



# TITLE IX TRAINING

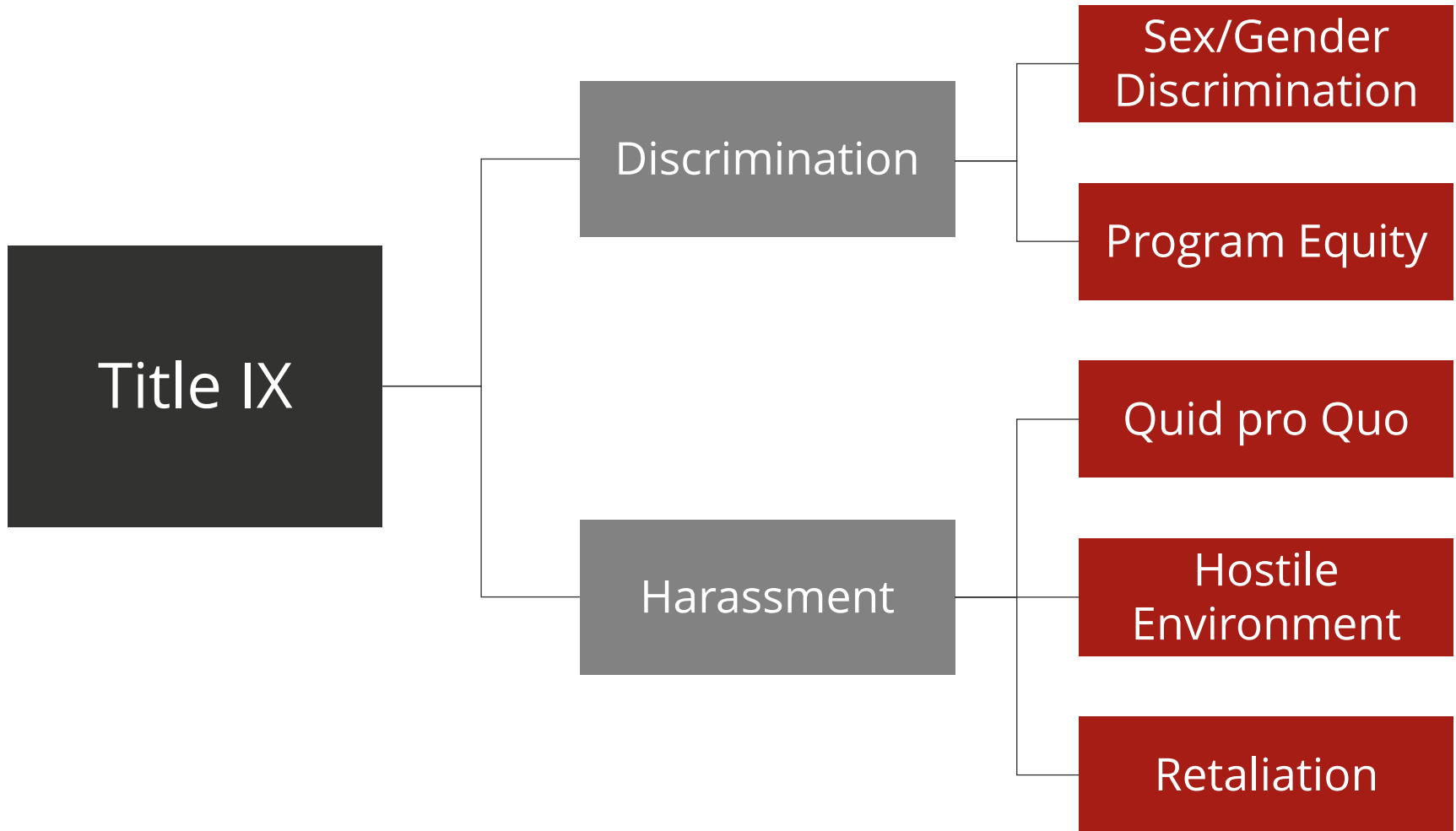
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Hudson County Community College

*20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)\**

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”





# TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



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

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

# EQUITY & GRIEVANCE PROCEDURES



- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
- Meetings and opportunities to present witnesses and provide evidence.
- Access to information.
- Provide the same rights for an advisor.
- Impartial investigators, investigation, hearing, and panelists.
- Remedies.
- Appeals.

# STEPS OF AN INVESTIGATION



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

# STEPS OF AN INVESTIGATION



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

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



# MAJOR GATEKEEPING GUIDEPOSTS



Notice.

Preliminary investigation.

Comprehensive investigation.

Charge/allegation.

Finding.

Sanction.

Appeal.

# NOTICE TO THE INSTITUTION



- In the new Regs, “Actual Knowledge” is defined as:
  - “Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.”
- And the school must investigate upon receipt of a “Formal Complaint”
  - Defined by USU Policy 339 as, “A signed document that indicates the University will proceed with a formal investigation of sexual misconduct. A formal complaint may be signed by the Claimant or by the Title IX Coordinator.

- **Responsible Employee.**
  - All USU Employees who are neither Student Employees nor Designated Confidential Resources are Responsible Employees. However, Student Employees with supervisory or security responsibilities are Responsible Employees.

# WHEN DO YOU INVESTIGATE?



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

# WHEN TO USE INTERIM/SUPPORTIVE MEASURES?



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

# COMMON INTERIM/SUPPORTIVE MEASURES FOR STUDENTS



- ✓ Providing a campus escort.
- ✓ No Contact Order/contact restrictions
- ✓ On-campus housing and/or parking relocation
- ✓ Providing counseling services.
- ✓ Providing medical services.
- ✓ Offering academic support services, such as tutoring.
- ✓ Arranging transportation accommodations.
- ✓ Changes in class schedule
- ✓ Training with Respondent
- ✓ Arranging for the Reporting Party to re-take a course/withdraw from a class without penalty.
- ✓ Retaliation and Interference discussion with the parties and/or others.
- ✓ Providing institution-wide training and education initiatives.
- ✓ Reasonable supportive measures

# COMMON INTERIM/SUPPORTIVE MEASURES FOR EMPLOYEES



- ✓ Providing no-contact orders/contact restrictions.
- ✓ Providing an escort.
- ✓ Arranging transportation accommodations.
- ✓ Providing referral to counseling services, medical services, and mental health services.
- ✓ Retaliation and Interference discussion with the parties and/or others.
- ✓ Adjusting work schedules, work assignments, supervisory responsibilities, etc.
- ✓ Administrative leave with pay.

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

Show Your Work



# DOCUMENTATION



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

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

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

- Identify

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

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

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

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



**Maintain impartiality throughout**

- Analyze
  - Find an opportunity to let your subconscious work on the gaps in information (e.g. yoga, meditation, etc.).
  - If you are too busy analyzing what you know, you will not focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
  - Look for evidence that should be there that is not, for some reason.



# MAKING AN INVESTIGATION REPORT



- Review the relevant university policies in play.
- Parse the policy.
  - Specific evidence for each policy with regard to each Respondent.
- Pose key questions.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not policy has been violated.
- Cite concretely the reasons for your conclusions.

# USING EXTERNAL EVIDENCE



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

# CREDIBILITY



# WHAT IS CREDIBILITY?



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

# CREDIBILITY



- Inherent plausibility
  - “Does this make sense?”
  - Be careful of bias influencing sense of “logical”
- Demeanor
  - Do they seem to be lying or telling the truth?
- Motive to falsify
  - Do they have a reason to lie?
- Corroboration
  - Aligned testimony and/or physical evidence
- Past record
  - Is there a history of similar behavior?

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

EEOC (1999)

## Key Issues

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

## Corroborating evidence

- Strongest indicator of credibility
- Independent, objective authentication
  - Party says they went to dinner, provides receipt
  - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

## Corroborating evidence

- Can include contemporaneous witness accounts
  - More “separate” the witness, greater the credibility boost
- Outcry witnesses
  - Does what party said then line up with what they say now?
- Pay attention to allegiances
  - Friends, roommates, teammates, group membership



## Inherent plausibility

- Does what the party described make sense?
  - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness”
  - Would a reasonable person in the same scenario do the same things? Why or why not?
  - Are there more likely alternatives based on the evidence?

## Inherent plausibility

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
  - Could they have heard what they said they heard?
  - Were there other impediments? (darkness, obstructions)
- How good is their memory?
  - Temporal proximity based on age of allegations
  - “I think” “I’m pretty sure” “It would make sense”

## Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
  - Think academic or career implications
  - Also personal or relationship consequences
- What if the allegations are false?
  - Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

## Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
  - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

## Demeanor

- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- **BE VERY CAREFUL**
  - Humans are excellent at picking up non-verbal cues
  - Human are terrible at spotting liars (roughly equivalent to polygraph)

- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it...this is not Lie to Me.

## Factors that do NOT add/detract from credibility

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

# TRAUMA INFORMED INTERVIEWING

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



# ATIXA POSITION STATEMENT



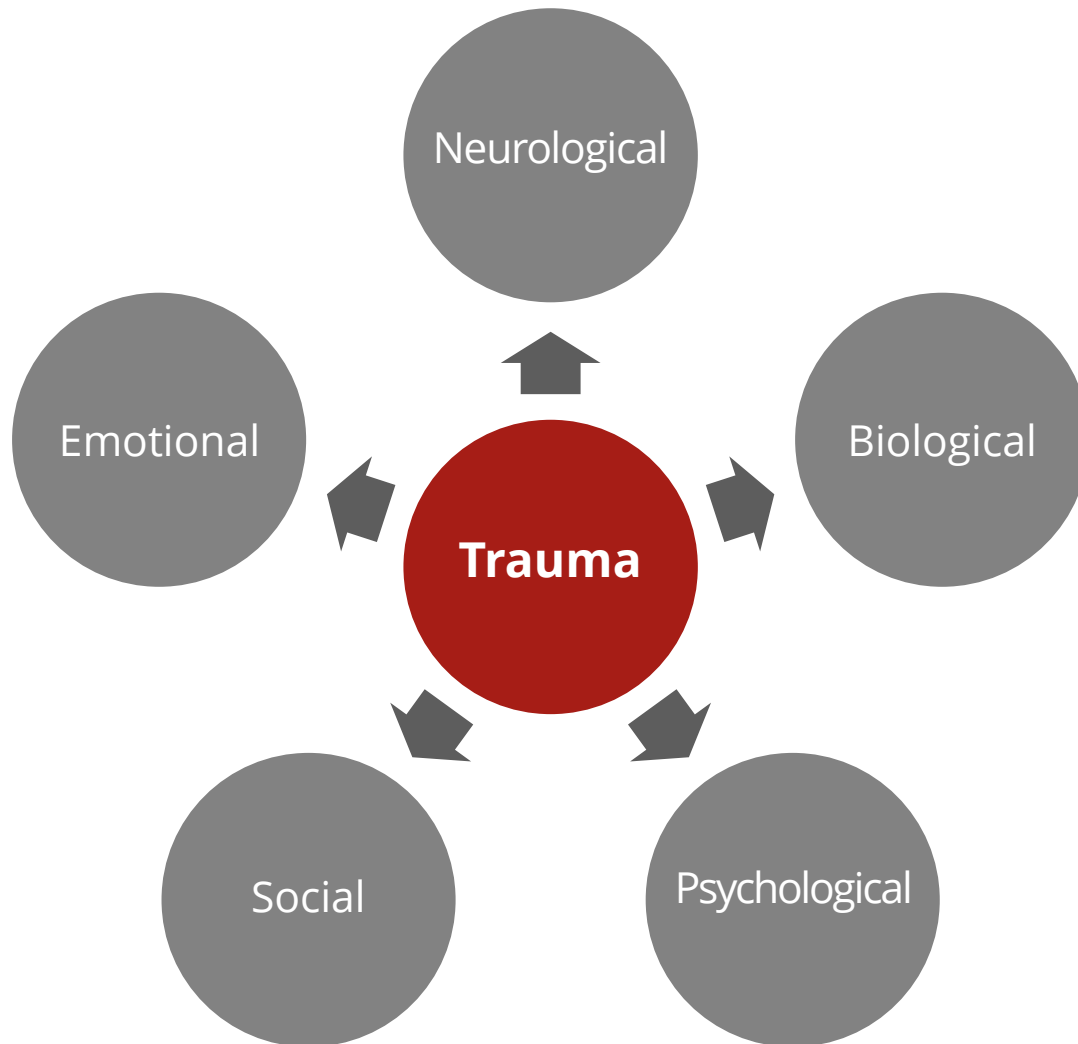
- Worry that application of the knowledge obtained by practitioners in our field has gotten way ahead of the actual science
- The body of knowledge is being misapplied
- Some purveyors of this knowledge are politically motivated to extrapolate well beyond any reasonable empirical conclusions currently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

# ATIXA POSITION STATEMENT



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

# IMPACT OF TRAUMA ON FUNCTIONING



# HORMONAL FLOOD

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

React physically

Think rationally

Consolidate or  
group memories

**This is a neurobiological response, not a choice.**

# MEMORY AND TRAUMA



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

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

- Empathy is critical.
  - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
  - 5 senses
- What were your reactions to this experience?
  - Physically
  - Emotionally
- What, if anything, can you not you forget about this experience?

Source: Patricia Crawford-Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

- Allowance for sleep cycles prior to interviews (if within 96-120 hours).
  - One to two sleep cycles makes a big difference in ability to connect memories.
- A non-linear account, with jumping around and scattered memories is not uncommon.
- If drugs or alcohol are an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Use strategies that pull out fragmented memories.
- Be patient during the interview and allow time.



- Empathy is critical.
  - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
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Source: Patricia Crawford-Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

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

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

# REVIEW OF UPDATED USU POLICIES AND PROCEDURES

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- This policy applies to incidents of Sexual Misconduct committed against Students or Employees, and/or Participants in an Employment or Education Program or Activity by Employees, Students, or third parties within the University's control when the conduct occurs in a University Employment or Education Program or Activity in the United States.

# EMPLOYMENT OR EDUCATION PROGRAM OR ACTIVITY



- An Employment or Education Program or Activity means locations, events, or circumstances in the United States over which the University has substantial control over both the Respondent and the context in which the Sexual Misconduct occurs. It includes any building owned or controlled by a student organization and may include the University's computer and internet networks and digital platforms.

# KEY DEFINITIONS: “NO PERSON...”



- **Student.** A person who is currently registered or enrolled at the University for credit or non-credit-bearing course work. For purposes of this Policy, a Student also includes a Claimant who is attempting to participate in the University’s Employment or Education Program or Activity through employment or enrollment.
- **Employee.** A full-time or part-time University faculty, staff, professional research staff, or post-doctoral fellow.
- **Participant.** A person who is not an Employee or Student but who has been hired, is seeking enrollment, or is otherwise attempting to participate in a University Employment or Education Program or Activity. Attempting to participate requires more than mere attendance at a University activity or athletic event.

- **Sexual Misconduct.** Referred to as “sexual harassment” in Title IX of the Education Amendments of 1972 and 34 CFR 106 *et seq.* (2020). Sexual Misconduct includes one or more of the following types of conduct:
  - Hostile Environment;
  - Quid Pro Quo;
  - Sexual Assault (Penetration) and (Sexual Touching);
  - Relationship Violence; and
  - Sex-based Stalking.



# KEY DEFINITIONS: SEXUAL ASSAULT



- Sexual assault includes Sexual assault (Penetration) and sexual assault (Sexual Touching).
- Sexual Assault (Penetration) is penetration of the vagina or anus, however slight, by a finger, object, penis, or tongue, without a person's consent; and oral penetration (mouth to genital contact or genital to mouth contact) without a person's consent.
- Sexual Assault (Sexual Touching) is nonconsensual or unwelcome touching – under or over the clothing – of the breasts, buttocks or groin, making another person touch any of these body parts, or the emission of ejaculate onto the clothing or body of another person for the purpose of sexual gratification.

# KEY DEFINITIONS: STALKING



- Stalking is engaging in a course of conduct directed at a specific person or persons based on sex, that would cause a reasonable person to fear for their safety or for the safety of others or to suffer substantial emotional distress. Stalking may include by telephone, mail, electronic communication, social media, or any other action, device, or method.
- A course of conduct is two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through a third party, follows, monitors, observes, surveils, threatens, intimidates, harasses, or communicates to or about a person, or interferes with a person's property by telephone, mail, electronic communication, social media, or any other action, method, device, or means.

# KEY DEFINITIONS: RELATIONSHIP VIOLENCE



- **Relationship Violence** includes dating violence and domestic violence.
  - **Dating violence** includes violence or physical harm, or threat of violence or physical harm, when committed by a person against their current or former intimate dating partner; or any attempt, conspiracy, or solicitation by a person to commit an offense involving violence or physical harm against their current or former intimate dating partner. Violence includes Sexual Assault (Penetration) and Sexual Assault (Sexual Touching).
  - **Domestic violence** includes violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit an offense involving violence or physical harm, when committed by a current or former spouse, intimate partner, or intimate cohabitant against another or by a person against another person with whom they share a child in common.

# KEY DEFINITIONS: QUID PRO QUO & HOSTILE ENVIRONMENT



- **Quid Pro Quo.** Quid Pro Quo occurs when a University Employee conditions the provision of a University aid, benefit, or service on a person's participation in unwelcome sexual conduct.
- **Hostile Environment.** Hostile Environment is unwelcome Sex-based conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's Employment or Education Program or Activity.

# SUPPORTIVE MEASURES



- **Non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the **Claimant or the Respondent** before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
- Such measures are designed to **restore or preserve equal access** to the University's Employment or Education Program or Activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, and/or to deter Sexual Misconduct.

# SUPPORTIVE MEASURES



- Supportive Measures may include but are not limited to:
  - Counseling
  - Extensions of deadlines or other academic course-related adjustments
  - Work or class schedule changes
  - Campus security or law enforcement escort services
  - Mutual no-contact orders
  - Changes in work or housing locations
  - Leaves of absence
  - Increased security
  - Monitoring of certain areas of the campus
  - Other similar measures.

- **Actual Knowledge.** The University has Actual Knowledge when the University's Title IX Coordinator or a Reporting Employee under Policy XXX has Notice of Sexual Misconduct or allegations of Sexual Misconduct.
  - If a Respondent who is also a Reporting Employee is the only person with Notice of the Sexual Misconduct or allegations of Sexual Misconduct, the University does not have Actual Knowledge.

# KEY DEFINITIONS: PARTIES AND WITNESSES



- **Claimant.** A Claimant is a person who is alleged to have experienced Sexual Misconduct. Referred to as “complainant” in Title IX of the Education Amendments of 1972 and 34 CFR 106 et seq. (2020).
- **Respondent.** A Respondent is an individual who is alleged to have committed Sexual Misconduct.
- **Witness.** An individual who has relevant information about the Sexual Misconduct allegations.



- **Safety Risk Assessment.** An individualized risk assessment based on the specific facts of one or more Incident Reports conducted to determine whether there is an immediate threat to the physical health or safety of a Student or other individual(s) arising from the allegations. The Office of Equity completes and Initial Safety Risk Assessment and then convenes a Safety Risk Panel to complete a Panel Safety Risk Assessment. If the Safety Risk Panel finds there is an immediate threat, the situation may be evaluated for Emergency Removal.
- **Safety Risk Panel.** A panel including the Title IX Coordinator, Office of Equity Executive Director, and the Appropriate Administrator convened to complete a Safety Risk Assessment.

# KEY DEFINITIONS: ADVISORS AND SUPPORT PERSONS



- **Support Person:** Students or employees participating in a disciplinary process may bring one person for emotional support.
  - Can be any “person that the student would like there for emotional support. However, a support person may not also serve as a witness.”
- **Process Advisor.** Any person, including an attorney, chosen by a party or the University, to advise and assist the party in the Investigation and/or hearing, including in conducting questioning of another party and witnesses on behalf of the party.
  - May be a parent, legal guardian, faculty member, USUSA Student Advocate, an attorney, or other person with whom a Claimant or a Respondent consults during a disciplinary proceeding
  - An advisor may not also serve as a witness.

- If there is no participating Claimant, a University-driven Investigation may be authorized following a Panel Safety Risk Assessment...if there is an immediate threat physical health or safety of a Student or other individual(s) arising from the allegations of Sexual Misconduct.
- If a University-driven Investigation is authorized, the Title IX Coordinator shall sign the Formal Complaint.
- The University-driven Investigation shall then proceed as outlined...

# NOTICE TO THE PARTIES



- **Notice of Allegations.** A written instrument notifying both parties that a Formal Complaint of Sexual Misconduct has been filed and outlining the allegations.
- **Notice of Emergency Removal or Administrative Leave.** A written instrument notifying the Respondent that they are being placed on Emergency Removal or Administrative Leave.
- **Notice of Hearing.** A written instrument notifying both parties of the date and time of the scheduled hearing.
  - Typically issued at the same time as the investigation report

# INFORMAL RESOLUTION



- Must be voluntary, and consented to in writing, by both parties
- An Informal Resolution may be facilitated via written communication, telephone, videoconferencing, and/or in-person meetings.
  - No in-person meetings unless consented to by the parties
- Either party may withdraw from the informal resolution process at any time
- Once completed, parties cannot withdraw
- Decision/agreement is binding
- Can involve sanctions or “other punitive disciplinary measures”
- Facilitator monitors compliance

# FORMAL INVESTIGATION



- Typically conducted by Office of Equity investigator, or external investigator
- Typically completed within 60 calendar days
- Equal opportunity for parties to present witnesses, evidence, fact and expert witnesses, and exculpatory and inculpatory evidence
- Evidence shared with Hearing Panel, Sanctioning Authority and TIX Coordinator at least 10 days prior to a hearing

# FORMAL INVESTIGATION



- Equal access (electronically) to the “Record” for both parties typically within 20 days of Formal Complaint
  - Evidence also shared with Advisors, but not support persons
  - Evidence may be restricted from downloading or sharing
- Parties have 10 business days from receiving the Record to “file a written Response to the Record outlining any new or additional evidence, including any evidence that may disprove relevant evidence in the Record”
  - Limited to 5 pages (excluding attachments); can include new evidence

# INVESTIGATION REPORT



- Investigation Report typically issued within 10 days of parties' Responses to the Record and at least 10 days prior to hearing
- Fairly summarize the investigation and outline all the evidence gathered during the investigation, both inculpatory and exculpatory.
- The investigator will consider Written Responses to the Record filed by the parties, if any.
- The Investigation Report will include the alleged policy violation(s) and a range of possible sanctions for each alleged violation in the event the Hearing Panel finds the Respondent to have violated this policy.
- However, the Investigation Report shall not reach a decision as to whether Respondent violated this policy.

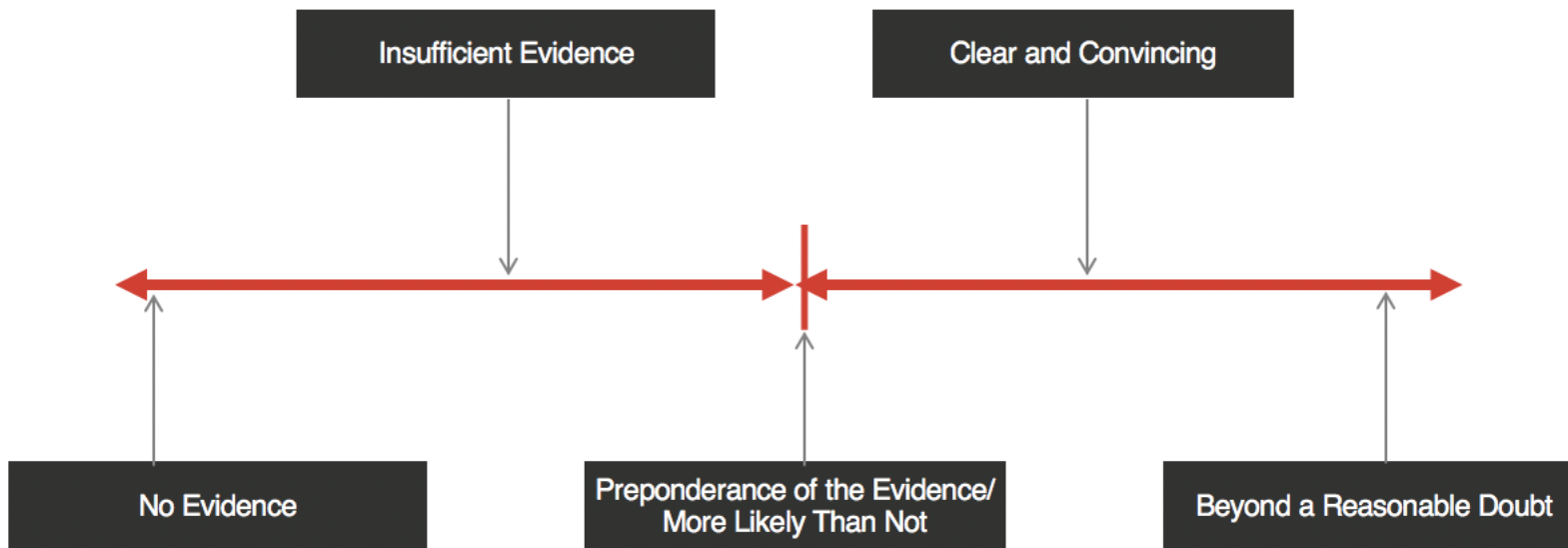


- Absent good cause, within 10 business days of the date the Investigation Report is issued, the parties shall:
  - Shall file a statement listing the numbered paragraphs in the Investigation Report that they agree are true, and the numbered paragraphs that they dispute;
  - Shall file a list of witnesses and exhibits in the Record they want the Hearing Panel to consider;
  - Shall file a list of questions they propose to ask the other party and investigator in the hearing; and
  - May file a written Response to the Investigation Report.
- For any paragraphs the party disputes, they shall outline why they dispute those paragraphs and cite any evidence or witness that supports their position with regard to those paragraphs.

# STANDARD OF EVIDENCE

- The University, through an investigator, has the burden to gather sufficient evidence for the Hearing Panel to determine whether, by a Preponderance of the Evidence, the Respondent violated this Policy.

## EVIDENTIARY STANDARDS



# ADDITIONAL ELEMENTS OF THE PROCESS

- Absent good cause, evidence not provided to the investigator by the close of the written Response to the Investigation Report period shall not be allowed in the hearing, and shall not be considered by the Hearing Panel in making its Determination as to whether Respondent violated this Policy.
- A Respondent is presumed not to have violated this policy until an Informal Resolution agreement has been made or a Determination that they have violated this policy by a Preponderance of the Evidence has been issued.
- Notice of Hearing issued simultaneously with Inv. Report

- **Hearing Officer.** A person given authority by the Hearing Panel to preside over the hearing. The Hearing Officer also serves as an advisor to the Hearing Panel on administrative procedures.
- **Hearing Panel.** A three-person panel assigned to review a Formal Complaint of Sexual Misconduct in a hearing and to determine whether Respondent violated this policy by a preponderance of the evidence.
- Absent good cause, a live hearing shall be set for within 5 business days of the date of the end of the written Response to the Investigation Report period. No party may waive the right to a hearing; however, neither party is required to participate in the hearing.

# HEARINGS: ATTENDANCE



- Who may attend:
  - Hearing Panel Members/Hearing Officer
  - University Legal Counsel;
  - Claimant;
  - Claimant's Process Advisor and/or Support Person;
  - Respondent
  - Respondent's Process Advisor and/or Support Person;
  - A University law enforcement officer;
  - The Title IX Coordinator or their designee;
  - The Sanctioning Authority or their designee;
  - Witnesses, including Expert Witnesses. Witnesses will be present only at the time of their testimony and will not be permitted to hear the testimony of other Witnesses.

- In person or via video conferencing
  - Parties must be able to see and hear each other throughout
  - Parties and witnesses should request video conferencing five days before the hearing
- The investigator, the Sanctioning Authority or their designee, and the Title IX Coordinator or their designee, shall attend and observe the hearing.

# HEARINGS: PRESENTING EVIDENCE



- Parties or Process Advisor may present opening statement
- Investigator may present opening statement
- Parties have equal access to present relevant evidence and witnesses
- Parties may waive rights to opening statement, or presenting witnesses or evidence

# HEARINGS: QUESTIONING



- Members of the Hearing Panel and each party shall be permitted to ask relevant questions and follow-up questions of the parties and Witnesses, including those that challenge Credibility.
  - Can ask investigator questions relevant to the evidence gathered during the investigation, including information provided by Witnesses.
- Questioning occurs by the panel, or the parties' advisors; never by the parties
- No requirement for parties to submit to questioning, but failure to do so means. The Hearing Panel cannot rely on any statement made by the party
- Relevance determinations by the panel



# THE DETERMINATION



- Each alleged incident of Sexual Misconduct;
- A description of the procedural history taken by the University from the receipt of the Formal Complaint through the Determination;
- Findings of Fact supporting the Determination;
- Conclusions regarding the application of this Policy to the facts;
- A statement of, and rationale for, its decision with regard to each allegation;
- Any Sanction(s) the University plans to impose on the Respondent; and,
- Whether and/or what Remedies the University will provide the Claimant.
- Absent good cause, within 20 business days of the hearing, the Hearing Officer shall electronically issue the written Determination to the parties, to the investigator, to the

# HEARINGS: SANCTIONING



- *Disciplinary or punitive action taking against a Respondent after they are found by the Hearing Panel to have violated this policy.*
- Sanctioning Authority: A University Employee or office that has the authority to determine appropriate Sanctions.
  - For Students, the Sanctioning Authority is the Director of Student Conduct and Community Standards.
  - For faculty, the Sanctioning Authority is the Provost.
  - For staff, the Sanctioning Authority is the Respondent's supervisor.
- Hearing Panel dismissed
- Hearing Officer presides over sanctioning portion

# APPEALS: KEY DEFINITIONS



- **Appeal.** A request by a party to have a Determination and/or a Sanction be overturned or modified.
- **Appeal Decision.** A written decision of an Appeal Panel granting or denying an appeal of a Determination and/or Sanction.
- **Appeal Panel.** A three-person panel made up of different members than the Hearing Panel assigned to review and decide an appeal of a Determination and/or a Sanction.

- Typically have 10 days to appeal
- An appeal on the Determination shall be limited to one or more of the following alleged procedural errors:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the Determination of whether Respondent violated this Policy was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

- An appeal on the Sanction shall be limited to one or more of the following alleged grounds:
  - The Sanctioning Authority had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the Sanction;
  - The Sanction is not proportionate to the violation.

- Dismissal of Appeal
  - Not Timely or does not meet standard for Appeals
- Response to Appeal
  - 10-day timeframe
- Appeal Decision
  - As to the Determination: May affirm, modify, overturn or remand; only modify, overturn, or remand if procedural error created substantial prejudice
  - As to the Sanction: May affirm, modify, overturn or remand; only modify, overturn, or remand if SA had Conflict of Interest or Bias that affected sanction, and/or Sanction is disproportionate

# CONCURRENT LAW ENFORCEMENT INVESTIGATIONS



- New Regulations

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

# CONCURRENT LAW ENFORCEMENT INVESTIGATIONS



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



# THE INVESTIGATION REPORT

UK

YOUR UNIVERSITY  
LOGO HERE

## SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

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

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University of Knowledge

Date of Report:

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

### **Executive Summary:**

*(Summarize findings here.)*

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### **Procedural History:**

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

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

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

### **Involved Parties:**

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

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

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

# THE INVESTIGATION REPORT



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

# CONSENT CONSTRUCT

- 
- Force
  - Incapacitation
  - Consent
  - Case Study

# KEY DEFINITIONS: CONSENT



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

# CONSENT IS...



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

# OVERVIEW OF THE 3 QUESTIONS



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

# KEY DEFINITIONS: FORCE



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



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

# USU POLICY ON INCAPACITATION



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

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

# SOME FACTS ABOUT ALCOHOL



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

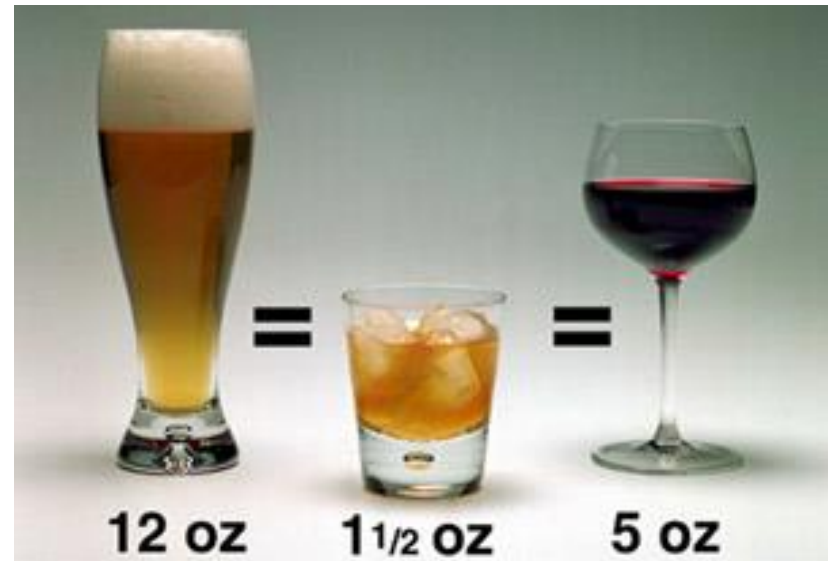
# COMMON INTOXICATION FACTORS



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

# BAC/BAL

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



- .05-.07: Buzzed; feeling of well-being; minor memory and coordination impairment.
- .07-.09: Slight impairment of coordination, vision, reaction time; judgment and self-control reduced.
- .10 -.125: Significant impairment of coordination, reaction times, and judgment; possible slurred speech.
- .13-.15: Severe motor impairment; blurred vision, loss of balance; judgment and perception severely impaired.

- .16-.19: “Sloppy drunk;” increased negative feelings; possible nausea; blackout possible.
- .20: Dazed and disoriented; possible difficulty standing or walking; possible nausea and vomiting; blackouts possible.
- .25: Severe mental, physical, and sensory impairment; nausea and vomiting – asphyxiation concerns; blackouts possible.
- .35: Possible coma; level of surgical anesthesia.
- .40: Coma possible; death possible due to respiratory arrest.



# CREATE A TIMELINE



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

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

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

# CONSENT: RULES TO REMEMBER



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