alleged misconduct
- Applicable offenses
- Description of procedural steps taken during investigation\*
- Evidence obtained
- Witnesses interviewed
- Supportive measures (whether they were/were not provided)
- Jurisdictional statement
- Summary of relevant evidence



- OR -

§106.45(b)(5)(vii).



# Investigative report may include

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- Identification of undisputed facts, corroborated facts and contested/disputed facts.
- Analysis of the relevant evidence, including a credibility analysis.
- Recommended findings or conclusions.



*"The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative process."*

*Final Regulations, Preamble p. 1059 (Federal Register Version).*





# Summarizing – Example #1

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How to summarize the relevant evidence within the Investigative Report:

1. Provide the allegations as stated in Notice of Allegations.
2. Cut and paste the relevant testimony and evidence from the Investigative File into the Investigative Report.
3. Explain the undisputed facts.
4. Explain the contested facts, or facts in dispute.
5. Explain the evidence that appears to corroborate or refute the testimony and allegations.

**- OR -**



## Summarizing – Example #2

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*“The Complainant alleges that the Respondent raped them in the Complainant’s dorm room when the Complainant was incapacitated due to alcohol consumption and unable to consent to sexual activity.*

*The Respondent insists that the Complainant was “fine” and an active participant during sexual activity. The Respondent claims that the Complainant was playful and joking around as they walked to the Complainant’s dorm room. Respondent also claims that the Complainant initiated sexual activity with the Respondent as soon as they entered the room.*

*The Respondent’s claim about the parties’ interactions while walking to the Complainant’s dorm room is inconsistent with the dorm’s video footage. The video shows the Complainant stumbling and staggering as they walked. The Complainant then falls to the ground. The Respondent picks up the Complainant, who appears unconscious, and carries the Complainant to the dorm room.”*

## See Sample Outline for Investigative Report in your Resources

### INVESTIGATIVE REPORT

#### PERSONAL AND CONFIDENTIAL

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#### IV. Applicable Offense(s)



# Title IX Coordinator's Review

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- After the parties have reviewed and responded to the investigative report, the Title IX Coordinator determines next steps.
- Following the investigative process, formal complaints of sexual harassment may:
  - Be dismissed entirely or just certain allegations (§106.45(b)(3)(i,ii)),
  - Be resolved through the informal resolution process, or
  - Proceed to the hearing process.

**QUESTIONS?**



# TAKEAWAYS

- Remember to always rely on your institution's policy and procedures as it relates to your investigative process protocol.
- Be as thorough as possible.
- Remain neutral, objective, and autonomous.
- Ensure an equitable investigative process
- Uphold party rights within the investigative process

# TAKEAWAYS



**For more training on how to draft the Investigative Report:**

**AI On-Demand Recording:**  
[The 5 Stages of Preparing Your Title IX Investigative Report](#)



# #10

## Testifying at the Hearing





# Live-Hearing

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- For postsecondary institutions, the institution's grievance process must provide for a live hearing.
- At the live hearing, each party's advisor must be allowed to ask the other party and any witnesses all:
  - Relevant questions
  - Follow-up questions
  - Questions challenging credibility (i.e., cross-examination).
- Questioning must be conducted directly, orally, and in real time by the party's advisor of choice.

§106.45(b)(6)



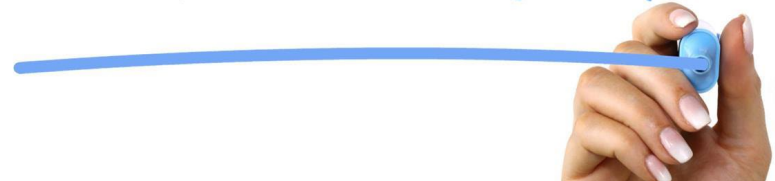
# Testifying at the Hearing

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Investigators will likely testify at the hearing.

- Investigators may “present” the case.
- Investigators may be questioned by the decision-maker(s).
- Investigators may be questioned and cross-examined by party advisors.

TESTIFY





# Cross-Examination

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What is cross-examination? Questioning designed to:

- Allow the parties to probe/challenge the credibility, plausibility, and reliability of statements asserted by parties/witnesses.
- Give the decisionmaker(s) the opportunity to observe parties and witnesses answer questions, including those challenging credibility, to serve a truth-seeking purpose.
- Permit parties to pose questions intended to promote the asking party's perspective with respect to the allegations at issue and bring out additional facts and details about the alleged incident.



# Leading Questions

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- Attorney advisors may conduct cross-examination by using leading questions.
  - Leading (or closed) questions generally solicit a “yes” or “no” answer and essentially suggests the answer to the question.



# Investigator as Witness

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The investigator as a witness:

- May testify about the procedural steps taken during the investigation.
- May be asked why the investigator did or did not interview a specific witness, pursue a specific topic during the questioning of a party or witness, or obtain certain evidence.
- May be asked about observations made during the evidence collection phase of the investigation.
- Should not be asked for opinion on outcome.



# 5 Tips for Testifying and Surviving Cross-Examination

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1. Prepare
2. Answer the Question Asked
3. Be Positive and Confident
4. Responding to Leading Questions
5. Control Yourself





# #1 – Prepare

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- Review all the evidence you collected during the investigation.
- Review the procedural steps taken during the investigation.
- No need to memorize! Bring information with you to the hearing and ask to refer to it if necessary.



## #2: Answer the Question Asked

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- Listen carefully to the questions you are asked and answer that question. Explain yourself, if necessary.
- If you don't understand the question, have it repeated or clarified before you answer.
- *Remember:* Wait to answer questions from advisors until decision-maker tells you to do so.





## #3: Be Positive and Confident

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- Avoid speculation.
- If you don't know, say you don't know.
- If you don't recall, say you don't recall. (If there is information available to refresh your recollection, ask to review that information before answering the question.)



## #4: Responding to Leading Questions

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- If questions can't be fully answered with a "yes" or "no," it's okay to explain your answer.
  - If advisor tries to cut you off before you finish your answer, ask the decision-maker to allow you to finish answering the question.



## #5: Control Yourself

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- Stay calm, cool, and collected
- Avoid arguing with the decision-maker(s) or advisors
- Take nothing personally
- Remain courteous but firm if your professional competency or your work product is challenged

**QUESTIONS?**

# *Thank you!*

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