

CONSENT, CREDIBILITY, AND CONFIDENTIALITY: TACKLING CHALLENGING ISSUES IN TITLE IX INVESTIGATIONS

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Scott A. Roberts

Hirsch Roberts Weinstein LLP
Boston, Massachusetts

Pamela Heatlie

University of Michigan
Ann Arbor, Minnesota

Monica S. Bloom

Purdue University
West Lafayette, Indiana

Sarah Rankin

Massachusetts Institute of Technology
Cambridge, Massachusetts

Issues of sexual assault on college campuses have dominated the higher education compliance landscape for the better part of the last three years, since the Department of Education's Office for Civil Rights ("OCR") issued its April 4, 2011 "Dear Colleague Letter" regarding student-on-student sexual harassment and sexual violence ("DCL"). The DCL emphasized the obligation of institutions under Title IX of the Education Amendments of 1972 ("Title IX") to investigate instances of sexual violence on their campuses.

The DCL thrust many schools into an unfamiliar role – that of investigator – and identified a number of requirements for institutional investigations. The investigations had to be conducted by persons with "training or experience" in handling complaints of sexual harassment or sexual violence. The investigations had to be "prompt," "thorough," and "adequate, reliable, and impartial." The investigations had to afford the parties an equal opportunity to present "relevant" witnesses and evidence. The investigations had to apply a "preponderance of the evidence" standard. And, in one particularly head-spinning passage in the DCL, institutions were told that if a complaining student asked a school *not* to pursue an investigation, schools should nonetheless "take all reasonable steps to investigate" that were "consistent with" the "request not to pursue an investigation."

For most institutions, the DCL raised more questions than it answered. What "training" will enable employees to conduct a sexual assault investigation, and how do we determine what "relevant" evidence is? What is an "adequate" investigation, and is it different from a "thorough" investigation? What is the "preponderance of the evidence," and how is that standard applied? And how does a school *conduct an investigation* while at the same time honoring a request from a student *not to conduct an investigation*?

Following the DCL, institutions pursued the elusive "best practice" for conducting investigations, only to realize that there was no "one size" that fit all. But through educational seminars (including many presented by NACUA), consultation with inside and outside counsel, and the sharing of thoughts and ideas, colleges and universities began to develop investigative and decision-making processes that worked for their particular institutions, based on their size, structure, resources, and culture. But difficult issues remained. To further clarify the DCL and assist institutions in meeting their obligations to prevent and remedy the effects of sexual violence, OCR recently issued *Questions and Answers on Title IX and Sexual Violence* ("OCR

Q&A”), which addressed, among other things, investigative procedures, evidentiary issues, and handling requests for confidentiality.¹

While investigative processes vary from campus to campus, this article outlines information and processes that are relevant to any institution, from the smallest private college to the largest public university, and that can assist them in conducting an investigation that is fair, thorough, and responsive. Specifically, this article addresses:

- The unique dynamics of sexual assault, and the impact it may have on responses and reporting
- The prevalence of alcohol consumption in incidents of sexual assault, and how an investigator can assess when intoxication becomes incapacitation
- Tips for conducting thorough but respectful questioning of witnesses and evaluating credibility
- The need to recognize and avoid potential bias in conducting investigations
- The issue of consent, and how to evaluate whether it was given
- The preponderance of the evidence standard, and how to apply it
- How to handle an investigation when faced with a complainant who requests confidentiality or who does not want an investigation to occur

We have also provided sample documents to assist in all steps of the investigation, from the initial complaint to the final report, which are included in the appendix.

I. Understanding the Dynamics of Sexual Assault on College Campuses

In January 2014, the White House commissioned the Task Force to Protect Students from Sexual Assault. The White House Task Force’s first report, “Not Alone,” was issued on April 29, 2014 and included a lengthy discussion about ways the federal government intends to help colleges and universities address “the particular problem” of campus sexual assaults. *See* White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action*, January 2014; and *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, April 2014.²

It is important for campus professionals who are grappling with these challenging matters to understand the unique dynamics, distinct emotional trauma, and realities of sexual assault. A suggested starting point is “I Never Called it Rape,” a report of a groundbreaking (at the time) study conducted jointly by Ms. Magazine and Mary P. Koss, Ph.D., a professor of psychology. *See* ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE* (2d ed. 1994). Ms. Magazine and Dr. Koss administered surveys to 6,159 undergraduate students (3,187 women and 2,972 men) across 32 college campuses. The book provides first-person case histories interwoven with data gleaned from the survey in a highly-accessible and engaging format. Though the surveys were administered in 1984 and 1985, the dynamics described throughout the book and in the survey

¹ The OCR Q&A, issued on April 29, 2014, can be found at www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

² *See* http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf.

results continue to have relevance for understanding campus sexual assault in 2014, and the book remains a compelling read.

A. Basic Statistics on Sexual Assault

Some of the most commonly used data to evaluate the prevalence and gain a better understanding of sexual assault on college campuses comes from a 2000 National Institute of Justice Study, *The Sexual Victimization of College Women*.³ The study surveyed 4,446 women who were randomly selected and who were attending a two- or four-year college during fall 1996. This study revealed that between 20-25 percent of college women are survivors of a completed or attempted rape during the course of their college careers. See Bonnie S. Fisher, et al., *The Sexual Victimization of College Women* 10 (December 2000) (“Fisher Study”), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. In addition to revealing the high incidence of sexual assault among college women, the study also shed light on some other aspects of sexual assault. The study indicated that:

- Most reported incidents took place after 6:00 p.m.
- Nearly 52% of completed rapes occurred after midnight
- The vast majority of these incidents took place in living quarters, dispelling the typical notion that “rape” means an attack by a stranger in a dark alley or deserted parking lot.

See id. at 18-19.

Additional research reveals that individuals most at risk for sexual assault are freshman and sophomore women in their first six weeks of school. See National Institute of Justice, *Factors the Increase Sexual Assault Risk* (<http://www.nij.gov/topics/crime/rape-sexual-violence/campus/Pages/increased-risk.aspx>). A recent United Educators study of claims data over a five-year period revealed that 63 percent of survivors were freshman. Alyssa Keehan, *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS RISK RESEARCH BULLETIN 3 (2014).

Finally, while most (90%) those who survive a sexual assault are female, it should be made clear that men are also at risk for sexual assault. In their lifetimes, 1 in 71 men (almost 1.6 million) have been raped. Black, M.C., et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* 18 (2011).

B. Acquaintance Assault and “Defining” Rape

While many continue to think of rape as a random crime of violence perpetrated by an unknown assailant, in fact, 90% of college women know the person who sexually assaulted them. This includes intimate partners, friends, co-workers, or other acquaintances. See Fisher Study at 17.

³ The authors of this article understand that the terms “victim,” “survivor,” and “complainant” may carry with them different judgments and preconceptions, and the same is true for “accused,” “perpetrator,” and “respondents.” Investigators and adjudicators should be aware of this dynamic. In this article, the authors have generally used the terms “complainant” and “respondent” to refer to the parties involved in an allegation of sexual misconduct, except when quoting from studies.

In part because most assaults are committed by someone who was formerly trusted, many victims/survivors do not label their experience as being a sexual assault or rape. In the 2000 NIJ study, 48.8% of the study participants who experienced an incident categorized by researchers as a rape did not consider the incident to be rape, and a further 4.7% answered “don’t know.” See Fisher Study at 15. Thus, more than half of all incidents understood by the researchers to be sexual assaults were not considered to be rape or sexual assault by those who experienced such incidents.

C. Reporting Rates, Barriers, and Delays

While 20-25% of college women have experienced sexual assault, less than five percent of completed or attempted rapes of college students are reported to either campus authorities or law enforcement. See Fisher Study at 23. There are a number of reasons individuals delay or fail to report sexual assaults, including that they:

- Do not see the incidents as serious enough to report
- Are not clear that a crime was committed
- Do not want family to know⁴
- Fear acts of retaliation
- Fear of police treatment
- Lack of proof about the incident.

See id. Because of these concerns, those who do report a sexual assault often do so after a delay that may be fairly lengthy. As a result, institutions may then find themselves in the position of conducting investigations into events that happened during a previous semester, or even a previous year, which increases the challenges of the investigatory process.

Investigators should be aware that complainants may have a range of responses. This awareness does not mean, as some have argued, that investigators must “believe everything” a complainant says. Rather, it means that investigators can and should understand that a complainant’s delay in reporting, or change of mind about reporting, does not necessarily undermine a complainant’s credibility.

D. Alcohol and Sexual Assault

Alcohol consumption is often a factor in sexual assault. Each year, approximately 97,000 students between the ages of 18 and 24 are survivors of alcohol-related sexual assault. See Hingson, R.W., *Magnitude of and Trends in Alcohol-Related Mortality and Morbidity among U.S. College Students Ages 18-24, 1998-2005*, JOURNAL OF STUDIES ON ALCOHOL AND DRUGS SUPPLEMENT 16:12-20 (2009). On average, half of college sexual assaults involve alcohol

⁴ Consider that many students are on their parents’ health insurance, and they often fear that seeking medical attention will cause their parents to learn of an assault when services are billed to the family. Many states have laws that require sexual assault services to be provided to individuals free of charge, thereby eliminating this perceived barrier to reporting.

consumption by the complainant, respondent, or both. See Antonia Abbey, et al., *Alcohol and Sexual Assault* (available at <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm>).

Alcohol, which for most college students is readily available, is also sometimes used as a tool to facilitate a sexual assault in the same way that more commonly thought of “date-rape” drugs can be used. See Jessica Bliss, *Police, Experts: Alcohol Most Common in Sexual Assaults*, USA TODAY (October 2013) (available at www.usatoday.com/story/news/nation/2013/10/28/alcohol-most-common-drug-in-sexual-assaults/3285139/); see also Teresa P. Scalzo, “Prosecuting Alcohol-Facilitated Sexual Assault,” National District Attorneys Association, 3 (August 2007) (citing Antonia Abbey et al., *The Relationship Between the Quantity of Alcohol Consumed and the Severity of Sexual Assaults Committed by College Men*, 18(7) J. OF INTERPERSONAL VIOLENCE 813 (July 2003) (“A small amount of alcohol eases tension, a large amount removes inhibitions, and a still larger amount prevents the potential victim from resisting the aggressor.”)).

United Educators claims data revealed that in 92 percent of the claims with losses, the complainant was under the influence of alcohol, and more than 60 percent of these individuals had no clear memory of the assault as a result of intoxication. See Keehan at 3. Thus, what makes someone a perfect target in the context of alcohol-facilitated sexual assaults may make that person a poor witness in any ensuing investigation due to his or her inability to remember part or all of an incident.

E. “Hook-Up Culture” and Sexual Assault

Sexual encounters are increasingly normalized among young adults, especially on college campuses, and popular media portrays sexuality among young adults as being dominated by a “hook-up culture,” which has been defined as casual sexual contact, ranging anywhere from kissing to intercourse, in a non-relationship context (and without any promise of one). See, e.g., Armstrong, E. A., & Hamilton, L., *Gendered sexuality in young adulthood: Double binds and flawed options*, *Gender & Society*, 23, 589–616 (2009); Bogle, K. A., *Hooking up: Sex, dating, and relationships on campus*, New York: New York University Press (2008). Hook-up culture has been found to be correlated with sexual assault and may be a factor in a large percentage of college sexual misconduct cases. Using representative student samples from two colleges, one researcher found that 78% of coerced vaginal, anal, and oral sex occurred during a reported hook-up encounter. Flack, W. F., Jr., Daubman, K. A., Caron, M. L., Asadorian, J. A., D’Aureli, N. R., Gigliotti, S. N., et al., *Risk factors and consequences of unwanted sex among university students*, *Journal of Interpersonal Violence*, 22, 139–157 (2007).

Even within an environment of increased sexual permissiveness, a double standard appears to exist. While women and men may experience similar *emotional* outcomes with hooking-up, research shows there are gender differences in *reputational* outcomes. Men continue to gain social status by having a large number of non-committal sexual partners, while women who do so are labeled “sluts.” Armstrong et al. 2009; Bogle 2008. Given this gender-based bias, some students involved in a hook-up related assault may be reluctant to bring a report, or may present as feeling shamed or defensive if they do report. Investigators need to recognize that they may

have their own subconscious bias about hook-up behaviors, and they need to guard against having that bias emerge and skew the course of an investigation.

II. Tips for Conducting Thorough and Respectful Questioning of Witnesses

A. Explore Facts, Don't Prosecute

The allegations in sexual misconduct cases are usually highly charged, with emotions running high on both sides. For that reason, it is especially important for the institution to set the tone for the investigation, and to ensure that all parties are treated with fairness, sensitivity, and compassion. The investigation should not be conducted in a prosecutorial manner, but rather as an impartial and reliable process that is intended, as best as possible, to determine what actually occurred.

Equally importantly, the investigation should be conducted by someone who is comfortable asking questions about sexual matters, and who does not reflect or feel negative judgments or disdain for either party. Remember: the investigator does not have to be a lawyer. While lawyers may (and should) be well-versed in law, some are not capable of adopting the conversational persona needed to conduct effective questioning, but instead reveal a strong (and sometimes nasty) prosecutorial bent. An effective investigator, whether a lawyer or non-lawyer, is someone who is respectful, personable, neutral, and calm under fire. The investigator should be able to put any witness at ease, establish a rapport, and elicit information thoroughly, efficiently, and comfortably.

B. Prepare, Don't Just "Wing it"

The questioning of witnesses, including the complainant and respondent, should not occur until *after* the investigator has thoroughly prepared. Without advance preparation, the interviews will be nothing more than a lost opportunity. Before the interview, the investigator should:

- Review the particular portions of the code of conduct or policies that are alleged to have been violated, and understand the elements of any violation
- Review relevant documents (e.g., any statements from the parties, law enforcement documents, relevant student files, text messages)
- Determine whether there were witnesses to the incident
- Determine whether prior similar incidents have occurred or been alleged
- Identify the subjects about which the complainant and respondent are believed to agree and disagree
- Prepare an investigative plan, determining who will be interviewed and in what order
- Determine sources of additional evidence and how to get it
- Determine what questions will be asked of each witness

Not only does this prior preparation allow an investigator to sharpen questions before meeting with a witness, it helps avoid the situation where a witness is unnecessarily called upon to provide multiple statements about a traumatic event.⁵

C. Ask Good Questions, and Be Persistent

An effective investigator must be able to ask good questions, not just about the incident in question, but about related events that occurred both before and after the incident. The investigator should:

- Provide the witness sufficient context for the questions
- Explain, in general fashion, why the information is being gathered
- Explain the degree of confidentiality that applies to the information gathered, and how it will be used
- Emphasize the importance of honesty
- Explain the institution's anti-retaliation policy
- Begin by asking neutral, non-judgmental, and open-ended questions relating to the incident
- Ask questions about the same subject in slightly different manners to determine whether the party provides a similar response, provides different or conflicting information, or provides what appears to be a rehearsed or "canned" response (a useful tactic for evaluating credibility)
- Raise questions about inconsistencies in a curious but non-confrontational manner (think of the indirect, off-hand style of questioning made famous by Peter Falk as Lieutenant Columbo)
- Save tough questions (e.g., those that bring to light inconsistencies) for later in the interview so the witness does not get defensive
- Refrain from asking questions about complainant's "character" or "reputation," or about sexual encounters with anyone other than the respondent⁶
- Consider exploring the nature of any current or prior sexual relationship between the complainant and respondent (while mindful that consent to prior activity does not itself imply consent to other sexual activity)⁷

Most importantly, an investigator should be persistent and should not stop asking questions until all relevant information has been elicited. If an investigator feels that a witness has been evasive, or that the witness's testimony is unclear or incomplete, the questioning should continue, even if

⁵ See OCR Q&A, p. 25 (recommending that a school take steps to coordinate its investigation "so that complainants are not unnecessarily required to give multiple statements about a traumatic event")

⁶ By refraining from asking about sexual encounters with others, the investigator may help minimize potential, unfavorable bias relating to a willingness to "hook-up". See Section I(E) above. In addition, OCR has indicated that a complainant's prior sexual history with others is irrelevant and should not be the subject of questioning. See OCR Q&A, p. 31.

⁷ See OCR Q&A, p. 31 (acknowledging that prior sexual contact between the parties may be considered while reminding schools that the "mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence").

the subject is delicate or sensitive. An investigator should also consider circling back to the parties and witnesses for follow-up interviews as necessary. These follow-up conversations are often necessary in a thorough investigation to allow a party or witness to address conflicting information provided by others during the investigation.

D. Record and Evaluate the Information Obtained

As soon as possible after each interview, the investigator should prepare a memorandum reflecting the information that was obtained. The memorandum should, at a minimum:

- State when the witness was interviewed
- Record the witness's version of events, with as much factual detail as possible
- Use direct quotes with respect to important or evocative observations (e.g., Don't say: "The witness reported that the complainant walked into the room and collapsed." Do say: "The witness reported that the complainant walked into the room and 'collapsed like a marionette whose strings had been cut.'")
- Record behavior that may reflect on a witness's credibility (e.g., differing responses to similar questions)

Once this information is recorded for all witnesses, the investigator can assess credibility and make informed judgments about what occurred or did not occur.

III. Consent: What is It, and How Do We Evaluate Whether It Was Given?

One of the more challenging (and ever-present) issues to evaluate in sexual assault investigations is the question of consent. As discussed above, most sexual assaults on college campuses involve alcohol consumption by one or both parties. Frequently, parties to an incident will have limited or no memory of the events in question, and the investigator will be required to obtain and evaluate information provided by other witnesses or other corroborating evidence. Very often, however, the third party witnesses were also impaired to varying degrees (or may have no idea how impaired they were), which adds additional challenges to the investigative process.

A. Developing Policies and Guidance on Consent

Institutions take varying approaches to the concept of consent. At one extreme, some schools require students to get verbal authorization for every step in the "hook-up" process.⁸ At the other end of the spectrum are schools that do not define consent at all in their policies.

⁸ For example, one school famously established a policy that had a seven-part consent requirement, part three of which stated, "Obtaining consent is an on-going process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking 'Do you want to have sex with me?' is not enough. The request for consent must be specific to each act." Antioch College Sexual Offense Prevention Policy, available at <http://www.mit.edu/activities/safe/data/other/antioch-code>.

Experience in investigating and adjudicating sexual assault matters reveals that many students lack a solid understanding of healthy sexual relationships and the importance of having sober, open, and direct conversations with a sexual partner about sexual activity. Thus, institutions are well-advised to have clear definitions of consent in their policies. A clear definition of consent – both what consent is and what consent is not (or, what is effective consent and what is ineffective consent) – will assist students in understanding the institution’s expectations and will also give investigators a guidepost against which to evaluate the specific facts in a sexual assault claim.

In addition to having clear definitions of consent, many schools provide additional guidance with respect to the interpretation of consent. For example, Holy Cross College, which has a formal definition of “consent” in its sexual misconduct policy, also has a webpage devoted to “understanding sexual assault,” in which the terms “sexual misconduct,” “consent,” and “sexual assault,” are explained in accessible, easy-to-understand ways. The description of consent in Holy Cross’s policy includes the following:

It is the responsibility of both intimate partners to clearly give consent for each sexual act, and for each time the sexual encounter occurs. Talking with one another while engaged in sex need not seem like a “cold shower.” It’s intimate. And having “hooked-up” previously and had a satisfying sexual experience does not automatically mean a follow-up sexual encounter is acceptable.

See <http://offices.holycross.edu/safer/understanding/consent>.⁹

Many other institutions have interesting and imaginative approaches to explaining consent, including:

- Denver University, “Consent is Sexy”: <http://www.du.edu/health-and-counseling-center/cape/consent-is-sexy.html>
- University of Georgia Health Center, “Consent is Sexy”: <http://www.uhs.uga.edu/consent/>
- University of Michigan, “Consent & Coercion”: <http://m.sapac.umich.edu/article/49>
- Vassar College, “Consent”: <http://savp.vassar.edu/information/consent.html>

B. Evaluating Consent

Almost all sexual assault investigations will involve an evaluation of the issue of consent. In most cases, the parties agree that sexual activity occurred, but disagree, and vehemently so, whether the conduct was consensual. The issue of consent is one of the most difficult and complex issues an investigator must tackle – especially when one or both parties were under the influence of alcohol or other drugs at the time of an alleged assault.

There are a number of elements that a well-run investigation will take into consideration in evaluating consent.

⁹ The full policy definition of consent is available in the College’s Sexual Misconduct Policy, available at http://offices.holycross.edu/sites/all/modules/tinytinymce/tinymce/jscripts/tiny_mce/plugins/filemanager/files/scs/sexual_midconduct_policy.pdf.

1. Avoiding Misconceptions about Responses to Assault

Too often, untrained investigators or hearing board officers have preconceptions, and misconceptions, about how they believe a person who has been sexually assaulted *should* behave. Why, they ask, did s/he wait to report the assault? Why did s/he first say that s/he didn't want us to take any action, but now says s/he does? Why does s/he describe events in a piecemeal fashion, rather than in a neat chronology? Why does s/he come forward and state that s/he now remembers more about an event that s/he didn't tell us in her first interview?

Understanding responses to sexual assault is critical for investigators whose expectations of "normal" responses to a traumatic event may not be evident in an individual complainant. For example, a delay in reporting, which is common in sexual assaults, may be "misconstrued and interpreted as the victim is not being truthful and is lying about the attack." Patricia L. Fanflik, "Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?" (National District Attorneys Association, 2007), p. 9. Additionally, those who have experienced sexual assault develop varying coping strategies that not only differ by individual but may also differ within the same individual by day. "[V]ictim reactions are often scrutinized because of the variability of behaviors. For example, a victim might appear very attentive and cognizant at one point in time and then appear apprehensive or preoccupied at another, leading some observers to question the credibility of the victim." Fanflik, p. 14. Thus, all investigators need to understand that reactions of those who experience sexual assault may appear counter-intuitive but in fact are quite common. In this way, an investigator may be able to ensure that a typical reaction to trauma is not misinterpreted as reflecting a lack of credibility about a key issue like consent.

2. Evaluating Intoxication vs. Incapacitation and Avoiding Bias Related to Alcohol Consumption

Investigators need to be cognizant of what the standard for consent is at their particular institution. Unlike police officers who pull over an individual suspected of drunken driving, investigators do not have the ability to administer a Breathalyzer test to a complainant at the time of the assault to determine whether the individual meets some numerical standard for being incapacitated. In other words, there is no "legal limit" for when an individual has the ability to consent to sexual activity.

Adding more challenge to this equation is that each person is unique with respect to the impact of alcohol or drug consumption. The impact of four drinks on a 120-pound female will likely be vastly different than the impact of those same four drinks on a 220-pound male. Thus, a competent investigation cannot stop with the question, "How much did you have to drink?" A skilled investigator must also try gauge the *impact* of alcohol consumption by asking questions such as:

- What type of alcohol did you consume?
- Over what period of time did you consume the alcohol?
- How quickly was the alcohol consumed?
- Did you consume any food? How much? When?

- Were you taking any medication that has any restrictions regarding consumption with alcohol?
- Can you describe the impact that the consumption of alcohol had on you?

Still another challenge rests with the perceptions and cultural notions about alcohol, consent, and sexual assault. When presented with a report of sexual assault that involves alcohol, many tend to make the initial presumption that the complainant was intoxicated and later regretted the encounter, rather than thinking that the event was an assault. *See Scalzo at p. 8* (“Instead of assuming that it was probably rape because the [complainant] was too drunk to consent, people tend to assume that the [complainant] consented because [s/he] was intoxicated and simply regretted the sexual encounter later.”). A skilled investigator must be cognizant of the possibility of this type of bias in conducting the investigation and be able to anticipate the potential for such assumptions in witnesses, hearing board members, and appeals officers.

In evaluating whether an individual was incapacitated by the use of alcohol, an investigator should consider a number of possible factors that might help distinguish sexual assault from a consensual (albeit intoxicated) sexual encounter:

- Was the complainant conscious or unconscious? Did s/he regain consciousness during the incident? If so, what did the respondent do?
- Did the complainant black out at any point?
- Did the complainant vomit at any point?
- What was the complainant’s condition when last seen by reliable third-party witnesses?
- Did the complainant seem to understand where s/he was and where s/he might be going?
- Could the complainant walk, or did someone have to assist or carry the complainant?
- Could the complainant speak or communicate clearly? Was s/he slurring?
- What physical tasks did the complainant perform, and how well did s/he perform them? (For example, was the complainant using a Smartphone, and did his or her coordination seem impaired? If the complainant was smoking, could s/he light his or her own cigarette?)
- Could the complainant make and maintain eye contact with others?
- Was the complainant able to remove his or her own clothes?
- Is there anything to suggest that a complainant may have been less inclined to participate in consensual intercourse at the time of the incident? (e.g., was the complainant undergoing treatment for a yeast infection or other uncomfortable condition?)

Adapted from Scalzo, at p. 9. Though these considerations and questions are extensive and may seem invasive, it is important for a thorough investigation evaluating consent and incapacitation to explore objective indicators to be able to reach and support the ultimate conclusion about consent.

3. Corroborating Evidence

In many sexual assaults, only two people – the complainant and respondent – were present for the incident at issue, and it may be difficult for an investigator to reach a conclusion on the issue of consent based solely on the accounts of the parties. For that reason, a conscientious sexual

assault investigator must take care to pursue and evaluate other evidence that may corroborate or serve to refute the accounts of the parties, which may help an investigator make an informed judgment call on the question of consent.

Witness Accounts: Witness accounts may help an investigator assess the cognitive state of both parties just prior to an alleged assault. For example, friends of a complainant might be able to shed light on how the complainant was functioning when last seen. Also valuable is the perspective of friends who have “partied” with a complainant or respondent previously. These witnesses can often describe how intoxicated the individual seemed and whether the behavior was atypical or concerning. These pieces of information may be highly valuable for an investigator who is tasked with understanding issues of incapacitation and consent in a sexual assault investigation.

Smartphones and Social Media postings: Technology offers many more opportunities for an investigator to uncover contemporaneous information, and even documentation, regarding an assault.

Text and voicemail messages exchanged between the parties before, during and after an event are often highly relevant and assist in explaining the parties’ perspectives. While it may have been unusual even five years ago for a student to be able to provide photographic or video evidence in an investigation, that is no longer true. Today, every student has a cell phone, every cell phone has a camera, and every student posts or shares pictures and video, often accompanied by explanatory (and sometimes damning) text. As a result, social media – including apps like Twitter, Facebook, Vine, Instagram, SnapChat, etc. – may provide a treasure trove of information for an investigator. Investigators should be aware of and explore with parties and witnesses whether there are videos, photographs, or other information, whether on phones or online, that may be relevant.

Student ID Card Swipes: To gain access to residence halls and other campus buildings, students often have to swipe a student ID card that contains personally identifiable information. That swipe is often recorded by your IT department and can show who entered a building and when, which may help resolve debates about the timeline of relevant events.

Surveillance videos: Surveillance videos, both on campus and off-campus, can provide excellent objective information, including about the intoxication level of a party. For example, a video might show a party who appears to be stumbling, falling down, and highly intoxicated, or it might show a party who appears to be moving steadily, capably and willingly with another party. In this regard, a picture may tell a thousand words.

It is highly unlikely that a single piece of evidence, standing alone, will be dispositive, and it is important for investigators not to overlook the existence of objective evidence that might be used to assess whether a complainant had the ability to consent and did in fact consent.

IV. Providing “Jury Instructions” to Help Investigators and Administrators Understand and Apply the Preponderance of the Evidence Standard and Reaching a “Verdict”

In the DCL, OCR made clear that the appropriate standard for evaluating allegations of sexual misconduct was the civil standard of “preponderance of the evidence,” and not higher standards of “clear and convincing evidence” or “beyond a reasonable doubt.”

A. “Jury Instructions”

Like first-time civil jurors, newly-minted investigators and hearing panel members often question how to apply the “preponderance of the evidence” standard. To assist them in weighing and considering evidence under that standard, it is useful to provide instructions, either during training sessions or before a hearing, that mirror those a judge would provide to a jury. Something like this:

1. Keep an Open Mind Until All Evidence Has Been Heard.

In our day-to-day dealings, when most of us listen to information, we may come to conclusions quickly. Here, you must do something different than you may usually do. You must keep an open mind until the end of your review of this matter. Don’t come to any judgment, opinion, conclusion or belief about any aspect of this matter until you’ve reviewed or heard all of the evidence.

2. Render a Soundly Reasoned Decision.

Your job is to render a soundly reasoned decision on every charge that has been filed against the respondent. Your function is to determine the facts of this case, as best as you are able, because you are the sole and exclusive evaluators of the facts. You must determine what evidence to believe, how important the evidence is, and what conclusions to draw from that evidence.

3. Consider All The Evidence, and Only the Evidence.

You should decide the charges brought in this matter solely by considering the evidence obtained in this matter. You are to consider only the evidence and nothing but the evidence.

4. Be Reasonable and Impartial.

You are to be impartial when considering the evidence and weighing the credibility of witnesses. You must consider and determine this case as a matter between persons of equal standing in the campus community. You should not be swayed by prejudice or sympathy, by personal likes or dislikes, or by any personal view that you may have of the claim or any party.

5. Decide How Much Weight to Give the Evidence.

The evidence in this matter will include both testimony from witnesses and documents. Both are important types of evidence, and you are to decide how much importance to give any person's testimony or any documents.

The quality of the evidence is not determined by the volume of evidence or the number of witnesses or exhibits. It is the *weight* of the evidence – its *strength* in tending to prove the issue at stake – that is important. You might find that a single person, or a small number of witnesses who testified to a particular fact, are more believable than a larger number of witnesses who testified to the opposite, or you may find to the contrary. It is up to you to evaluate the evidence as a whole based on your own judgment.

6. Evaluate the Credibility of Witnesses.

You are the sole judges of the credibility of the witnesses. You should give the testimony of each witness whatever degree of belief and importance you reasonably believe it is entitled to receive. If there are conflicts in testimony, it is your function to resolve those conflicts and determine where the truth more likely than not lies. You may believe everything a witness says, or only part of it, or none of it.

In deciding whether to believe a witness and how much importance to give a witness's testimony, you must look at all the evidence in context, drawing on your own common sense and experience. Often it may not be *what* a witness says, but *how* the witness says it that might help you in determining whether to accept the witness's version of events as believable. You may consider a witness's demeanor, frankness or lack of frankness, and whether the testimony is reasonable or unreasonable, or probable or improbable.

You may take into account how good an opportunity the witness had to observe the facts about which the witness testifies, and whether the witness's memory seems accurate.¹⁰ You may also consider whether there is any motive the witness may have for testifying, whether the witness displays any bias in testifying, and whether or not the witness has any interest in the outcome of this case.

You may find that a witness says something that differs from what he or she has said on another occasion. In that event, you may consider whether a contradiction exists, and, if so, whether that contradiction is meaningful to your evaluation of the witness's credibility. In deciding whether a contradiction has any impact on your consideration of a witness's credibility, bear in mind that people sometimes forget things. Therefore, you should consider whether a contradiction is the result of an innocent lapse in memory or an intentional falsehood, and that may depend on whether the contradiction has to do with small fact or an important fact.

¹⁰ The investigator and/or hearing board should receive training regarding the effects of trauma on those who experience sexual assault and the potential impact on memory.

You are not required to believe a witness simply because that person's testimony is uncontested by other evidence, nor are you required to disbelieve a witness's testimony because it has been contested in some or even all respects.

7. Draw Reasonable Inferences.

You are entitled to draw inferences from the evidence. Inferences are sometimes called circumstantial evidence. That is evidence that you infer from the direct evidence that you heard or saw during the course of the hearing.

Drawing inferences is something we do every day. We make small steps in reasoning in which we take some known information, apply life experience to it, and draw a conclusion. For example, if you've been sitting inside since 9:00 this morning and have not had an opportunity to go outside or even to look out a window, and you see someone coming in the door with a raincoat and a dripping umbrella, you are entitled to infer that it had started to rain outside and that the person has just come in out of the rain, even though you did not see that it was raining. In evaluating the evidence in this case, you may draw inferences as is warranted and reasonable.

8. Apply the Preponderance of the Evidence.

You must use the "preponderance of the evidence" standard of proof when evaluating if a student is responsible for any charges filed against him or her.

You have heard of "beyond a reasonable doubt." That is the standard of proof that is applicable to criminal cases. It is not the appropriate standard to use in a student conduct case. In student conduct cases, the institution uses a "preponderance of the evidence" standard. This means you must decide whether it *more likely true than not true* that the respondent engaged in the misconduct alleged.

A preponderance of the evidence has been defined by courts as such evidence, when considered and compared to any opposing evidence, that has the more convincing force and produces in your mind a belief that the conduct with which the respondent has been charged is more likely true than not true.

In determining whether any fact at issue has been proved by a preponderance of the evidence, you must consider all the evidence as a whole, regardless of who might have presented it. You may not conclude that a respondent is "responsible" for any charge simply because a complaint has been brought against him or her. Rather, in making this decision, you must consider the testimony of all of the witnesses and all of the exhibits received in evidence, and you must decide whether the evidence presented to you is sufficient to establish that it is more likely than not true that the respondent engaged in the conduct with which he or she has been charged. Look at all of the evidence in total, make your judgments about weight and credibility, and then decide whether the evidence persuades you that the conduct with which the respondent has been charged more likely than not occurred.

If, after consideration of all the evidence and the reasonable inferences you have drawn from the evidence, you are persuaded that is more likely true than not true that the respondent engaged in the conduct with which he or she has been charged (that is, you are more than 50% certain that the conduct occurred), then the burden of proof has been met, and you must find the respondent “responsible” for the charge. However, if, after consideration of all the evidence and inferences, you cannot decide that it more than 50% likely that the alleged conduct occurred, or if you find that the evidence presented on the issue in question balances equally, you must find the respondent “not responsible” for the charge.

9. Don’t Consider the Potential Impact of Your Decision When Determining if Charges Have Been Proven.

It is natural for you to think about what impact your decision may have on the complainant, the respondent, or others in the campus community, and that is true whether the respondent is found “responsible” or “not responsible.” However, you are expected to put such considerations out of your mind when considering this matter. As difficult as it may be, you should focus only on the charge or charges that have been brought in the case, and whether the evidence presented to you was sufficient to persuade you that the respondent is responsible for such charge or charges.

B. Investigator’s Rationale or Hearing Board’s “Verdict”

Whether the decision concerning responsibility is made by an investigator or a hearing board, the institution should be sure that the decision, whatever it may be, is documented and that all of the requisite elements of the offense charged have been addressed.

If the decision is set forth in an investigative report, the report should, at a minimum, describe the charge against the respondent (citing the specific provision of the code of conduct at issue), describe all evidence obtained and reviewed by the investigator, describe all facts to which the complainant and respondent agree, identify the facts about which they disagree, and, to the extent possible, provide the investigator’s conclusions about the contested facts.

If the decision on responsibility is made by a hearing board, the institution may want the board to render its decision on a form akin to the type used by a jury in a civil case. In civil cases, the necessary elements of the charge are listed on a verdict form, and the jury is asked to answer whether each element has been established by preponderance of the evidence. For example:

Did the complainant and respondent engage in sexual activity? ___ Yes ___ No
(If “no,” respondent is not responsible and proceed no further. If “yes,” proceed to the next question.)

Was the complainant legally capable of giving consent to the activity? ___ Yes ___ No
(If “no,” respondent is responsible and proceed no further. If “yes,” proceed to the next question.)

Did the complainant give consent to sexual activity? ___ Yes ___ No

(If “no,” respondent is responsible and proceed no further. If “yes,” respondent is not responsible.)¹¹

V. Conducting an Investigation When the Complainant Does not Wish to be Identified or Does Not Want an Investigation to Occur

This is, perhaps, the most difficult investigation-related decision institutions face. What to do when a complainant or a third party shares information about sexual harassment or sexual violence with a “responsible employee,” which imputes knowledge of the incident to the institution,¹² but the complainant does not want his or her name shared with the respondent, will not cooperate with the investigation, and/or is adamant that no investigation take place. If the institution has sufficient information regarding the underlying incident to determine that sexual harassment was alleged, responsive action is necessary; however, what action can occur will depend on the quality of the information the institution has and is able to develop. There are two important variables in this assessment: interaction with the complainant and analysis of information to determine whether an investigation is appropriate.

A. Can You Identify the Complainant?

Concerns about sexual harassment or violence are not always brought to the institution’s attention by the person who experienced the behavior. Information may come indirectly, such as from a witness to the incident or a friend of the complainant. Sometimes the reporting person will provide the identity of the complainant, sometimes they will not. On occasion, a third party with no involvement may raise concerns (e.g., “I was sitting in the dining hall at X residence hall and I overheard a young woman with red hair describe what sounded like a sexual assault by another student who lives on the same floor as her”). Perhaps the institution learns about a sexual harassment/violence matter involving members of its campus community in the local media or through social media. Each of these situations requires follow up by the institution.

When the complainant’s identity is not clear, the institution should take reasonable measures to try to identify him/her. Some institutions are under the mistaken belief that the institution has no obligation to act unless a complainant comes forward and requests an investigation. OCR has clearly stated its expectation that institutions will react to all information about possible sexual harassment/violence of which it knows or should have known.

In those instances in which the institution cannot identify the complainant despite diligent efforts, it still should consider whether and what action can be taken. For example, if the institution is told that a member of the marching band has been sexually assaulted, but the institution is not able to determine which member may have been affected, it may be appropriate for the institution to follow up with education sessions for the marching band, to ensure all

¹¹ The particular questions will depend upon the definition of the particular form of sexual misconduct in your institution’s code or under the laws of your state.

¹² A “responsible employee” is an individual who, if s/he becomes aware of behavior that could constitute sexual harassment, must share that information with the Title IX Coordinator or designee. Each institution is responsible for determining which of its employees are “responsible employees” and providing them with appropriate training. For a discussion of this topic, see “Responsible Employees and Reporting,” OCR Q&A, Section D, pp. 14-18.

members are aware of resources and support services, as well as the institution's policies and procedures for lodging complaints, the availability of interim measures, the prohibition on retaliation and the option to seek redress through the criminal justice system.

B. When the Complainant Has Been Identified.

In those instances in which the complainant is the individual who comes forward or the complainant has been identified through information provided by a third party, the next step (assuming a non-emergency situation) is for the institution to ensure the complainant is aware of available resources and support, options for reporting (both internal to the institution and through the criminal justice system), and the prohibition on retaliation. The institution should also determine if any interim measures are appropriate or necessary, and, if so, work to put them in place.¹³ This should occur at the time the complainant discloses information, or very soon thereafter. These steps must occur whether the complainant wants an investigation to ensue or not.

In some instances, although the complainant initiates contact, s/he subsequently wants no further interaction with the institution. One way of handling this situation is to mail or email the complainant the relevant information. It is important to remember that the complainant might benefit greatly from learning about resources and support and may change his or her mind at a later date and decide to participate in an investigation, so providing this information is important.¹⁴

C. The Complainant Does Not Want His or Her Identity Disclosed or Does Not Want An Investigation to Ensure.

The recent OCR Q&A states that OCR “strongly supports a student’s interest in confidentiality in cases involving sexual violence” and “[f]or Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.” See OCR Q&A, pages 18-19.

However, OCR also makes it clear that an institution is expected to undertake an analysis of available information about the incident and assess that information in the context of the

¹³ Although not the topic of this presentation, interim measures are an extremely important aspect of handling sexual harassment concerns well and creating a sense of trust towards the institution's handling of sexual harassment matters. Note that institutions should consider interim measures regardless of whether the complainant lodges a complaint, and that these protective measures may continue after the complaint is resolved. It is also important to continually monitor these measures for any necessary changes over time (e.g., reassessing schedules as semesters change to ensure the complainant and respondent are not in the same courses). Interim measures are discussed in the DCL and also throughout the Q&A. See “Interim Measures,” OCR Q&A Section G, pp. 32-34.

¹⁴ There are a variety of ways to accomplish this. The University of Michigan developed an “Informed Survivor Letter” for this purpose, a copy of which is included in the Appendix. If the complainant is willing to meet with a staff member, information should be provided verbally and interim measures should be discussed. It can also be helpful to give the individual a short written summary of the process, as well as the resources and support for later reference. The Appendix includes a copy of a “Complainant Information Sheet” that the University of Michigan uses for this purpose (a similar document is provided during initial meetings with respondents).

complainant's request. In essence, the institution must balance the student's individual request against its overall responsibility to provide a safe and non-discriminatory environment for the entire campus community (including the complainant). In the Q&A, OCR provides a list of factors that should be considered. Specifically, OCR advises considering:

- circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators);
- circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group);
- whether the sexual violence was perpetrated with a weapon;
- the age of the student subjected to the sexual violence; and
- whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

See OCR Q&A, page 21.

In the Q&A, OCR provides two examples using this analytical framework. In the first, the institution has credible information that the respondent has previously sexually assaulted other individuals. In this instance, OCR advises that the case should be investigated, which likely would require revealing the complainant's identity to the respondent. OCR further advises that the complainant should be informed that this will occur and additional interim measures should be put in place, as appropriate. In addition, if the complainant asks that the institution tell the respondent that the complainant did not wish for an investigation to occur, OCR advises that the school should honor that request.

The second example concerns a respondent about whom there is no credible information of prior sexual assaults, who is not alleged to have used a weapon during the incident at issue or threatened further sexual violence against the complainant or others, and where the incident does not appear to be part of a larger pattern of sexual harassment/violence occurring within the community. In this instance, OCR advises that "the balance of factors would likely compel the school to respect the student's request for confidentiality." *See* OCR Q&A, p. 22. Even so, as discussed below, the institution is still obligated to consider what additional action is possible.

Unfortunately, few cases will be as clear cut as these two examples provided by OCR. For this reason, an institution should have an established decision-making process for assessing these situations that utilizes knowledgeable and experienced staff.

D. The Decision-Maker and Decision-Making Process.

OCR does not recommend any particular process to be used in reaching decisions regarding a complainant who requests confidentiality or who requests that no investigation occur. But OCR does state that:

[T]he Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests.

See OCR Q&A, p. 20. In essence, the Title IX Coordinator is generally in the best position to reach determinations in these matters, because one of that individual's responsibilities is to assess sexual harassment/violence concerns raised across campus for patterns. For this reason, the institution should establish practices whereby all reports of sexual harassment/violence to "responsible employees" are funneled to the Title IX Coordinator to ensure proper institutional response. OCR also advises that the institution's sexual misconduct policy explicitly state "reporting policies and protocols, including provisions for confidential reporting" and identify "the employee or employees responsible for evaluating requests for confidentiality." See OCR Q&A, p. 13.

On April 29, 2014, the White House Task Force to Protect Students from Sexual Assault issued a *Checklist for Campus Sexual Misconduct Policies*. See www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf (the "White House Checklist"). The Task Force recommends that institutions describe their policies governing confidentiality. The specific recommendations are that the policy:

- Specify those employees to whom a student can disclose in confidence and those "responsible employees" who must report incidents (including personally identifying details) to the Title IX Coordinator. Consider particularly how a school will ensure that a student understands an employee's reporting obligation before he or she reveals any information to that employee.
- Describe what information will be kept confidential and what information may be disclosed, to whom it will be disclosed, and why.
- Explain when the school may not be able to honor a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigatory or disciplinary action be taken. Identify the employee responsible for evaluating such requests for confidentiality or no action.

See White House Checklist, p. 5.

Regardless of whom the institution selects to make these assessments, it should consider how it can assist that individual in making these often quite difficult decisions. At the University of Michigan, for example, the Title IX Coordinator has the responsibility for making determinations in these matters; however, the Title IX Coordinator is assisted through the advice and counsel of a review panel. This process is outlined in the University's Sexual Misconduct Policy, which provides as follows:

If the Complainant requests confidentiality or asks that the report of sexual misconduct not be pursued, the University will, generally before taking any further investigative steps, forward that information, along with all available information about the report, to a review panel. The review panel will consist of the Title IX Coordinator and staff members. These panel members will represent the interests of the University, law enforcement, survivors of sexual misconduct, persons accused of sexual misconduct, and/or other offices as deemed necessary and appropriate under the circumstances.

The review panel is charged with balancing U-M's tradition of supporting survivor-centered practices with U-M's equally strong commitment to providing due process to the respondent and promoting a safe community.

Specifically, the panel members will provide information and advice to the Title IX Coordinator regarding:

1. Their perspectives on whether, how, and to what extent, U-M should further investigate the report of sexual misconduct;
2. What steps may be possible or appropriate when a respondent is unknown; and
3. What other measures or remedies might be considered to address any effects of the reported sexual misconduct on the campus community.

In all cases, the final decision on whether, how, and to what extent the University will conduct an investigation, and whether other measures will be taken in connection with any allegation of sexual misconduct, rests solely with the Title IX Coordinator.

See studentsexualmisconductpolicy.umich.edu/.

This panel currently consists of a survivor advocate from the University's Sexual Assault Prevention and Awareness Center, a UM Police Officer, a law professor (who generally assesses the matter from the respondent's perspective) and a member of the Office of Student Conflict Resolution. An attorney from the Office of the General Counsel is also present. Although the attorney does not serve as a member of the panel, there are instances when legal advice is valuable. In practice, the panel first hears from the investigator or individual who has the greatest amount of information about the underlying incident and then a group discussion occurs, with, ultimately, each person weighing in with advice. This practice has proven invaluable to the Title IX Coordinator in reaching informed decisions.¹⁵ It is not uncommon for a member of the panel to have information that was not available to the investigator (e.g., prior criminal history, prior student judicial affairs cases, due process concerns, etc.). As a word of caution, if your institution is considering establishing such a panel, it is wise to have the institution's attorney withhold comments until the end of the conversation, since an attorney's opinion can sometimes shut down or otherwise prevent necessary and fruitful discussion.

¹⁵ Your institution should consider in advance who will perform this function in the event the Title IX Coordinator is unavailable or has a conflict of interest.

There is no single “right” way to conduct these assessments. What will work on your campus may be quite different from the process that works at other institutions; however, the point is that you should be thinking about what your process is (or should be) and whether it is effective and reaches thoughtful and wise decisions.

E. The Decision Not to Investigate is Not a Decision to Do Nothing.

If the institution has conducted its analysis and determined that it is appropriate under the circumstances to honor the complainant’s request for confidentiality or that no investigation take place, that decision does not absolve the institution of its responsibility to address the concerns that were raised. Rather, it causes the institution to focus on what it can do in the absence of an investigation. One obvious example is the need to provide interim measures appropriate to the situation (e.g., housing arrangements, adjustments to academic schedules, safety escorts, etc.); however, there may be other action that the institution can and should take to achieve its greater goal of campus safety and a non-discriminatory working, living and learning environment. OCR addresses this issue in its Q&A, stating:

Although a student’s request to have his or her name withheld may limit the school’s ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school’s policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

See OCR Q&A, p. 20.

The White House Checklist for campus sexual misconduct policies also addresses this topic with very similar language to OCR’s, suggesting that institutions do the following in their policy:

Explain the school’s response if a victim’s request for confidentiality limits the school’s ability to investigate a particular matter. A school may take steps to limit the effects of the alleged sexual misconduct and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include: providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; revising and publicizing the school’s policies on sexual

misconduct; and conducting climate surveys regarding sexual misconduct.

See White House Checklist, p. 6.

F. Leave the Door Open for the Complainant.

While a complainant may not wish to go forward at the point in time the institution becomes aware of the incident, that can (and does) change. Institutions that truly want to engender trust in their willingness and ability address sexual harassment/violence issues on their campuses will always leave open the possibility for the complainant to come forward at a later date. Complainants should be encouraged to come forward in the future if they feel able to do so. While an institution may permissibly have a limitations period for bringing forward claims, the institution should be mindful of how that limitation is drafted and allow for exceptions in appropriate circumstances. Strict adherence to a statute of limitations period may hinder an institution's ability to effectively address sexual harassment/violence concerns, to engender trust in its policies and processes for doing so, and to change campus culture surrounding sexual harassment/violence.

VI. Sample Forms¹⁶

- A. Informed Survivor Letter (University of Michigan)
- B. Title IX Intake Form (Purdue University)
- C. Investigative Case Process Checklist (University of Michigan)
- D. "What you Need to Know" Flier (MIT)
- E. Complainant Information Sheet (University of Michigan)
- F. Rights and Resources Letter to Student Who Chooses Not to Report (MIT)
- G. Investigative Plan (MIT)
- H. Checklist for Conducting OIE Investigations (Purdue University, adopted from United Educator's checklist)
- I. Template for Investigator's Report (Purdue University)

¹⁶ These forms are provided for general guidance. To determine whether they meet the needs and requirements of your institution, including any legal requirements, please consult with your institution's counsel.

OFFICE OF INSTITUTIONAL EQUITY



HUMAN RESOURCES

2072 ADMINISTRATIVE SERVICES BUILDING
1009 GREENE STREET
ANN ARBOR, MI 48109-1432
V: 734 763-0235 TTY: 734 647-1388 FAX: 734 936-8894
www.hr.umich.edu/oie

[care_report|custom_field_52]

[date]

[student|fname] [student|lname]
[student|address]

Dear [student|fname] [student|lname]:

The University was recently informed that you may have experienced sexual misconduct by a U-M student. U-M is committed to both supporting your well-being and acting to ensure the safety of our community. This letter explains important information pertaining to the University of Michigan Policy on Sexual Misconduct by Students. The complete policy and additional resources are available at: <http://studentsexualmisconductpolicy.umich.edu/>.

First, I want you to be aware that, pursuant to the enclosed procedure, the University may further review and investigate the information it received regarding the alleged misconduct. I encourage you to participate in University's review and investigation process so that your experience of the alleged misconduct may be fully considered. However, you have the right not to participate if you do not wish to do so. [Given that you have not responded to our repeated attempts to contact you OR Given your communication to [insert name] indicating that you would not like to be involved further], it is our understanding that you do not want to participate in the University's investigation and review process. If you change your mind later, and would like to participate in the investigation and review process after all, simply notify our office by calling 734-763-0235.

Second, I want you to know that, whether you participate in the University's review and investigation process or not, you have the right to be protected from retaliation related to the information you shared. If you believe you are experiencing retaliation in any form, please let the University know as soon as possible.

Third, I want to encourage you to consider filing a report with the University of Michigan Police Department (UMPD) or the Ann Arbor Police Department (AAPD), as appropriate. UMPD can be reached at (734) 763-1131 and AAPD can be reached at (734) 794-6900. UMPD or AAPD may conduct an investigation based on potential criminal activity related to any information you report.

Fourth, as indicated in the enclosed Survivor Handbook, it is important for you to know where to find additional sources of support and assistance should you find it helpful or necessary to do so. You may contact the Sexual Assault Prevention and Awareness Center (SAPAC) at any time to obtain confidential, comprehensive advocacy and support. Other confidential resources available on and off campus include Counseling and Psychological Services (CAPS) and SafeHouse Center. Contact information for each resource is listed below. Your personal information will not be shared by any of these resources.

Sexual Assault Prevention and Awareness Center (SAPAC)
(734) 764-7771; 24 hr. Crisis Line: (734) 936-3333
530 S. State St. Room G509
Ann Arbor, MI 48109

Counseling and Psychological Services (CAPS)
(734) 764-8312
3100 Michigan Union (3rd Floor)
530 S. State St.
Ann Arbor, MI 48109

SafeHouse Center
24 hr. Crisis line: (734) 995-5444

The Dean of Students Office also provides various support services to students. Although they will respect your privacy to the greatest extent possible, they may need to share some of your information with others to ensure that the University responds appropriately and effectively to any concerns you share with them. They are located at 3100 Michigan Union (3rd Floor) and can be reached at (734) 764-7423.

If you need additional support in the form of counseling, alternative housing, academic accommodations, or otherwise, please contact SAPAC, the Dean of Students Office, or my office so we can work with you in a timely way to provide assistance. If you have any questions, don't hesitate to contact us at 734-763-0235. We'd be happy to help in any way we can.

Very sincerely,

[staff]digital_signature]

[staff]fullname]
Investigator

Title IX Intake Form

GENERAL INFORMATION				
Complainant:	Respondent:			
Clery Act Reportable: YES <input type="checkbox"/> NO <input type="checkbox"/>	Date of Intake:			
Clery Form Submission Date:	Date of Incident:			
Clery Form Submitted by:	Location of Incident:			
OIE/OSRR Staff Member Handling Intake:				
TYPE OF ALLEGATION				
OUTREACH/SUPPORT ITEMS				
	Yes	No	Date Item Completed	Comments/Action Items
Was complainant provided and explained the following items:				
“Know Your Rights” brochure				
CAPS Information				
PUSH/Medical Help Information				
No Contact Directive Information				
Housing Assistance Information				
Community Resources Information				
Law Enforcement Information				
<i>Fostering Respect</i>				
Campus Disciplinary Process				
Advice to Obtain Support Person				
Other Information (<i>explain</i>)				
PROCEDURAL ITEMS				
	Yes	No	Date Item Completed	Comments/Action Items
Does complainant wish to file a formal complaint?				
Does complainant wish for University to initiate an investigation?				
<i>If no investigation is conducted, describe what action was taken:</i>				

OIE/OSRR Staff Member: _____
Signature

Date: ___/___/___

Please complete and return to Title IX Coordinator within 5 business days of the intake meeting.



INVESTIGATIVE CASE PROCESS CHECKLIST

CASE NUMBER: _____

RESPONDENT: _____

OPEN DATE: _____ **CLOSE DATE:** _____

PHASE I

Complainant Interview (DATE: _____)

- _____ Inquire as to union status of all involved parties (Inform GEO Complainants of right to union representation)
- _____ Hand out and review Complainant Information Sheet and applicable SPG (DATE: _____)
- _____ Notify Compl of right to contact UMPD (or local PD) of criminal activity, as applicable
- _____ Strive to provide .pdf draft interview notes to Complainant within 7 calendar days of interview
- _____ Complainant has 2 business days to review their statement (DATE SENT: _____ RCVD: _____)
- _____ Enter into OIE Complaint Management database and ADVOCATE if applicable

Interim Measures

- _____ Yes No
- _____ Interim measure in place: _____
- _____

Notifications

- _____ UMPD: Yes No (DATE: _____)
- _____ If Yes, memo to file/email
- _____ Applicable UM officials: _____
- _____ Clery: Yes No (DATE: _____)
- _____ Notification response in file

Respondent Interview (DATE: _____)

- _____ If Union member, inform of representation right
- _____ Hand out and review Respondent Information Sheet and applicable SPG (DATE: _____)
- _____ Strive to provide .pdf draft interview notes to Respondent within 7 calendar days of interview
- _____ Respondent has 2 business days to review their statement (DATE SENT: _____ RCVD: _____)

CASE NUMBER:

PHASE II

Witness Interviews

- _____ Review witness information re: confidentiality and retaliation
- _____ If identified, offer 2 business days to review .pdf draft
- _____ Memo to file

Other Evidence

- _____ Retrieve/assess as appropriate

PHASE III

Drafting

- _____ Redact attachments as appropriate
 - _____ Review by Senior Director
- _____
 Senior Director Initials Date
- _____ Provide Complainant and Respondent .pdf draft copy with 5 business days review time
- C Draft Sent: _____ C Response Rcvd: _____
 R Draft Sent: _____ R Response Rcvd: _____

Analysis / Review

- _____ Review all evidence
 - _____ Write analysis
 - _____ Provide to Senior Director for review and approval
- _____
 Senior Director Signature Date
- _____ Share with other University officials as appropriate

PHASE IV

Finalize Report

- _____ Issue to relevant parties (student cases are issued to OSCR)
- _____ Contact Complainant and Respondent re: distribution
- _____ Close case in OIE Case Management database
- _____ Obtain and file letter documenting sanctions imposed, as applicable
- _____ Assemble case file for filing within 14 calendar days of case closure date


Final Case File Review

Investigator Signature Date

Senior Director Signature Date

WHAT YOU NEED TO KNOW

Obtaining Information, Support and Assistance, Filing a Complaint



If you experience any form of sexual misconduct, there are a number of ways you can report the incident as well as a wide array of services available to obtain the information, support, and assistance you need to ensure your health and safety, both emotional and physical.

DEFINITION The Institute uses the term **Sexual Misconduct** as an umbrella term to include

- **Sexual Assault;**
- **Sexual Harassment;**
- **Interpersonal Violence (dating/domestic violence);**
- **Stalking; and**
- **Sexual Exploitation**

Complete definitions, together with a discussion of what it means to give “effective consent,” can be found at sexualmisconduct.mit.edu.

1

OPTIONS IMMEDIATELY AFTER INCIDENT

Seeking Confidential Crisis Counseling



There are a number of **resources** you may turn to for **confidential** advice, support and information in the immediate aftermath of an incident.

MIT RESOURCES

- VPR: **617-253-2300**
- Mental Health & Counseling: **617-253-2916**
- MIT Chaplaincy: <http://studentlife.mit.edu/rl/mit-chaplains>

COMMUNITY RESOURCES

- Boston Area Rape Crisis Center (BARCC): **1-800-841-8371**
- Transition House: **(617) 661-7203** (DV Shelter)
- Network/La Red: **617-742-4911** (LGBTQ Services)

Seeking Emergency Medical Attention



You can receive **health care** (like medications to prevent infections or pregnancy) at MIT Medical. To learn more about obtaining a **Sexual Assault Evidence Collection Kit**, go to www.surviverape.org.

INFORMATION ABOUT MEDICAL CARE

- Violence Prevention & Response (VPR): **617-253-2300**
- MIT Medical: **617-253-4481**
- Boston Area Rape Crisis Center: **1-800-841-8371**

Beth Israel and MGH Hospitals are the nearest SANE sites (Sexual Assault Nurse Examiner). These nurses are specially trained to care for victims of sexual assault and to conduct a “medical evidence collection kit.” Please call VPR’s 24 hour hotline to discuss medical options or to request an advocate accompaniment for care.

Reporting the Incident to the Police



Report an incident to the police by calling one of the numbers at right. Your decision to report to the police will not affect your ability to file a complaint through the Institute’s procedures, which are independent of the criminal process.

HOW TO CONTACT THE POLICE (24/7)

- MIT Police: **617-253-1212**
- Campus Phone: **100**
- Cambridge Police: **617-349-3300**

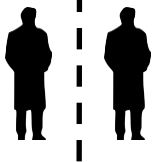
2

The Institute’s Response

2

SEEKING PROTECTIVE SERVICES

You may choose either or both options



Division of Student Life (DSL): The Title IX Coordinator can assist with a variety of measures including a no contact order, academic support, and housing accommodations, whether or not there is a formal complaint filed. Email TitleIX@mit.edu for more information.

Protective Order: A court-issued order that can be enforced anywhere in the United States, no matter where you obtain it. A violation of it can result in criminal charges. MIT Police can provide information and can support you through this process. If you get a protective order, MIT will also work with you to make any accommodations necessary

3

REPORTING OPTIONS

You may pursue either, both or none of these options. You are not required to file a report immediately; however it is important to preserve any evidence of the incident. Detailed information about your reporting options is available at sexualmisconduct.mit.edu.



Institute Complaint

If the alleged perpetrator is an MIT affiliate you may file a complaint with the Institute by contacting the Title IX Coordinator. The complaint is governed by the Institute's Sexual Misconduct Policy. You may seek either "formal" or "informal" resolution; the standard of proof is "a preponderance of the evidence;" and potential sanctions may include suspension or expulsion (for students) and termination (for employees). Contact titleIX@mit.edu with questions.

Criminal Complaint

You are not required to file a criminal complaint. If you choose to, MIT will provide you with support throughout the process. You may file a criminal complaint by contacting the police. A criminal complaint is governed by applicable criminal statutes; the standard of proof is "beyond a reasonable doubt;" and potential sanctions include all applicable criminal sanctions, up to and including incarceration.

4

THE INSTITUTE'S RESPONSE



The Institute is committed to responding to sexual misconduct and is required by Federal Law to investigate all allegations and take any remedial action deemed necessary to preserve your safety and that of the community, whether or not you wish to make a formal complaint. However, in planning any response, the wishes of the reporting student are given full consideration. You may receive assistance and support without disclosing details of the incident. Below is a chart to clarify the confidentiality levels of many campus resources.

Confidential

I want to think through my situation with someone who can keep my information as confidential as possible."

MIT RESOURCES

VPR: 617-253-2300 (24-hour hotline)

Mental Health & Counseling: 617-253-2916

MIT Chaplaincy: <http://studentlife.mit.edu/rl/mit-chaplains>

COMMUNITY RESOURCES

Boston Area Rape Crisis Center (BARCC): 1-800-841-8371

Transition House: (617) 661-7203 (DV Shelter)

Network/La Red: 617-742-4911 (LGBTQ Services)

Private

I need to confide in someone and it is okay if that person needs to tell the Title IX Coordinator."

Title IX Coordinator/Investigator

Dean of Student Life | Student Life Staff | Residential Life Staff

Academic Adviser | Faculty | Coaches

Student Support Services, S3

ODGE



Information for Student Complainants - Sexual Misconduct

We are neutral. The Investigator does not take sides. We are committed to providing a fair and unbiased review, and our investigations are focused on the information available. We also help Complainants and Respondents by providing information about support and advocacy services.

Support person. The Complainant may bring a support person with them to any meetings with the Investigator. We request that the Complainant please let us know in advance if they will be doing so.

Understanding the complaint. The first step the Investigator takes in an investigation is to gather information about the complaint. This usually involves interviewing the Complainant and gathering all information the Complainant has, including documentation and names of witnesses, if any. Complainants are strongly encouraged to share all information they have regarding the matter.

Anonymity. Complainants frequently want to know if the Respondent will be told they raised concerns. Respondents are provided enough information about the allegations to allow them a fair opportunity to respond, and the level of detail necessary to do that varies depending on the circumstances surrounding the incident.

Interviewing the Respondent. After the Investigator understands the nature and scope of the complaint, the Respondent is asked about the allegations and given a full and fair opportunity to respond. The Respondent is also asked to provide any documentation and identify witnesses relevant to the complaint. The Complainant is not present during the Respondent's interview and vice versa.

Gathering other information. The Investigator interviews witnesses and reviews all documentation deemed relevant to the situation. The Investigator may also contact the Complainant and Respondent with additional questions or to request additional information.

Review of Investigation Summary. If the Investigator determines that a written Investigation Report will be produced, the Complainant and Respondent, if participating in the investigation, will typically be provided with a written summary of the statement of each person interviewed (Complainant, Respondent and other witnesses) and documentation or other information reviewed by the Investigator. To ensure accuracy, the Complainant and Respondent are given the opportunity to provide clarifying comments on the summary. The Investigator reviews the comments submitted by the parties, if any, and determines whether the report should be modified. The Investigator considers any and all comments from the parties in reaching a determination on the matter.

All information or documentation provided by either party, or by a witness interviewed in the course of an investigation, may be included in the final Investigative Report and shared with the other party to this matter.

Decision and follow up. After receiving the Complainant's and Respondent's comments, if any, the Investigator analyzes the information and reaches a conclusion. This conclusion is shared with the Office of Student Conflict Resolution, along with the Investigation Report if one was produced. If the Investigator determines that inappropriate behavior or discrimination or harassment has occurred, the Office of Student Conflict Resolution will address the matter consistent with applicable University policies.

Retaliation. The University has a strong policy against retaliation. Complainants or witnesses who feel they are being subjected to retaliatory behavior are strongly encouraged to immediately contact the Investigator or OSCR.

Resources for support. The University offers a variety of services to support to students, a short list of which is included below. The OIE investigator can provide additional information about the resources, as requested. Any individual who has experienced a crime or is concerned for their safety should call UMPD at 9-1-1 immediately. If the incident occurred off campus, local police should also be called.

- Sexual Assault Prevention and Awareness Center 734/936-3333
- Counseling and Psychology Services 734/764-8312 or www.umich.edu/~caps
- after hours UM Psychiatric 734/996-4747
- Dean of Students 734/764-7420
- UM Student Legal Services 734/763-9920
- Graduate Student Crisis 800/GRAD-HLP (800/472-3457)
- Crisis Line 800/273-TALK (8255)
- www.crisischat.org

More information. If you have any other questions about the investigation or investigation process, please do not hesitate to contact the staff member investigating your case at 734/763-0235.

Complainant's Name (please print)

Signature

Date

Revised 9/12/13

**MIT Sexual Misconduct
Options and Follow-Up
Choosing to Not Report: Rights and Resources**

At this time, you have stated that you do not want to make a formal complaint to the Institute and do not want to participate in any disciplinary action. We respect your wishes and want you to be aware of your rights and our obligations.

If other reports are made regarding the same individual, it may be determined that it is necessary to conduct an investigation. If this happens, we will make sure you are notified and kept informed as much as possible.

It is important that you are aware of your rights and opportunities for support and assistance. The following are resources available both on campus and in the community. Talking to any of the following resources will be confidential – they will not share any of your personal information.

MIT Campus:

Violence Prevention and Response (VPR) 24-hour Support and Information line: 617-253-2300
MIT Medical - Mental Health and Counseling: 617-253-2916

Community:

Boston Area Rape Crisis Center 24-hour hotline: 800-841-8371
Victim's Rights Law Center (pro bono legal counsel for sexual assault victims): 617-399-6720

In addition, you have the right to file a report with MIT Police. You can reach MIT PD at 617-253-1212 and speak with a representative from their investigation division.

Although you are not pursuing a formal complaint, it's important that you know that the Institute can still act on your complaint if you change your mind. You may request further action at any future time, consistent with the Institute's policy. Of course, the longer the period of time elapsed from the time of the incident you reported, the more difficult it will be to obtain information as individuals graduate or leave school or physical evidence is no longer obtainable. However, this does not mean that the option of a hearing is not available to you. All complaints are reviewed on a case-by-case basis. More information on the MIT Sexual Misconduct Policy and reporting procedures can be found at <http://sexualmisconduct.mit.edu>.

If you need support at any time in the form of counseling, alternative housing options, or academic accommodations, please contact the Title IX Coordinator or Title IX Investigator so that we can work with you in a timely way to provide assistance. We want to support you as best we can on your path towards a successful graduation.

Title IX Coordinator:
Barbara Baker
Senior Associate Dean
babaker@mit.edu
617-253-4052

Title IX Investigator:
Sarah Rankin
SRankin@mit.edu
617-324-7526

Investigative Plan

Complainant Name:

Respondent Name:

Date Report Received:

Action	Planned Date	Actual Date and Reason for Delay
Complainant Interview		
Respondent Interview		
Primary Witness List/Dates of Interviews		
Secondary Witness List/Dates of Interviews		
Necessary Follow-Up Interviews		
Evidence Collected & Reviewed		
Investigative Report Completed		

Inquiry Meetings	Yes/No/Not Applicable	Further Steps
Explain policies and procedures		
Explain Informal, Formal, and University-Initiated (if applicable)		
Advise potential complainants of all relevant filing deadlines		
Provide a copy of Fostering Respect		
Follow-up within 2 weeks		
Send out closing letter if no complaint filed		

Special Considerations for Sexual Assault Investigations	Yes/No/Not Applicable	Further Steps
Notify Title IX Coordinator within 1 day of receiving report		
Notify OSRR personnel to coordinate outreach/support to affected student		
Consider whether there are any remedial measures necessary		
Confirm and document Clery Report (and submit report if not previously submitted)		
Confirm whether complaining party wishes to file a complaint or have University initiate		
University-initiated: Prepare narrative document and submit to OIE Director within 1 business day of completing intake meeting. Include recommendation about whether no contact directive is appropriate.		
Provide complaining party with a copy of Know Your Rights and document		
Advise complaining party when matter will be initiated by the University		
Consider whether there is a certain order in which parties and witnesses should be interviewed		

Preparing to Investigate	Yes/No/Not Applicable	Further Steps
<i>Developing a Plan</i>		
Define the investigation scope (e.g., fully understand the scope of the allegations at the outset) based on the complainant meeting and written complaint		
Develop a preliminary timeline of events based on the complaint or incident report		
Develop an initial witness list		
Consider what testimony or other information is necessary to confirm or rebut the allegations		
Consider whether there is a certain order in which parties and witnesses should be interviewed		
<i>Gathering Materials</i>		
Applicable policies and procedures		
Campus police or security reports		
Local police reports		
Security videotapes		
Photos or videos from parties or witnesses		
Voice mails, text messages, social media postings, phone recordings		
Personnel files, performance reviews, and other employment-related documentation		
Information from any prior investigations involving the same parties		
Searches of computers, office space, residence halls; e-mails from network <i>If so, consult with legal counsel</i>		
<i>Interview Locations</i>		
Can interviews take place in person? <i>If not, consider Skype or Face Time</i>		
Secure private, comfortable meeting locations in neutral territory		
<i>Potentially Reluctant Interviewees</i>		
Anticipate procedural questions and be prepared with answers		
Be prepared to answer inquiries about having attorneys, parents, therapists, etc. present		
Explain general time frame for process		
Explain importance of confidentiality and prohibition on retaliation (zero tolerance)		
Explain how information shared with you will be used		
Provide party/witness opportunity to ask questions before beginning questioning		

<i>Conducting the Interview</i>		
Ask broad, open-ended questions		
Ask specific questions only as needed to clarify items that are unclear		
Assure that all critical issues are raised and parties given opportunity to respond		
Clarify slang or unfamiliar terms		
Avoid interrupting the flow of narrative and encourage person to keep talking		
Establish timeline with interviewee		
<i>Credibility Determinations</i>		
<i>Use the interview to assess credibility of the parties and witnesses, taking into account:</i>		
Individual's general demeanor (e.g., is the individual appear open and honest v. evasive, argumentative, hostile)		
Person's opportunity and capacity to observe the event		
Contradiction or consistency with other information		
Whether there is reason to lie		
Improbability of account (i.e., does it make sense?)		
Any prior inconsistent statements		
<i>Concluding the Interview</i>		
Ask "anything else" until the person says no		
Ask for names of all potential witnesses		
Request any documentation the interviewee may have		
Remind interviewee next steps and relevant timeline(s)		
Thank interviewee for cooperating		
Invite interviewee to follow up with additional information		
Remind interviewee about need for confidentiality		
<i>Documenting the Interview</i>		
Take careful notes		
After the meeting, review the notes and ensure accuracy of meeting		

Special Considerations for Interviewing Alleged Sexual Assault Victim	Yes/No/Not Applicable	Further Steps
<i>Basic Questions</i>		
What happened?		
When did it happen?		
Where did it happen?		
Was anyone else there? If so, who and for how long?		
Have you spoken to others about this? To whom and when?		
Have you provided written statement to anyone?		
Have you posted anything about this online, including FB, Twitter, blogs?		
Have you created or kept notes, diary entries, or other writings about the incident?		
Do you know of others who might have similar concerns?		
How do you know respondent?		
Have you had any contact with respondent since the incident? If so, when and nature of contact?		
Were either of you drinking or taking drugs?		
How have you been impacted by this?		
What outcome would you like to see?		
(If delayed report) What prompted you to report?		
Have/will you report to police?		

Documenting and Completing the Investigation	Yes/No/Not Applicable	Further Steps
<i>Analyzing the Evidence</i>		
Review and confirm you have obtained copies of all relevant documents		
Review interview notes and determine whether follow-up is necessary with any parties or witnesses		
Review all written documentation, including notes, photos, e-mails, etc.		
Consider the following items to evaluate credibility:		
Is there corroborating evidence that supports either party's account?		
Did anyone make statements that later proved untrue? (If yes, consider following up with the interviewee to give opportunity to address.)		
Did either party's account or chronology differ significantly from witness accounts?		
Did either party's account conflict with written/photo/video evidence?		
Did either party appear particularly forthcoming or particularly evasive?		
<i>Preparing Report</i>		
Address all allegations		
Specifically address credibility of the parties		
Focus on factual observations and conclusions, not speculation		
Make recommendations as to sanctions, if any		

This document is intended to provide a general template for an Investigator's Report. The Investigator should insert appropriate information in the bracketed sections.

UNIVERSITY INVESTIGATOR'S REPORT TEMPLATE

TO: [Director] [Chancellor]

FROM: [Name and Title of University Investigator]

DATE: [Date of Report]

I. Investigator's Charge

On [date of appointment], the [Director] [Chancellor], appointed [name of Investigator] as University Investigator in the complaint filed by [name of Complainant] pursuant to the Formal Resolution Process of the Procedures for Resolving Complaints of Discrimination and Harassment ("Procedures") alleging violations of Purdue University's [relevant University Policy or Policies] by [name of Respondent(s)], [position/title], [department].

II. Relevant Provisions

In this section, the Investigator should include all sections from the relevant University Policy or Policies on Harassment/Nondiscrimination that pertain to the specific Complaint.

III. Interviews and Document Review

Pursuant to this complaint, I spoke with the following individuals:

1. [name, position, department]
2. [name, position, department]
3. [etc....]

In addition, I reviewed numerous [letters, memoranda, e-mail messages, notes, etc....]

IV. Analysis and Findings ♦

A. *The Allegations*

B. *Specific Issues*

C. *Conclusion* ♦

D. *Recommendation*

Based upon the preponderance of the evidence, I find that the allegations of [discrimination] [harassment] [and/or retaliation] are [substantiated] [not substantiated]. Therefore, I [do] [do not] find a violation of the [relevant University Policy or Policies]. This investigation [does] [does not] indicate that [Complainant] filed a knowingly false or malicious complaint.

♦ **Although a sample outline of the Analysis and Findings section is provided, the organization of this section is driven by the specific complaint. For example, it may be organized chronologically, thematically, or in another way that the complaint dictates.**

♦ **In this subsection, the Investigator should indicate whether there has or has not been a violation of University Policy.**



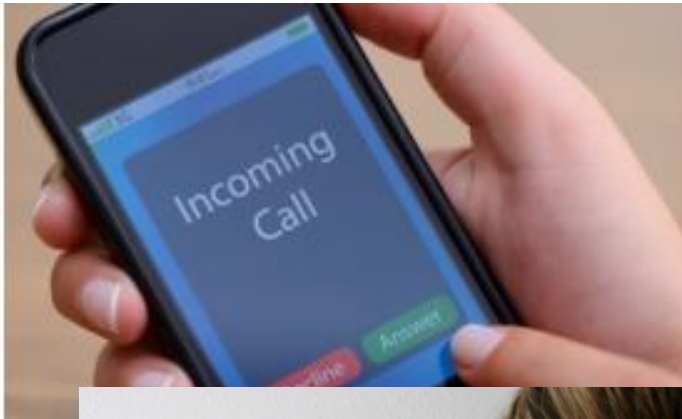
CONSENT, CREDIBILITY, AND CONFIDENTIALITY: TACKLING CHALLENGING ISSUES IN TITLE IX INVESTIGATIONS

Scott A. Roberts, Hirsch Roberts Weinstein LLP
Pamela Heatlie, University of Michigan
Monica S. Bloom, Purdue University
Sarah Rankin, Massachusetts Institute of Technology

Agenda

- GOAL: Allow you to capably EVALUATE and ASSESS the investigative and hearing processes on your campus
- Methodology – Interactive Case Study, or “Let’s Jump Right in to the Deep End of the Pool” Method
- Q&A
- Introduction of the Panel

Case Study – Day 1



Issue Spotting

- Student's lack of awareness of institution's sexual assault procedures
- Methods for encouraging reporting
- Obligations to identify the friend?
- Understanding the friend's reluctance to report



Reasons that Reports of Sexual Assault are Delayed, or Not Made

- Do not see the incident as serious enough to report
- Are not clear that a crime has been committed
- Don't want family to know
- Fear of retaliation
- Fear of police treatment
- Lack of “proof”
- Fear of not being believed
- Conflicted feelings about the possible consequences for the respondent

Misperceptions on The Experience

- In a study by the National Institute of Justice, participants were asked whether an **incident characterized as rape** by the researchers *was* rape. The response?
 - 48.8% said **“Not Rape”**
 - 4.7% said **“I don’t know”**
- Why?
 - In part, trust. 90% of college women know the person who sexually assaulted them

Counterintuitive Response, or Adaptive Behavior?

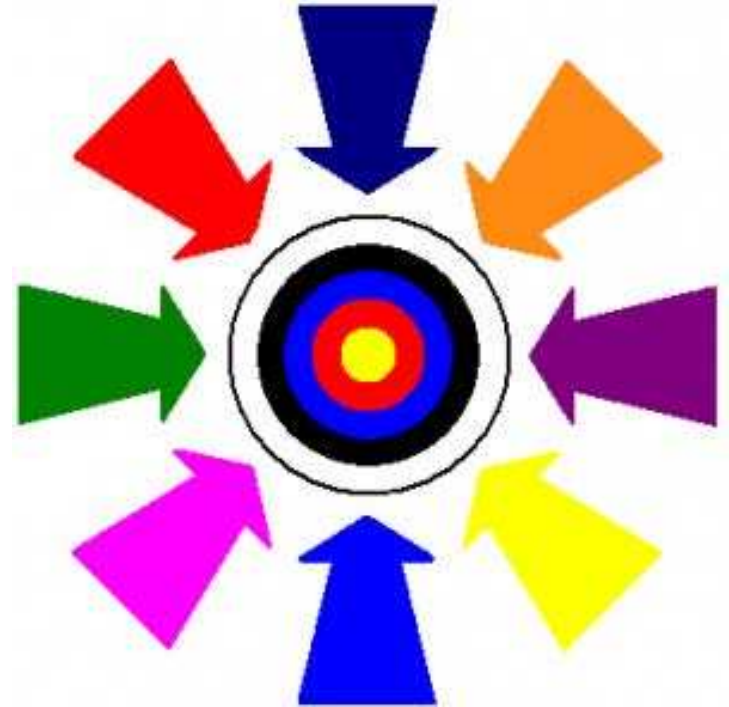
- Delay in reporting is a common coping mechanism
- Variability in behavior is common (e.g., attentive and cognizant on one day; apprehensive or pre-occupied on another)
- Investigator must ensure these typical reactions are not misinterpreted as reflecting a lack of credibility

Case Study – Day 7



Issue Spotting

- Location: Does it matter?
- Understanding the “hook-up” culture, and avoiding bias
- Handling complainant’s requests for confidentiality, or no investigation
- Intoxication, or incapacitation?
- Initial gathering and preservation of evidence



Hook-up Culture

- Hook-Up: Casual sexual contact, ranging anywhere from kissing to intercourse, in a non-relationship context (and without any promise of one).
- Very different meanings to different students
- Men and women may experience similar emotional outcomes, but *different reputational outcomes*: conquests vs. easy
- Be aware of impact on student's willingness to report and investigator's subconscious bias

Addressing the Request for Confidentiality

- OCR “strongly supports” a student’s interest in confidentiality
- When student requests confidentiality or for no investigation, the institution “should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.”
- But, institution must balance student’s request against overall responsibility to provide safe campus environment.

Weighing the Request for Confidentiality: Considerations

- Are there **other sexual violence complaints** about alleged perpetrator?
- Does the alleged perpetrator have arrests or records indicating **history of violence**?
- Were **multiple perpetrators** involved?
- Do circumstances suggest a **pattern**, and an increased risk of similar violence?
- **Age** of the student subjected to sexual violence
- **Use of a weapon**
- School's ability to obtain **evidence**
- **DOING NOTHING IS NEVER THE RIGHT RESPONSE**



























Remedial Efforts, Without Full Investigation

- Increased monitoring, supervision or security at locations or activities
- Training or educational materials for students & employees
- Changing and publicizing sexual violence policies
- Climate surveys
- Put alleged perpetrator on notice, without revealing complainant's name

Initial Evidence Gathering and Preservation

- Identification of other witnesses, including fresh complaint witnesses
- Texts
- Emails
- Photos and video
- Pictures of condition

Case Study – Day 12



































	1	Non-Compliant	ISAAC FELTON	301 N COLLEGE AVE	BLOOMINGTON 47404	Home Address	
	1	Non-Compliant	ROOSEVELT HAWTHORNE	301 N COLLEGE AVE	BLOOMINGTON 47404	Home Address	
	1		MICHAEL HOENE	301 N COLLEGE AVE	BLOOMINGTON 47403	Home Address	
	1	Non-Compliant	DAVID RUNYON	301 N COLLEGE AVE	BLOOMINGTON 47404	Home Address	
	1		FRANK TODD	301 N COLLEGE	BLOOMINGTON 47401	Home Address	
	2		DANE DVORAK	6TH AND WA	BLOOMINGTON 47401	Work Address	
	3		CARL JAMES	126 1/2 N WALNUT ST	BLOOMINGTON 47404	Work Address	
	3		JOHN MCGUIGAN	112 N WALNUT ST	BLOOMINGTON 47404	Work Address	
	3		KYLE OLIVER	108 E KIRKWOOD AVE	BLOOMINGTON 47408	Work Address	
	4		JEREMIAH ADAMS	530 N COLLEGE ST	BLOOMINGTON 47404	Work Address	
				waffle house			
	4		JAMES ULAND	10TH AND C	BLOOMINGTON 47408	Work Address	
	5		MARK UPCHURCH	309 N 3RD ST	BLOOMINGTON 47404	Work Address	
	6		STEPHEN GRIMSLEY	422 E 11TH ST	BLOOMINGTON 47408	Home Address	
	6		RAYMOND MERCER	406 East 11th stret #4	BLOOMINGTON 47404	Home Address	
	7		CARL JAMES	703 W 7TH ST	BLOOMINGTON 47404	Home Address	
	8		JAMES PHELAN	424 S WALNUT ST	BLOOMINGTON 47401	Work Address	

Found 17 offenders in 8 locations Viewing locations 1 through 8

Information By Course

Course (CN) Student (GN)

+ Add new Subject
13 items found, displaying all items.1

	Student ID	Student Name	Grade	Class Code	Stat	Concen	Comp	Disability	Disadv		
				COLL, TRAVIS	06	WAUM-0611W-03	0	N	N	01	*
				STICKLEY, JORDAN	06	WAUM-0611W-03	0	N	N	**	*
				REED, TAYLOR	06	WAUM-0611W-03	0	N	N	**	*
				PHILLIPS, DESTENY	06	WAUM-0611W-03	0	N	N	**	*
				WOOLEY, WADE	06	WAUM-0611W-03	0	N	N	**	*
				MYERS, GRACE	06	WAUM-0611W-03	0	N	N	**	*
				TUCKERMAN, AUSTIN	06	WAUM-0611W-03	0	N	N	**	*
				SALYERS, CHEYENNE	06	WAUM-0611W-03	0	N	N	**	1
				VASQUEZ, GLORIA	06	WAUM-0611W-03	0	N	N	**	*
				WARD, ALYXANDRIA	06	WAUM-0611W-03	0	N	N	**	*
				STUCK, ALEXANDER	06	WAUM-0611W-03	0	N	N	**	*
				GONZALEZ, MARGARITA	06	WAUM-0611W-03	0	N	N	**	*
				RENDON, JAVIER	06	WAUM-0611W-03	0	N	N	**	1

Export options: Excel

Case Study – Day 30



Case Study – Day 32



Seven Habits and Skills of Highly Effective Investigators – The Top 5

- Remains respectful and non-judgmental
- Quickly creates rapport and trust with others
- Asks tough questions and obtains detailed information about difficult subject matter
- Writes thorough, yet concise, reports with strong analysis of the evidence
- Feels comfortable making and standing by decisions based on the preponderance of the evidence standard, but willing to ask for help

Seven Habits and Skills of Highly Effective Investigators – Two More

- Has a thick skin and can handle feeling unappreciated
- Willing to work to develop more than 7 habits and skills – this work takes experience, talent, and even *more* experience

Gathering Evidence: Preparing for the Deep Dive

- PREPARE (review code, documents, texts, social media, surveillance video, card swipes etc.)
- Identify additional sources of evidence, and then get it
- Develop investigative plan:
 - Witnesses
 - Order of examination
 - Sharpened questions

Gathering Evidence: Asking the Hard Questions

- Provide witness sufficient context
- Explain importance of honesty
- Start with neutral, non-judgmental, and open-ended questions
- Ask varied questions on same subject
- When questioning about inconsistencies, do so in a curious, non-confrontational manner

Gathering Evidence: Asking the Hard Questions

- Raise tough questions later in interview, to prevent witness from “shutting down”
- Don’t ask questions about complainant’s sexual encounters with persons other than respondent
- BE RESPECTFUL
- BE PERSISTENT
- BE THOROUGH

“So, How Much Did You Have to Drink?”

- That’s not sufficient
- Same number of drinks may have vastly different impacts on different persons
- Goals: assess the impact of alcohol consumption on the witness

Intoxication vs. Incapacitation: Consumption

- Type of alcohol consumed?
- Over what period of time?
- How quickly?
- Any food consumed? How much? When?
- Taking any medication that has restrictions regarding alcohol consumption?
- “Can you describe the impact that the consumption of alcohol had on you?”

Intoxication vs. Incapacitation: Behavior

- Was the complainant ever unconscious? Did s/he regain consciousness during the incident? If so, what did the respondent do?
- Did the complainant black out?
- Did the complainant vomit?
- What was the complainant's condition when last seen by reliable third-party witnesses?
- Did the complainant seem to understand where s/he was and where s/he might be going?

Intoxication vs. Incapacitation: Behavior

- Could the complainant walk?
- Could the complainant speak clearly?
- What physical tasks did the complainant perform, and how well did s/he perform them? (e.g., using a Smartphone, lighting own cigarette)
- Could the complainant make and maintain eye contact?
- Was the complainant able to remove his or her own clothes?
- Anything to suggest that a complainant may have been less capable of making important decisions, such as whether to have sex?"

Case Study – Day 33



Evaluating Consent

- Avoid preconceptions and misconceptions about how a “victim” should behave
- Understand institution’s policy on consent
- Avoid bias related to alcohol consumption and “hook-ups”
- Understand the full extent of the COMMUNICATION between parties

Making the Decision: Wrestling with the Preponderance of the Evidence

- If civil juries can apply it, you can to.
- Determine the necessary elements of the charge
- Wait until all evidence is gathered before rendering a decision
- Be reasonable and impartial
- Recognize, but do not consider, the “impact” of your decision

Making the Decision: Wrestling with the Preponderance of the Evidence

- Consider all the evidence, and only the evidence
- Evaluate the credibility of witnesses
 - Identify and resolve conflicts in testimony
 - Demeanor
 - Frankness, or lack thereof
 - Reasonableness, or lack thereof
 - Bias
 - Contradiction: memory lapse or falsehood?

Making the Decision: Wrestling with the Preponderance of the Evidence

- Determine the weight of evidence – its quality and strength
- Draw reasonable inferences
- “Is it more likely than not true that the respondent engaged in the conduct alleged?”
 - Did parties engage in particular sexual activity?
 - Was complainant legally capable of giving consent?
 - Did complainant give consent to particular activity?

Q&A

