

TITLE IX INVESTIGATIONS AND REPORTS

Best Practices in an Ever-Changing Landscape

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The Fundamentals

ALL investigations should be:

- Prompt
- Thorough
- Impartial

Prompt

- TIX regulations require “reasonable” promptness
- What does your policy say?
- What are the underlying principles?
 - **Avoid undue stress to parties from prolonged process**
 - **Minimize loss or fading of relevant evidence**
 - **Send a professional and caring message to the community**

When “Prompt” is a Challenge

- Do not pretend not to notice or keep your fingers crossed
- Set expectations with parties and investigator
- Check in with the investigator
- Check in with the parties
- Document the reason for the delay
- Have investigator document reason for delay

Thoroughness

Know your scope and be thorough within it.

What is scope?

The scope of the investigation is determined by the allegations in the complaint. What evidence is required in order to determine whether the conduct alleged by the Complainant is more likely than not to have occurred?

Know What Policies Are Implicated

What evidence is required in order to determine whether one or more policies have been violated?

The answer to this question is in the policy language.

Note: Just because the investigator will not determine whether there is a policy violation does NOT mean the investigator does not need to review the relevant policy/policies.

An interview is thorough when...

... it reflects the interviewee's perspective in as much detail as possible and includes all the relevant information that individual can provide.

Mastering the Thorough Interview

- Plan on more than one interview with each party
- Ask general questions first that enable the party or the witness to control pacing
- Listen carefully, express interest but do not “converse”
- Ask follow up questions that elicit details (without being overly aggressive)
- Ask for clarification (but do not express irritation or impatience about a lack of clarity)
- Ask parties and witnesses about witnesses
- Ask about documents and electronic material, photos, videos, etc.

Listening

Research shows us that when an interviewee observes that the interviewer is not going to “take over, talk, interrupt, maneuver or manipulate” what he/she/they say, the interviewee thinks more clearly, has better recall, and is better equipped to access their own solutions to the problem being expressed.

-- *Time to Think*, Nancy Kline (1999)

Some Very Specific Tips – 1

- **Ask each party to describe what interactions they had with the other party – if any – prior to the alleged incident. Also ask when their most recent communication or interaction was.**
- **Make sure to get facts from each party about what they were doing immediately prior to the alleged incident. (This is particularly important if there is an allegation of incapacitation.)**
- **Try to create a timeline during the interview with each party. Ask each party about when things happened and for how long they were happening. Also ask what enables them – or might enable them – to answer these questions (if they can). Are there texts? Photos?**
- **If the dispute is about whether a sexual assault occurred, at night, ask questions about what the lighting was.**

Specific Tips – 2

- **Have each party describe any positions they were in, especially if sexual assault is at issue, in detail.**
- **Make sure you have a visual of the space in which the alleged incident occurred and ask about who might have seen or heard anything.**
- **If consent is at issue, make sure you understand the facts or observations upon which each party bases their perspective on whether consent was or was not present.**
- **If incapacitation is alleged, make sure you obtain the information that will enable the decision-maker to determine whether a policy violation occurred. (Remember to explain amnesty policy.)**

Specific Tips –3

- **Always ask each party about what they did and to whom they spoke, during the 24 hours after the alleged incident.**
- **Ask each party with whom they have spoken about the alleged incident – at any point in time – and get those details.**
- **Pay attention to whether people to whom you think the party might have spoken are not on the list (e.g., a roommate) and find out why (without implying suspicion or judgment).**

Even if Not Assessing Credibility, Research Tells us to:

- Note discrepancies between the accounts a party gives.
- Present contradicting evidence after the party has given their account and ask the party to help you understand the discrepancy.
- Note whether the party is speaking from memory or telling you what the party “typically” does.
- Note whether there is ambiguity in the language a party uses when denying an allegation.

Liens, et al (2012); Evans, Michael, Meissner & Brandon (2013) Meissner & Lyles (2019)

Impartial – What Does This Mean?

- *Keeping an open mind and being respectful*
- *Allowing each party an opportunity to walk you through what they consider the relevant events before getting into the specifics*
- *Providing the parties with the details of each other's accounts*
- *Avoiding assumptions*
- *Being aware of confirmation bias*
- *Giving equal extensions of time/flexibility*

Feedback from Attendees re: Interviews #1

Complainant interview challenges:

- Hesitation and general unwillingness to officially report – especially after learning of hearing requirement
- Desire not to name the person or to proceed anonymously
- Desire for sanctions without a process
- Confusion about what is defined as sexual misconduct
- Getting the complainant to hear (and accept) the amount of time the formal process will take
- Confusion about what support is realistically available and how the environment can be made to feel safe for the complainant

Feedback from Attendees #2

Respondent interview challenges:

- The respondent wants to meet immediately because they are anxious
- The respondent does not recall the event or recalls it completely differently
- The respondent is in complete disbelief that their actions are described as sexual misconduct or sexual assault
- The respondent is extremely defensive, highly emotional, and distrustful of presumption of innocence
- Getting the respondent to hear (and accept) the amount of time the formal process will take
- Unaware of resources; it's difficult to get this information to them

The Investigation Report

- Confirm what the report should contain, which may vary depending upon whether the alleged conduct falls under Title IX.
- Review all the evidence before starting to write the report.
- Remember that your primary objective is to present the relevant evidence in a clear, unbiased, and complete manner so that the decision-maker can determine whether a policy has been violated.

Initial Section of Report (Process and Scope)

- Date of complaint, allegations, notice to parties (including re: advisors and presumption of innocence), reference to policies
- Interviews (with dates); explain any unsuccessful attempts to interview as well
- Documents and other materials reviewed
- Documentation of when parties were given the opportunity to review all the “directly related” evidence and any comments they provided

“Directly Related” Evidence

Err on the side of inclusivity **but** remember that some evidence is “per se” irrelevant:

- **Complainant’s sexual history or experience – with a couple of specific exceptions**
- **personal medical or other private identifying information**
- **communications subject to a legal privilege**

And some information may be genuinely irrelevant to the allegations.

Policy Section

- Set out relevant policy sections.
- Include definitions!

Summary of the Relevant Evidence – Objectives

- Identify undisputed facts
- Organize the evidence by time or party (or both)
- Give the decision-maker a clear description of each party's account regarding each alleged act and the other's account of that act
- Enable the decision-maker to understand what is corroborated by witnesses or documents

Some Tips

- If you can afford to wait a day or so between finishing the investigation and summarizing the relevant evidence – do so. It helps to be “out of the trees” a bit so that you can present the forest.
- Consider the evidence as a whole and develop the outline that will convey it best (e.g., are there a lot of undisputed facts that can be grouped in an initial “Background and Context” section?)
- Put yourself in the position of the decision-maker. Will it be easier to absorb the information if presented chronologically but also broken down into sections containing the different accounts?

EXAMPLE – 1

1. Parties' Interactions Prior to September 21, 2021

Undisputed Facts

Complainant's Account

Respondent's Account

Witness Accounts

2. Parties' Interactions at Witness A's Party (9-11 PM)

Undisputed Facts

Complainant's Account

Respondent's Account

Witness Accounts

EXAMPLE – 2

3. Parties' Interactions in Respondent's Dorm Room

Undisputed Facts

Complainant's Account

Respondent's Account

4. Parties' Communications on September 22, 2021

Undisputed Facts

Complainant's Account

Respondent's Account

Witness Accounts

Report Language

- If you have exact quotes include them.
- Avoid adjectives (unless a party or a witness used them).
- Err on the side of overusing “Complainant” and “Respondent” references; pronouns can be confusing.
- Don’t worry about making the writing interesting.

Credibility Assessments

- If asked to make these do not conflate them with expressing an opinion as to whether a policy violation occurred.
- If asked to make a recommendation as to whether a policy violation occurred, be precise about what evidence supports it to avoid a party's subsequent allegation that the decision-maker "rubber stamped" the investigator's recommended finding.

Proofing

- Do it yourself, more than once.
- Have someone else proof it if possible.

Thoughts from Participants

Any investigation report-related comments, anecdotes, tips or questions?