



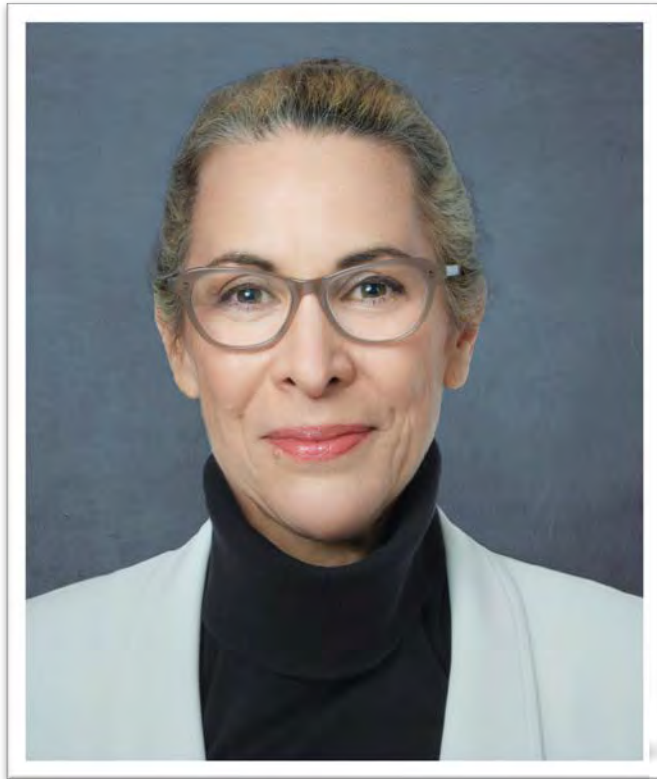
GRAND RIVER | SOLUTIONS

Hearings 201: Ready, Set, Go!

Massachusetts Institute of Technology

Jody Shipper
Managing Director

Your Facilitator



Jody Shipper, J.D.

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.





Vision

We exist to help create safe and equitable work and educational environments.



Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity

Agenda

01

Background Basics

05

Analyzing Evidence

02

Types of Evidence

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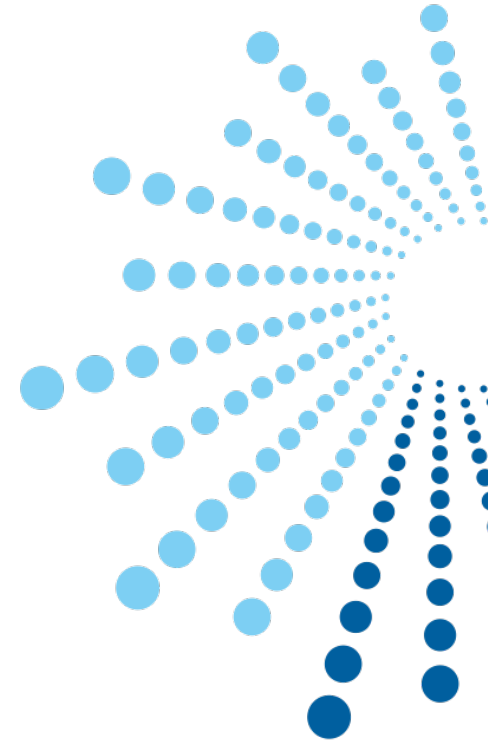
Report Writing

03

Weighing Evidence, Part 1

04

Weighing Evidence, Part 2

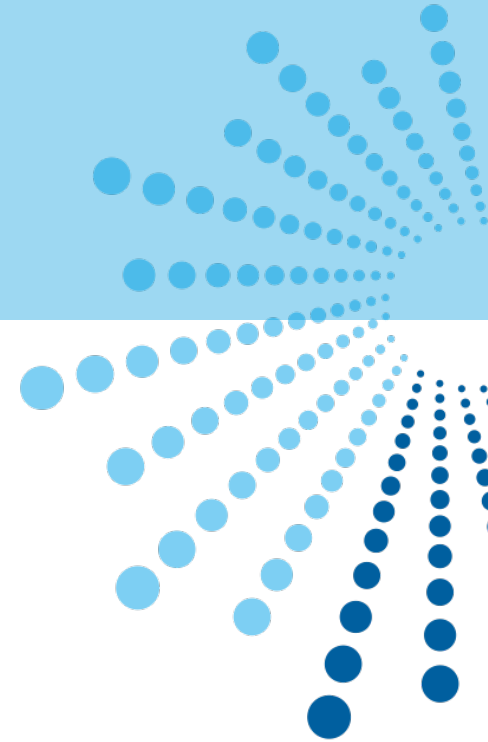




Background Basics

01

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Overview of Title IX Investigation

Notice

Trained investigator collects information

Investigator shares evidence “directly related” to allegations with parties

Parties have 10 days to respond

Report

Parties have 10 days to respond



Overview of All Other Investigations

Notice

Trained investigator collects information

Sharing of evidence?

Response?

Report



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Impartiality

WHAT DOES THIS
REALLY MEAN?

No Prejudging

“Believe all victims” does not mean an investigator is biased – a member of the faculty or administration can (and should!) show kindness when a disclosure is made, without having any impact on the process.

The decision to bring forward a case is not a judgment on the merits.



Bias and Conflict of Interest

Demonstrated bias – cannot have shown bias against any particular gender, or against complainants or respondents generally.

Actual conflict of interest – looking for something more than a potential or speculative conflict.



Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated





Types of Evidence

02

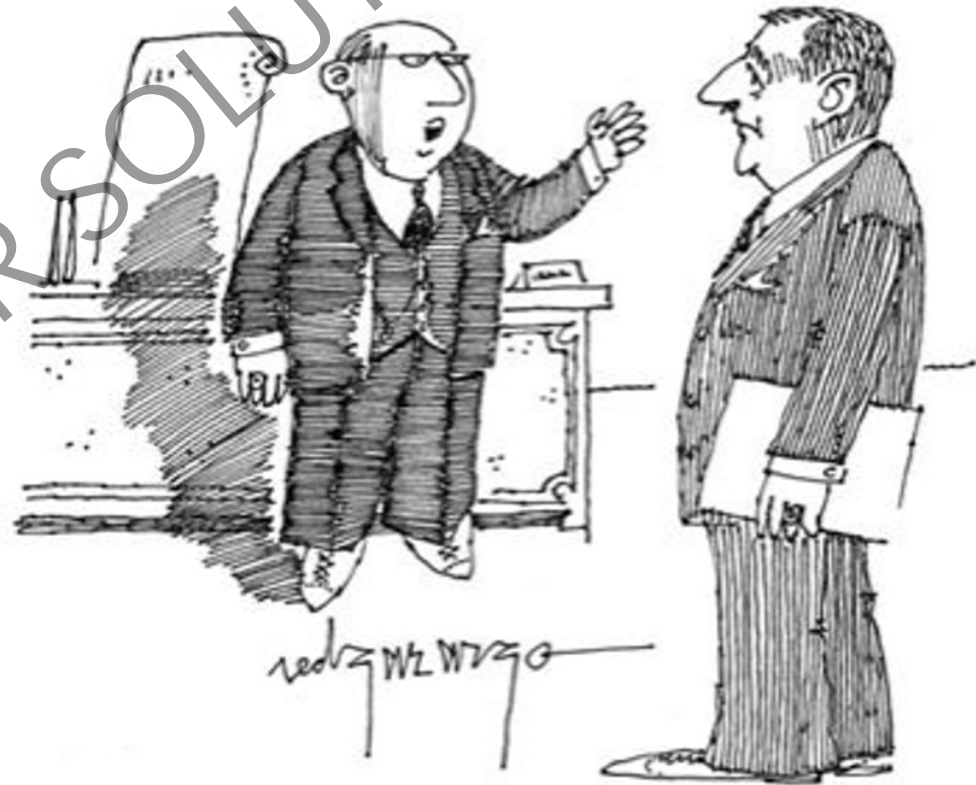
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Types of Evidence

- Online information
- Gut instinct
- Direct vs. circumstantial
- Hearsay
- Relevance
- Common sense

"WHILE DOING THE RESEARCH, KEEP IN MIND THERE ARE ONLY TWO KINDS OF FACTS... THOSE THAT SUPPORT MY POSITION... AND INCONCLUSIVE."



Evidence

What Evidence Are You Using and Why?

Direct

Circumstantial

Past conduct of respondent

Past conduct of complainant

Past sexual activity between complainant and respondent

Dating or domestic violence — past history

Medical, privileged

Impact statement?

What is an appropriate understanding of trauma?

What is appropriate to reference in the report?

Directly Related Evidence

Regulations do not define “Directly Related” evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, &
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



Can You Have a
General Rule About
Evidence In Title IX
Investigations?

NO

Evidence Rules

Rape shield protections

Privileged information not permitted without waiver

Medical information requires written permission

Cannot require release of any privileged information (lawyer, clergy, therapist, hospital)



Weighing Evidence: Part 1

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Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

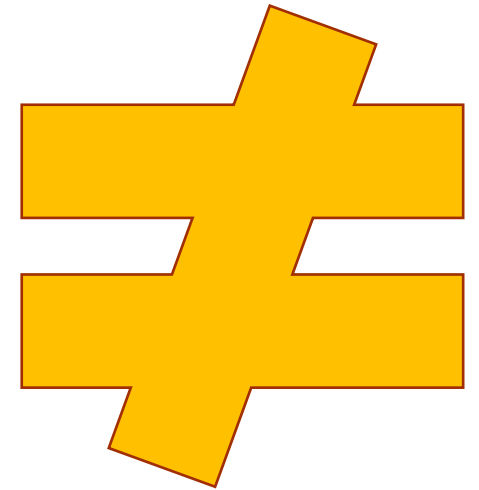
Relevance is Not:

Strength of the evidence

Believability of the evidence

Based on type of evidence:
circumstantial, direct

Based on complicated rules of court





Weighing Evidence: Part 2

04

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There are Two Different Points of View

You believe one party's version of events over another. Why?

Corroboration?

Plausibility?

They were convincing when they shared their story?

They could not have seen what they said they saw?

That makes no sense?

They seemed more trustworthy?

Some combination of the above?



Reliability vs. Credibility



Reliability



Credibility

Historically, They Have Been Treated as Being the Same

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eyewitnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past? (Would you ever look at history of complainant?)

Model Jury Instructions

1.7 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Credibility or Reliability?

Reliable Evidence

I can trust the consistency of the person's account of their truth.

It is probably true and I can rely on it.

Credibility

I trust their account based on their tone and reliability.

They are honest and believable.

It might not be true, but it is worthy of belief.

It is convincingly true.

The witness is sincere and speaking their real truth.

A credible witness may give unreliable testimony.

- Sleepers (1996)



Credible? Reliable?

- My Cousin Vinny (1992)



Reliability

- Did the witness correctly observe, process, interpret and recall the information? Is there corroboration?
- Vs. Credibility: bias, collusion, motive in outcome, lying, judging the person

Credibility: What Factors Do You Consider?

- Corroborating evidence
- Inconsistencies
- Consider the logic
- Insufficient explanation of inconsistencies?
- Consider the logic of person's narrative.
- Consider the impact of trauma



Assessing Credibility

Do You Use These?

Inherent plausibility: Is the testimony believable on its face? Does it make sense?

Demeanor: Did the person seem to be telling the truth or lying?

Motive to falsify: Did the person have a reason to lie?

Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Past record: Did the alleged harasser have a history of similar behavior in the past? (Would you ever look at history of complainant?)

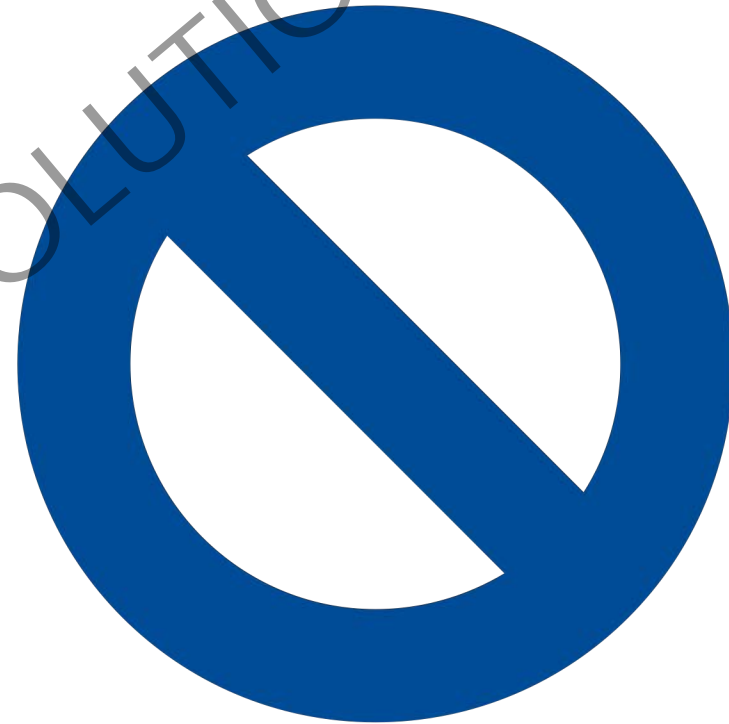


Where Does Demeanor Fit In?

Do You Need to See or Question the Witness?

- Reliability?
- Plausibility?
- To find corroborating evidence?
- Motive to lie?
- Past record?

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What is Demeanor Evidence?

- Demeanor evidence refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the witness's attitude while testifying.

• [The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The View of ALJs .](#)
[Ogden, G., March 15, 2000](#)

Cultural Cues and Demeanor Credibility

- Some cultures say refusing to look someone in the eye is evidence of unreliability. Others say it is a sign of respect.
- Quercia v. United States, 289 US 466, 471–72 (1933). Judge told jury that wiping hands during testimony is “almost always an indication of lying.”
Reversed
- In citing professional psychological opinions, Sannito and McGovern provide practical insights on non-verbal communications. They state that people with enlarged pupils are compassionate and those with beady-eyes use cold logic; a person who looks up and to the left while thinking is metaphorical and one who looks to the right reasons logically; thin lips mean frugality; hands and feet are more expressive than a face; and a low-pitched voice indicates confidence, while a high-pitched voice reduces believability. (Courtroom Psychology for Trial Lawyers, Sannito and McGovern, 1985)

Demeanor Evidence: Are You Worthy?

- Dyer v. MacDougall, 201 F.2d 265, 268–69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).
- *Courtroom Psychology for Trial Lawyers* (1985): “People with enlarged pupils are compassionate and those with beady eyes use cold logic; a person who looks up and to the left while thinking is metaphorical . . . a low pitched voice indicates confidence, while a high pitched voice reduces believability.”
- Judge Learned Hand: “The whole nexus of sight and sound . . . is lost in a written record. . . . The words that a witness utters . . . are again and again of no probative weight at all because of his address, his bearing and his apparent lack of intelligence.”

Demeanor Evidence

- Black's Law Dictionary: "[T]he tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidence of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity."
- Blackstone: "Demeanor includes witness's quality, age, education, understanding, behavior . . ."
- "Jurors base credibility on social status, style of speech, clothing, or occupation."

Catholic University Law Review

- Credibility includes attitudes, appearance, and conduct.

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Look at this Person: They are not Worthy of Belief!

- Clarence Darrow, all he did was ask that witness stand up and turn around for the jury. He asked no questions. He said, "I only wanted the jury to get a good look at you." Why?
- So the jury could see that the witness had a swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy hair had been a stranger to the brush or comb for so long as to have become tangled or matted. His clothes were covered with dirt and grime and his huge hands were covered with grime.
- Is this sufficient proof the witness would not tell the truth?

Why Do We Believe Some People?

- James Earl Jones, Sean Connery, Katie Couric
- What do they have in common?



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Putting It All Together

Complainant sobbed throughout interview, except when talking about sex

Complainant did not go to police

Complainant reported to Title IX only after failing a class

Complainant was laughing when telling her roommate what had happened. Two weeks after alleged assault, Complainant saw Respondent in a bar and asked him to dance.

Example 1: What Does this “Prove” to You?

Where Does Trauma Fit In?

Trauma and credibility — one does not prove or disprove the other.

Evidence of trauma is not evidence that this respondent violated your policy in this instance with this complainant.

How to Put Your Credibility Assessment in Your Report

- Factors to consider
- Best practices
- Showing your work

The image displays handwritten mathematical work and diagrams. At the top, there is a diagram of a triangle with a horizontal line and a vertical line, labeled with $\frac{Q}{2} \frac{E \epsilon}{l}$. Below this, the function $f(x) = \int_0^x x e^{-1000x} dx$ is written. To the right, there are notes: $\frac{\partial F}{\partial x} = \frac{\partial H}{\partial x} = \frac{\partial H}{\partial x} = \frac{\partial H}{\partial x}$ and $\frac{\partial H}{\partial x} = \frac{\partial H}{\partial x} = \frac{\partial H}{\partial x}$. In the center, there is a boxed equation: $H = \sum p(x) \log p(x)$. To its right, there is a summation: $\sum_{i=1}^n \frac{Q_i H_i}{2} + c_s \frac{Q}{2} + c_o D$. Below the boxed equation, there is another equation: $\frac{1}{2} S^2 \frac{\partial V}{\partial S} + S \frac{\partial V}{\partial S} - \frac{\partial V}{\partial T} = V = 0$. To the right of this, there is another summation: $\frac{Q(p-D)}{2p} \frac{H^M + E_N}{E_N \sum D_i \text{ und. } (E_i)}$. Below the boxed equation, there is a diagram of a cube with a diagonal line and a shaded area, labeled with $\frac{Q}{2} \frac{H^M}{2}$. To the right of the cube, there is a matrix equation: $\begin{bmatrix} \frac{\partial \Delta p(s, \phi)}{\partial \phi} \\ \frac{\partial \Delta M(s, \phi)}{\partial \phi} \end{bmatrix} = \begin{bmatrix} \beta & -\beta \\ -\beta & 0 \end{bmatrix} \begin{bmatrix} \Delta p(s, \phi) \\ \Delta M(s, \phi) \end{bmatrix}$. At the bottom, there is an integral equation: $\int_0^{\log \sin x} (\log \sin x)^2 dx = \frac{\pi}{2} \left\{ \frac{\pi^2}{12} + (\log 2)^2 \right\}$.



Report: Step 1

Determine the material facts

Determine which material facts are:

Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties

[e.g., X and Y attended a fraternity party on April 5, 2019]

Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains

[e.g., X alleged that Y kissed her without her consent around 1 am at the party, and Y asserted he never kissed X and went home early]



For Those Facts that are in Dispute

Why are some facts accepted and others rejected?

State the reasons why [e.g. “While Y maintained that he never kissed X and went home early, several witnesses corroborated that Y was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Y kissing X. Therefore, I find that Y’s version of events cannot be credited as being more likely than not to be true.”]

Is this based on credibility or reliability?

Where Does Trauma Fit In?

Trauma and credibility — one does not prove or disprove the other.

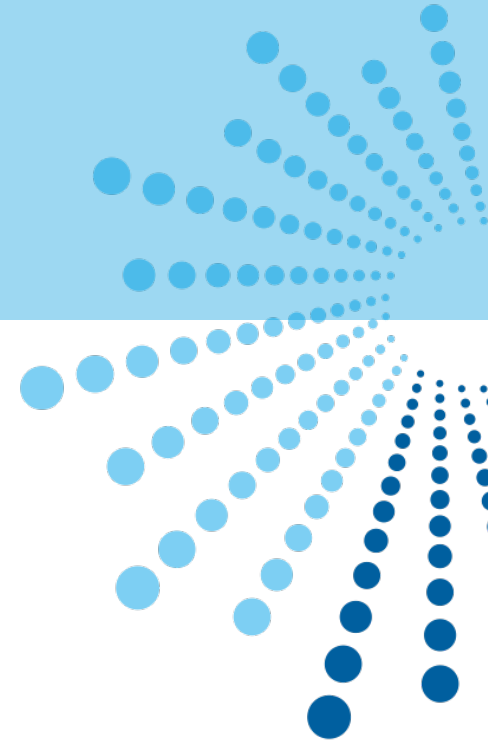
Evidence of trauma is not evidence that this respondent violated your policy in this instance with this complainant.



Analyzing Evidence

05

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Sexual Assault: Federal Definition

Sex Offenses

Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

Rape (except Statutory Rape)

The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

Sodomy

Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity



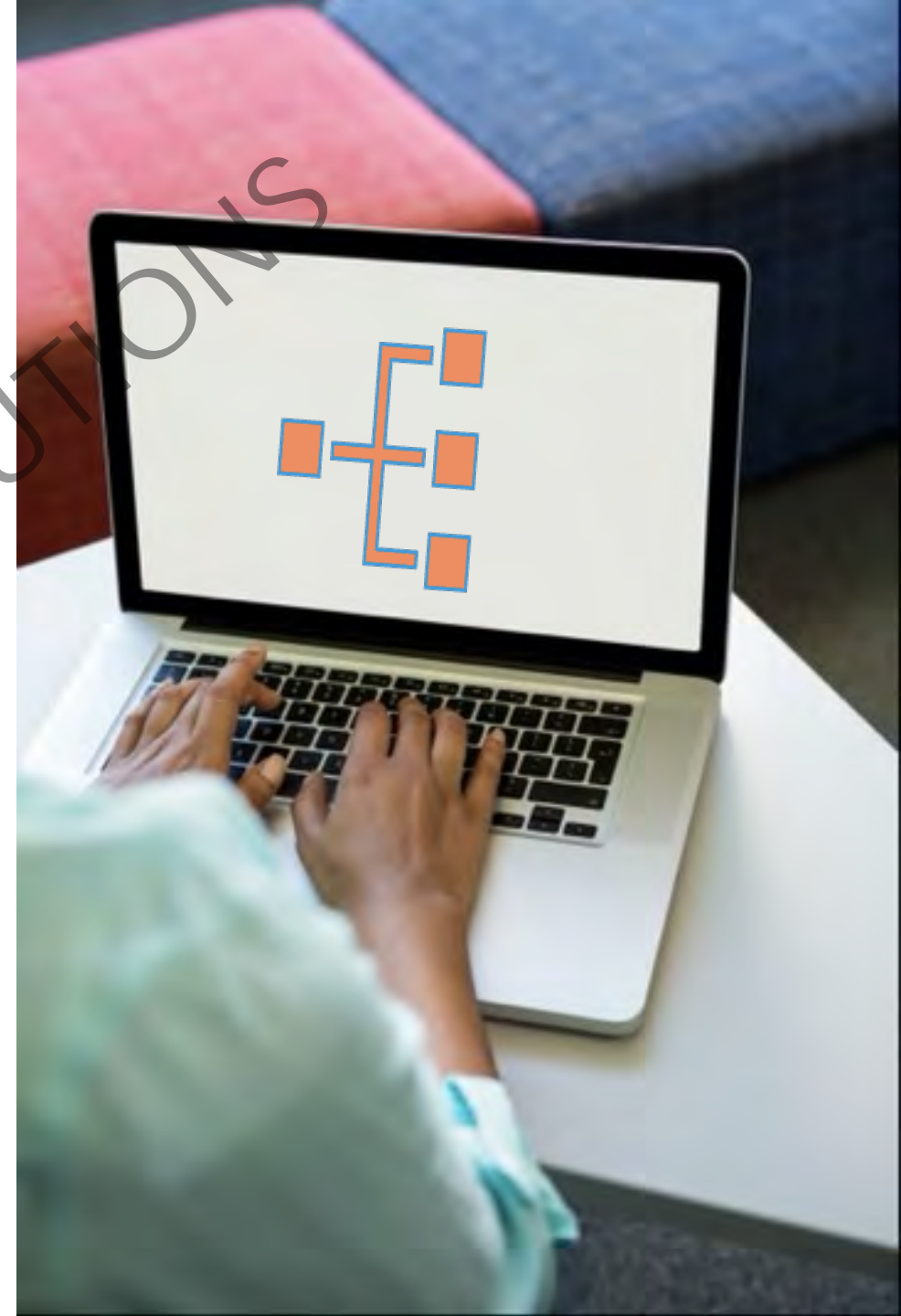
Findings of Fact

- **A "finding of fact"**
 - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
 - Based on available evidence and information
 - Determined by a preponderance of evidence standard
 - Determined by the fact finder(s)
- **For example...**
 - Complainant reports that they and Respondent ate ice cream prior to the incident
 - Respondent says that they did not eat ice cream
 - Witness 1 produces a timestamped photo of Respondent eating ice cream
- **Next steps?**

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate

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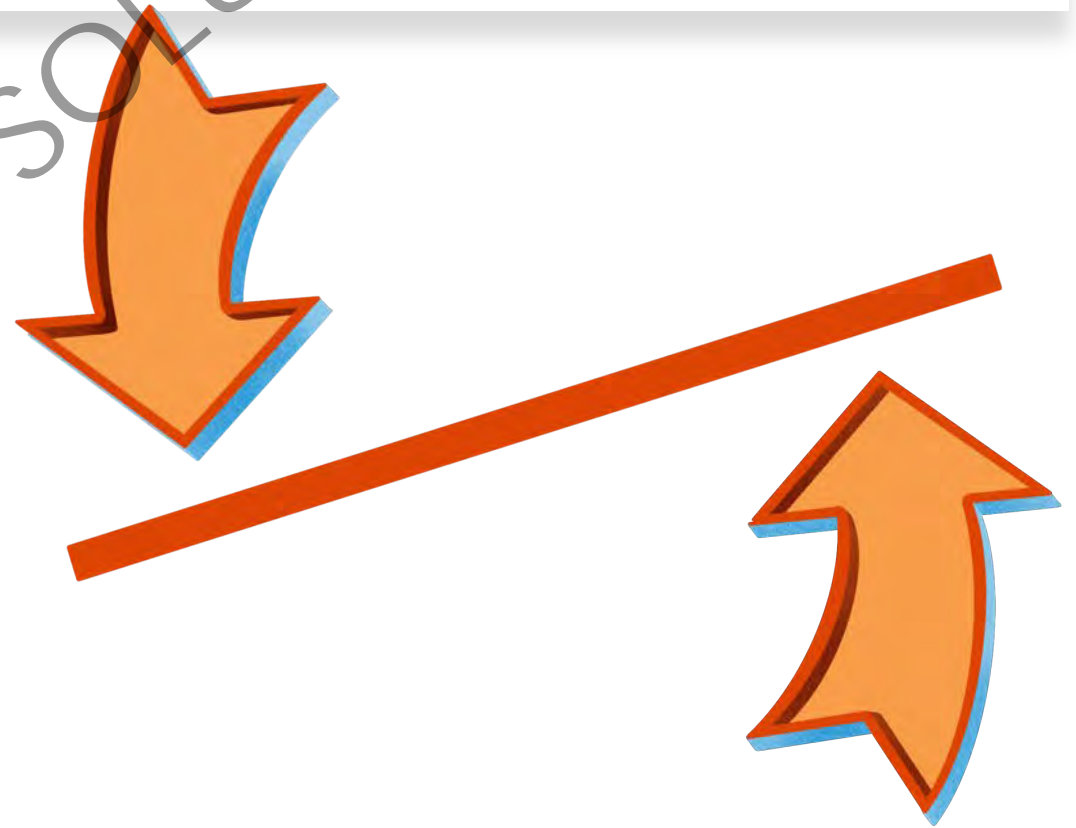
Allegation: Fondling

Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ without the consent of the victim,
 - ❑ including instances where the victim is incapable of giving consent because of their age or **because of their temporary or permanent mental incapacity.**

Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



Questioning to Assess Reliability

Authentication

Inherent Plausibility

Logic

Corroboration

Other indicia of reliability

Questioning to Assess Reliability

No formula exists, but consider asking questions about the following:

opportunity to view

ability to recall

motive to fabricate

plausibility

consistency

character, background, experience, and training

coaching

Final Report – Within 7 business days

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- **Rationale** for each allegation
- Sanctions and remedies
- Procedure for appeal





Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Asking Questions to Assess Authenticity

Investigating the Products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Request further investigation of the authenticity if necessary.

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Report Writing

06

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Elements of a Report

Procedural
background

Applicable policies
and procedures

Allegations

Charges

Witness
statements

Evidence
• Response

Credibility

Analysis and
rationale

Evidentiary
standard

Conclusion

Example: Sexual Harassment

What was the conduct?

- Unwelcome conduct (determined by a reasonable person)
- Sexual or based on sex
- Severe
- Pervasive
- Objectively offensive
- Denial of equal access

Background Information

- Includes how case came to you
- All decisions made (e.g., delay for police investigation, proceed without complainant)
- Charges

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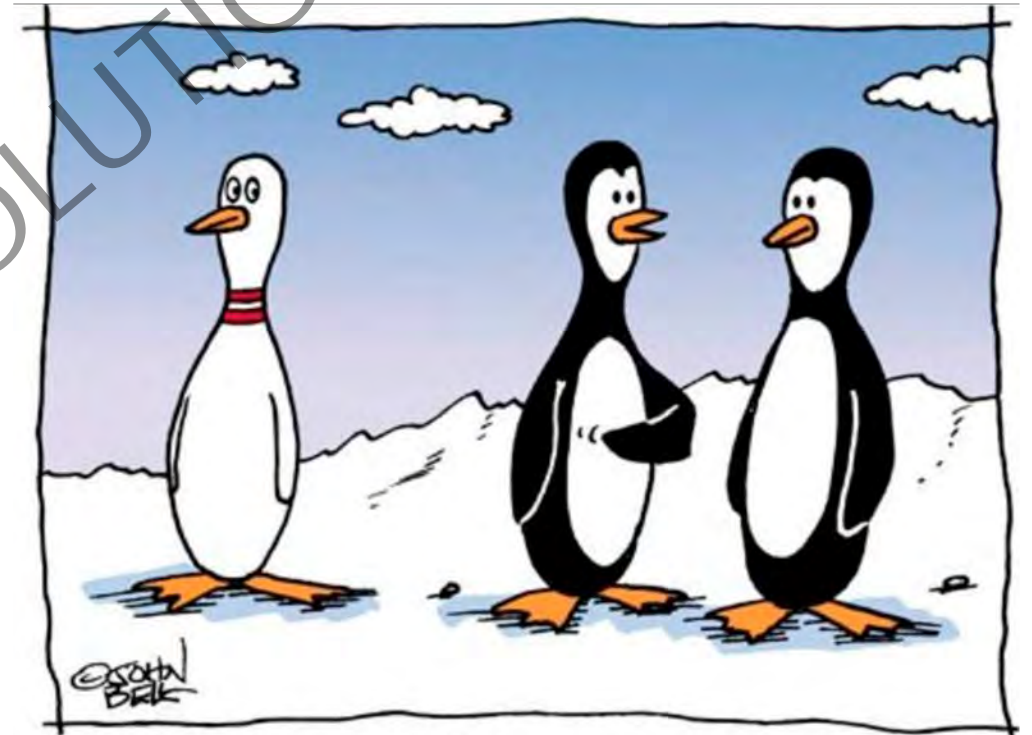
Allegations and Charges

- Distinguish what was alleged from what was charged
 - Allegations that did not result in charges
 - Referrals to other campus departments



Witness Statements

- Accurate, timely notes
- Review and retype as close in time as possible
- Verification of notes
- Use of initials or other masking to preserve identity
- Sharing of notes
- Start using the information to fill in timelines



HE'S IN THE "WITNESS PROTECTION PROGRAM".

Writing the Report

An Approach

First, get all the background set

What are the charges?

Put the policies in front of you

What evidence are you using?

- Relevant and credible
- How to handle evidence gathered, not used

Timelines

After sorting out all the credible, relevant evidence, create one timeline of what took place:

- Who knew what, and when?
- Why are other versions of the timeline incorrect?

Example of a Timeline

- According to Complainant:
 - Got to party at 11:00 p.m.
 - Had 3–4 beers prior while waiting for friends to get dressed
 - Big dinner at 5:30 p.m.
 - Had some jello shots when first got to party
 - Remembers someone making a comment at midnight
 - Remembers falling down while dancing, maybe after midnight
 - Remembers someone picked him up; they were laughing
 - Remembers being in bed with respondent and that she pushed him onto his back and got on top of him

Example of a Timeline, cont.

- According to Witnesses:
 - Got to party before midnight
 - Everyone was drinking before the party, but no one paid attention to consumption by complainant
 - Saw complainant have jello shots when first got to party
 - Not sure if complainant had any other drinks after the jello shots
 - Complainant was really wobbly after jello shots
 - Complainant started dancing, which he never does, and someone else bumped into him and both fell down; both picked each other up and kept dancing
 - Respondent arrived at party late, maybe 1:00 a.m.

Example of a Timeline, cont.

- According to Respondent:
 - At lunch, complainant and respondent agreed to hook up later that night
 - Respondent was very late getting to party, had been at two other parties prior to that one
 - Did not see complainant drinking anything at party
 - Complainant did not fall down, was dancing and talking to others
 - Complainant recalled their plan to go hook up, and suggested they leave together to go back to her apartment
 - They left party around 2:00 a.m.
 - Complainant initiated sex the first time; she initiated sex the second time

Analysis and Rationale

- Make factual determinations
- For each allegation, what are the elements?
- Look at each element
- Apply the factual determinations to each element
- Be guided by policy definitions
- Start by making factual determinations not ultimate decisions as to whether or not the policy was violated

Let's Practice!

Sarah is a senior, and a promising chemistry prodigy. She has always wanted to work in Professor Chem's prestigious lab.

One day after class, she approaches David Chem, a faculty member, to ask him about the upcoming interview and selection processes. She asked him if they could go out for a cup of coffee to discuss the application process, and he agrees. They find a local coffee spot and start chatting and stay for about two hours.

The next week, Sarah again invites David Prof out for a coffee, and he agrees. As it is getting late, they then decide to grab a bite to eat at the bar next door. While there, Sarah suggests that they have a few shots of whisky, which they do.

Practice, cont.

As the evening goes on, Sarah starts leaning against David Chem, and he casually puts his hands on her thighs as they talk. After another round of shots, the two of them start to kiss, and Sarah invites David up to her apartment to have another drink before he heads home. He agrees.

When they get to Sarah's apartment, David tells Sarah that he needs to lie down, as he does not feel well, and she offers him her bed. David goes to the bed and falls asleep.

In the morning, Sarah wakes up in her bed next to David. When she wakes up, both she and David are naked, although Sarah does not remember removing any of her clothing. As she starts to sit up, she feels some vaginal soreness and realizes that she and David had sex during the night.

Practice, cont.

Sarah invites David out for drinks the next week, as she is feeling awkward and uncomfortable around him and wanted to talk to him to “clear the air.” He declines.

Following the application and interview, Sarah discovers she is not invited to join the prestigious lab.

Two weeks later, Sarah files a complaint of sexual assault against Professor Chem.

Facts Not in Dispute

- Sarah is a senior
- Professor Chem is a member of the faculty, and it is hard to get a position in his lab
- Sarah was the one who approached Professor Chem and invited him for coffee
- She told him she wanted to discuss applying to work in his lab
- They went to the Peet's coffee shop around the corner
- Sarah again asked Professor Chem to coffee a week later
- They went to the same Peet's for coffee
- They both had shots at the bar next door

Facts Not in Dispute, cont.

- David asked to lie down once he was in Sarah's apartment, and fell asleep
- Both were naked when they woke up
- Sarah invited David out for drinks the week after the incident when they both woke up naked
- David declined her invitation to go out again
- Sarah did not get admitted as a graduate student into David Chem's lab

Facts In Dispute

- Who suggested getting a bite to eat
- Who suggested having shots to drink
- Sarah says they had whisky — David says she ordered shots of tequila
- David says she is the one who first leaned against him in the bar, which she denies
- Sarah says David is the one who initiated touching by putting his hands on her thighs, which he denies
- Who initiated the kissing at the bar
- Neither one remembers who suggested that they go up to Sarah's apartment after being in the bar
- Neither one remembers removing any clothing
- David denies that they had sex

Evidence Reviewed

- Interview of bartender, who remembers nothing
- Sarah's application to work in the lab
- Past disciplinary history of David Chem: Two years ago there was a complaint that he had inappropriately tried to help a friend's daughter get admitted to the school, but there was no finding of wrong-doing
- There was another past complaint that he had made sexually suggestive comments to someone working in his lab, but there had been no follow-up to that complaint, and no documentation available to review
- Bar tab was requested — no one has it; according to restaurant, tab was paid in cash

Applying Evidence to Report Elements

Procedural background

Applicable policies and procedures

Allegations

Charges

Witness statements

Evidence

Response

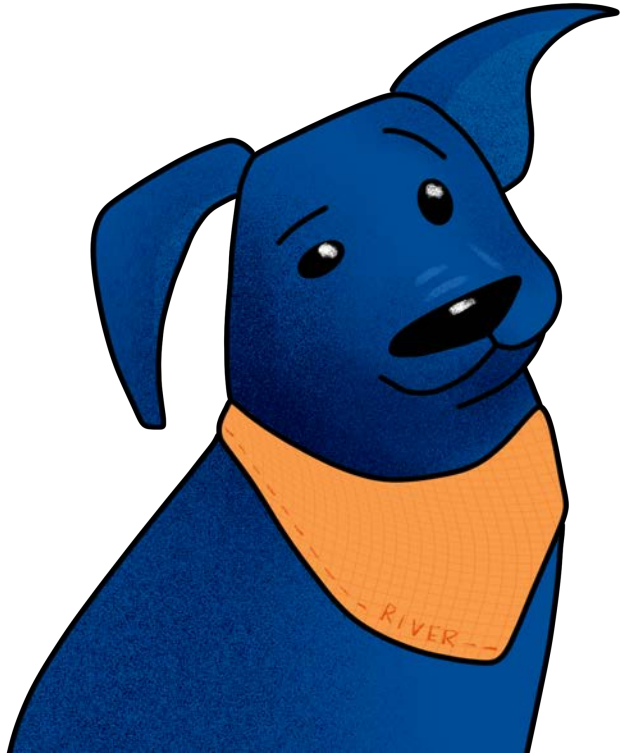
Credibility

Analysis and rationale

Evidentiary standard

Conclusion

Questions?



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