



Association of
Title IX Administrators

Title IX Foundations

Title IX Conference – Day 1

West Virginia School of Osteopathic Medicine

January 30-31, 2024

WELCOME!

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- The ATIXA Event Lobby can be accessed by the QR code or visiting www.atixa.org/atixa-event-lobby in your internet browser.
- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

The content and discussion in this training will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

Title IX Compliance Oversight

Title IX and Equity

- Title IX is a gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
 - Equity focuses on providing support and resources to reduce disparities in access to the education program
 - Title IX seeks to remedy the inequities sexual harassment and sex discrimination create

Title IX Compliance Oversight

Who is the Title IX Coordinator (TIXC)?

- Role mandated by Title IX regulations
- Oversees institutional Title IX compliance
- Responsibilities fall into two categories:
 - Responding to reports or complaints of sexual harassment and sex discrimination
 - Leading efforts to ensure gender equity across the entire institution



Title IX Compliance Oversight

Responsibilities:

- Recruit, supervise, and train TIX team
 - Must post training materials on website
- Manage policy and procedures prohibiting sex discrimination and harassment
- Oversee complaint resolution process and program equity
- Assure institution acts reasonably to stop, prevent, and remedy
- Track systemic issues or patterns
 - Take remedial action to prevent recurrence
- Assess compliance efforts and program effectiveness

Title IX Compliance Oversight

Responsibilities:

- Create and disseminate annual compliance report
- Update institutional leadership on Title IX issues
- Maintain records
- Liaise with institutional legal counsel
- Develop and maintain accurate web and print-based Title IX publications
- Respond to government inquiries

Essential Compliance Elements

The requirement to **Stop, Prevent,** and **Remedy** guides Title IX Coordinators in their equity and compliance work

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, on both individual and institutional levels

Title IX Compliance Oversight

- Institution must act **reasonably in light of known circumstances** to stop, prevent, and remedy
- Institutional responses must not be **deliberately indifferent** to known sex discrimination or sexual harassment
- An institution is deliberately indifferent when:
 - The institution has **actual notice** of harassment,
 - The harassment is **severe, pervasive, and objectively offensive**, and
 - The indifference is **systemic** in nature

Title IX Scope and Definitions

Review: Scope

- Education program or activity in the United States
- Control over the Respondent
- Control over the context of the harassment
- Applies to both student and employee complaints



Title IX: Scope

Sex Discrimination

- Inequitable Treatment
 - Sex characteristics
 - Sex stereotypes
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
- Exclusion from participation

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
 - Rape
 - Fondling
 - Incest
- Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking

Retaliation

Review: Sexual Harassment Definitions

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



Definitions: Consent

- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- ATIXA's Definition:
 - Informed, knowing, and voluntary (freely given)
 - Active (not passive)
 - Creates mutually understandable permission regarding the conditions of sexual activity
 - No means no, but nothing also means no; Silence and passivity do not equal consent
 - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
 - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
 - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

Review: Definitions

- Retaliation
- Common additional offenses
 - Sexual Exploitation
 - Harm/Endangerment
 - Discrimination
 - Intimidation
 - Hazing
 - Bullying



Activity: Does Title IX Apply?

Blake & Tamika

- Tamika is a graduate student serving as a graduate teaching assistant for a first-year chemistry course
- Blake, a student in the course, has visited Tamika's office hours each week to ask questions and seek help with the course materials
- With the midterm coming up, Tamika offered Blake her phone number so he could message her with questions and allow her to respond more quickly than email
- After the midterm, Tamika continued texting Blake and they often talked about personal things
- Tamika started flirting with Blake and he flirted back

Blake & Tamika

- After a few weeks, Tamika asked Blake to get a drink with her after class
- Blake declined
- Over the following few weeks, Tamika sent Blake several sexually explicit text messages, including a few partially nude pictures of herself
- Blake tried to tell Tamika he wasn't interested, but then gave up on responding
- Eventually, Blake blocked Tamika
- Tamika then resorted to winking at Blake during class and making thinly veiled sexual comments in front of Blake's classmates
- Tamika then used her school email account to ask Blake to come to her office hours for a surprise, implying his grade would suffer otherwise

Sexual Harassment Definition

- Conduct on the basis of sex, or that is sexual in nature, including:
 - **Quid Pro Quo**
 - An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service
 - under the recipient’s education program or activity
 - explicitly or impliedly
 - conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct.

Sexual Harassment Definition

- Conduct on the basis of sex, or that is sexual in nature, including:
 - **Hostile Environment**
 - Unwelcome conduct
 - determined by a reasonable person
 - to be so **severe, pervasive, and objectively offensive (SPOO)**
 - that it effectively denies a person equal access to the recipient's education program or activity.

Amina & Darius

- Amina and Darius are two first-year students who met during their institution's Welcome Week festivities
- In October, Amina invited Darius to come with her to a play on campus
- During the show, Darius tried to grab Amina's hand, which was resting on her leg
- Amina pulled her hand away, but Darius left his hand on her thigh for awhile
- Amina froze and did not remove Darius's hand
- At one point during the play, Darius leaned over to try and kiss Amina, but Amina moved so Darius could not reach her mouth
- He kissed Amina on the cheek instead

Amina & Darius

- Then Darius put his arm around Amina and squeezed her shoulder, pulling her into him
- After the play, Amina and Darius walked back to Amina's residence hall
- Darius put his arm around Amina's waist during their walk, again pulling her in closer to him
- When they reached Amina's residence hall, Darius pulled Amina closer to try and kiss her again
- Amina pulled him in for a quick hug, said goodbye, and bolted for the door

Fondling Definition

- The touching of the private body parts of the Complainant (breasts, groin, buttocks),
 - For the purpose of sexual gratification,
 - Without the consent of the Complainant,
 - Including instances where the Complainant is incapable of giving consent because of their age or because of temporary or permanent mental impairment

Sexual Harassment Definition

- Conduct on the basis of sex, or that is sexual in nature, including:
 - **Hostile Environment**
 - Unwelcome conduct
 - determined by a reasonable person
 - to be so **severe, pervasive, and objectively offensive (SPOO)**
 - that it effectively denies a person equal access to the recipient's education program or activity.

Daveed & Calvin

- Daveed reported an incident involving a former partner, Calvin, to his Resident Assistant
- Daveed reported that he and Calvin had been dating on-and-off for a few months but broke things off a few months ago
- Since then, Calvin has been spreading rumors that Daveed has an STI and is very promiscuous
- Daveed has been working with the Title IX office to try and resolve the situation since the RA followed their mandatory reporting obligations and submitted a report

Daveed & Calvin

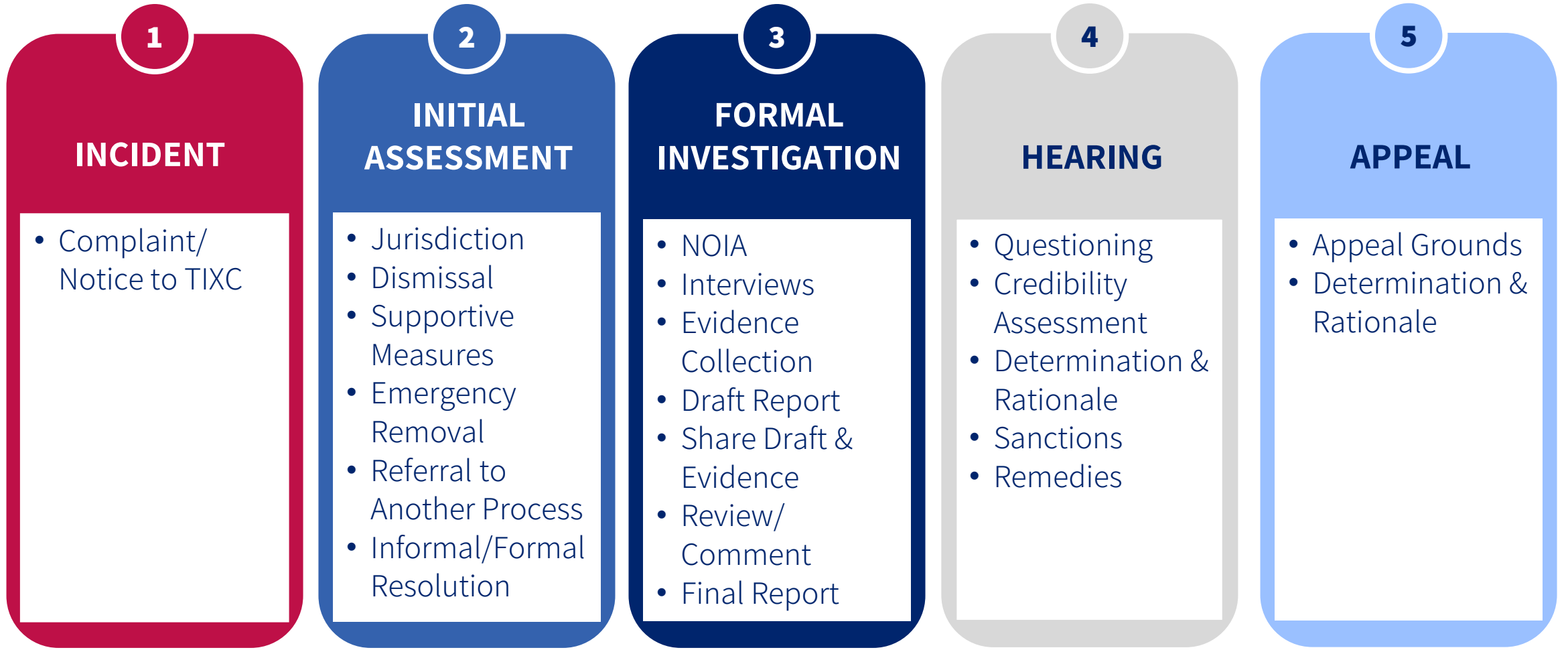
- Calvin's friend Kristina is on the student programming board's executive team and runs the club's elections
- Daveed is a club member and wants to be on the executive board next year
- Daveed is now reporting that Kristina has been talking to the executive board about his Title IX report and that Daveed is not trustworthy enough to be on the executive board
- Daveed feels like he can't file a formal complaint, or he won't get a fair shot at being elected

Retaliation Definition

- Retaliation means intimidation, threats, coercion, or discrimination against any person by a(n):
 - Student, employee, institution, or person authorized by the institution to provide some sort of aid, benefit, or service, AND
 - For the purpose of interfering with any Title IX right or privilege OR
 - Because the person has:
 - Made a report or complaint,
 - Testified, assisted, or participated or refused to participate in any Title IX process.

Formal Grievance Process Overview

Title IX Grievance Process Overview



Title IX Grievance Process Overview

Prompt Resolution

- Complete without undue delay
- Title IX regulations do not define “prompt”
 - 60 business days is a good guide
- Grievance process may take longer than expected
 - Anticipate, mitigate, and document delays
 - Communicate with parties regarding delays
- Must provide anticipated timelines for each proceeding

Title IX Grievance Process Overview

Equitable Resolution

- Treat all parties equitably
- Ensures that all parties have opportunity to fully participate in the grievance process
- Make certain that all Title IX team members operate without bias and/or conflict of interest



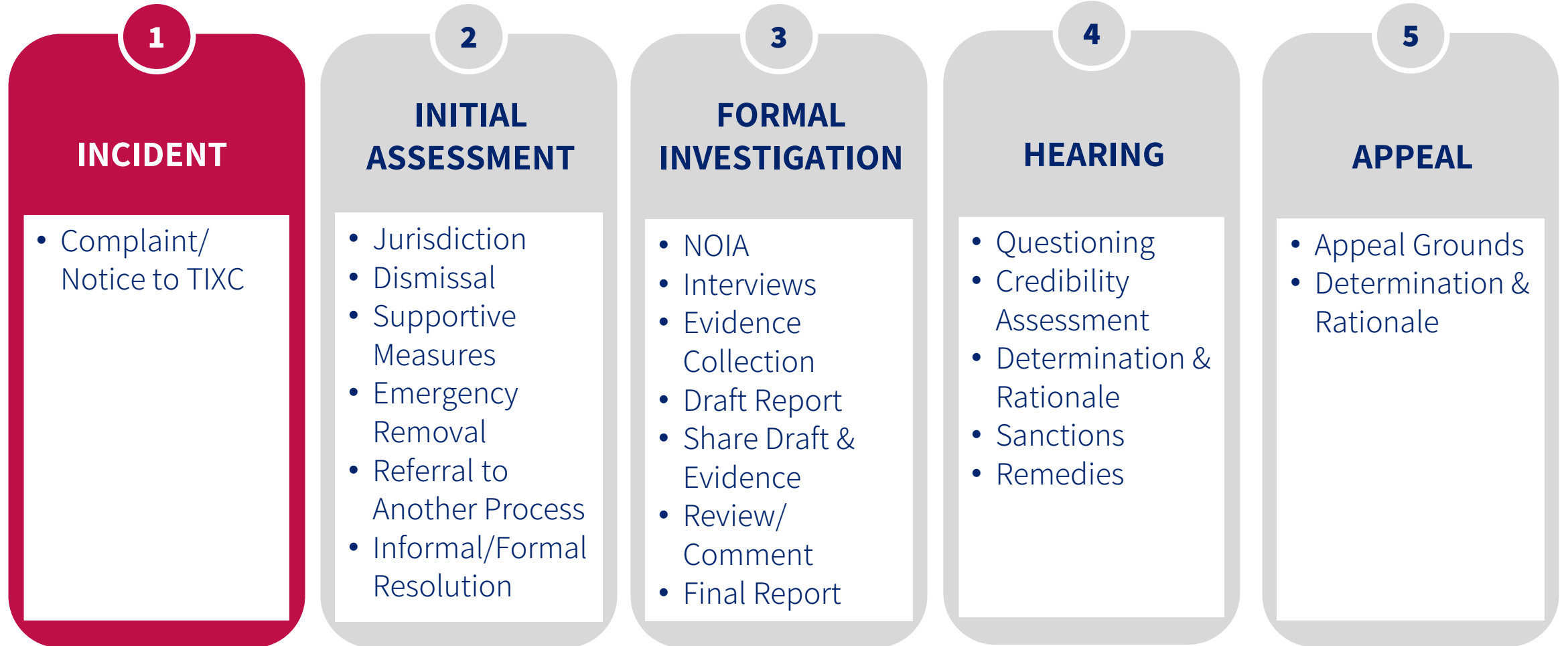
Title IX Grievance Process Overview

Rights of the parties during the grievance process:

- Present witnesses
- Present inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Be accompanied by Advisor of their choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review directly related evidence and investigation report

Reports, Complaints, and Notice to the Institution

When is the Institution “On Notice?”



Point Person for Reports and Complaints

- TIXC (or designee) receives all reports or complaints regarding sex/gender harassment, misconduct, and discrimination
 - The TIXC oversees institutional TIX efforts
 - Recipient may designate multiple entry points for receipt of information
 - Deputy Title IX Coordinator(s)
- TIXC contact information must be included within:
 - The institution's website
 - All handbooks or catalogs provided to applicants, students, employees, and unions

When is the Institution “On Notice?”

The institution is “**on notice**” of sexual harassment when a report is made to:

- **TIXC**, or
- An **Official with Authority (OWA)**: any official who has authority to institute corrective measures on behalf of the Recipient
 - ATIXA recommends including OWAs by role in policy

Mandatory Reporting

- ATIXA recommends that **all employees** are **mandated reporters** (except for **confidential resources**) under Title IX
 - Ensures information gets to those trained to respond
 - Enables institution to best support individuals
 - Supports tracking patterns
 - Provides for simpler, uniform, and universal training and reporting
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

Reporting

Confidentiality vs. Privilege vs. Privacy

1

CONFIDENTIALITY

Those who receive reports from students (and sometimes employees) and need not report to the TIXC

2

PRIVILEGE

A legal obligation, such as an attorney giving advice in an attorney/client relationship or clergy providing pastoral advice

3

PRIVACY

Only disclosing the allegations to those who need to know, but cannot guarantee confidentiality

Report vs. Complaint

A **report** is different than a **formal complaint**:

- **Report**

- Notifies the TIXC of an incident and
- Obligates the TIXC to offer supportive measures and explain the process

- **Formal Complaint**

- Written request to initiate an investigation
- Physical document or electronic submission from Complainant
 - OR signed by TIXC
- Alleging sexual harassment
- Complainant must be **participating or attempting to participate** (P/ATP)

Report vs. Complaint

- Online reporting form
- Anonymous reports
- Requests for confidentiality
- Take all reasonable steps to follow the Complainant's wishes
 - Institution must respond effectively and prevent harassment of other students or Complainant
- If TIXC takes no formal action in response to a report, document rationale

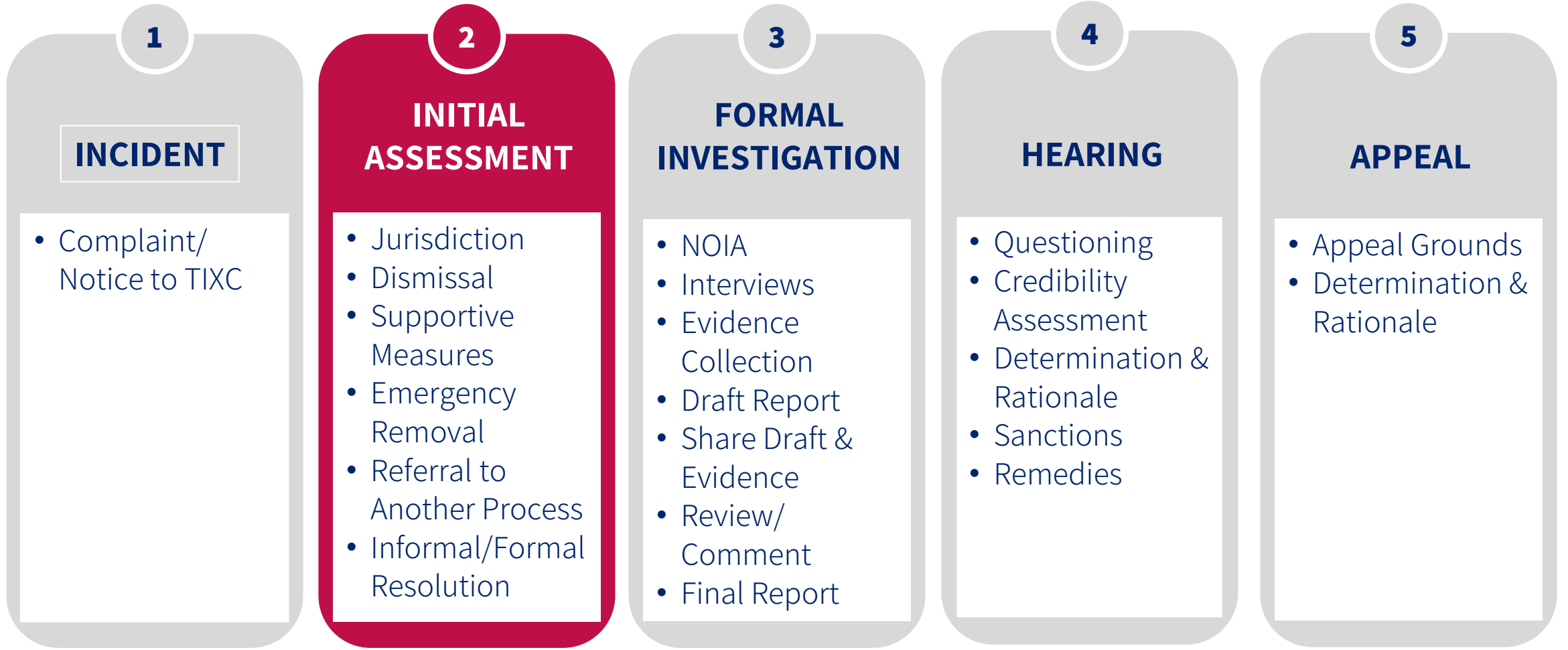
Interacting with Law Enforcement

- TIXC must assist Complainants who wish to report to law enforcement
- State laws, local practices, and MOUs may facilitate information sharing with law enforcement
 - Law enforcement may not be aware of federal requirements under Title IX
 - Develop a reporting and information-sharing protocol



Initial Assessment

Initial Assessment



Initial Assessment

- TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:
 - Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment?
 - Who is the Complainant?
 - Who is the Respondent?
 - Does the institution have control over the context of the alleged harassment?



Initial Assessment

- **Yes, or Arguable:** move forward with Title IX grievance process
- **No:** determine whether an alternate policy or process applies
 - Dismiss the complaint under Title IX
 - Document the rationale
 - Refer to other process



Outreach and Intake

- After receiving a report, TIXC (or designee), should always reach out to the Complainant
 - Best practice and regulatory requirement
- **Outreach** includes:
 - Introduction to Title IX and staff
 - Reason for the outreach
 - Offer to meet/speak over the phone; include right to Advisor
 - Available resources and resolution options, including how to file formal complaint
 - Discuss supportive measures and resources
 - Explain options to report to law enforcement
 - Follow up in writing with resources and information

Outreach and Intake

- **Intake** includes:
 - Setting the table
 - Having written materials to reference and for parties to take with them
 - Follow up with an email containing these materials, too
 - Include access to medical care, including evidence preservation
 - Exploring facts, but not interviewing
 - Needed for initial assessment and Clery timely warning
 - Discussing Supportive Measures
 - Discussing Complainant's options
 - Answering questions
 - **DO NOT** answer the question “What should I do?”

After Outreach and Intake

- Consider if new information affects jurisdictional assessment
- Implement any requested supportive measures and/or remedies

If formal complaint is filed:

- Determine whether to dismiss or proceed with formal investigation
- Consider whether **emergency removal** is warranted
- Evaluate whether complaint is appropriate for potential **Informal Resolution**

If no formal complaint is filed:

- Determine whether TIXC needs to sign a formal complaint
- Consider whether **emergency removal** is warranted

Signing a Formal Complaint: PPTVWM

In limited circumstances, a TIXC should sign a formal complaint even if the Complainant declines to do so.

Factors that likely indicate an ongoing risk of harm include:

- **P**attern
- **P**redation
- **T**hreat
- **V**iolence
- **W**eapons
- **M**inors

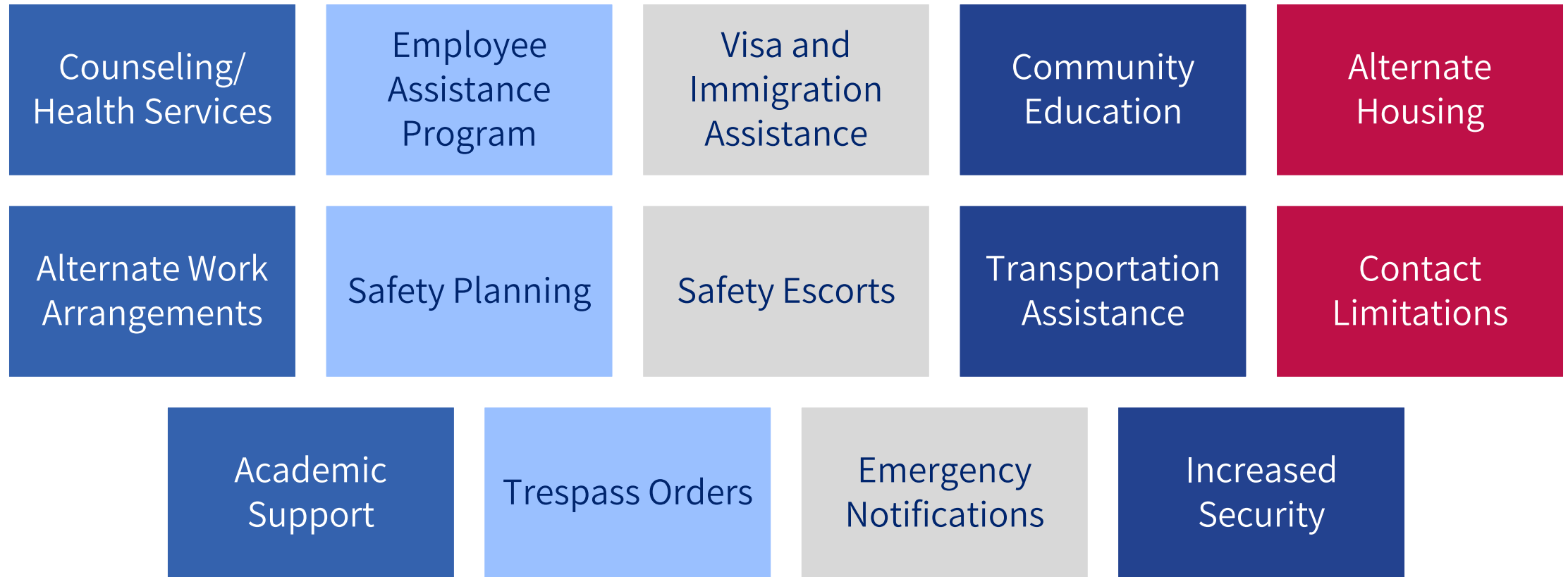
Other Considerations for TIXC Signing a Formal Complaint

- Employee Respondent
- Complainant who is not P/ATP

Supportive Measures

- Provided to parties throughout the process:
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
 - At no cost to the party
- Publish the range of supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with disability services when appropriate
- If not provided, document the rationale for refusal

Supportive Measures



Emergency Removal

Emergency Removal:

- Imposed upon student Respondents on an emergency basis only
- Individualized safety and risk analysis
 - Immediate threat exists to the physical health or safety of any student or other individual
 - The threat arises from the allegations of sexual harassment
- Respondent entitled to immediate notice and opportunity to challenge



Administrative Leave

- May remove a non-student employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal of a student Respondent



Mandatory Dismissal

TIXC must dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
 - No control over the context
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a formal complaint, a Complainant is not P/ATP
 - AND the TIXC determines they do not need to sign a formal complaint

Discretionary Dismissal

The TIXC **may** dismiss the complaint (or a portion of it) at any time prior to a determination, if:

- Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any portion thereof
- Recipient no longer employs or enrolls Respondent
- Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

Dismissals

- Must promptly notify parties of the dismissal
- Notify parties that a dismissal may be appealed and include appeal information
 - Appeal Decision-maker(s) must be trained; must not have been involved in the complaint so far
- Institution may, and often will, address reported behavior under other applicable policy

Informal Resolution

- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for employee-on-student harassment
- IR is not defined by regulations
- At discretion of TIXC, at any time prior to a final determination
 - Likelihood of resolution
 - Power dynamics
 - Goals and motivation of the parties to participate
 - Complexity and timing of the complaint
- IR facilitators must receive training, be free of bias or conflicts
 - ATIXA recommends IR Facilitators not serve in any other roles

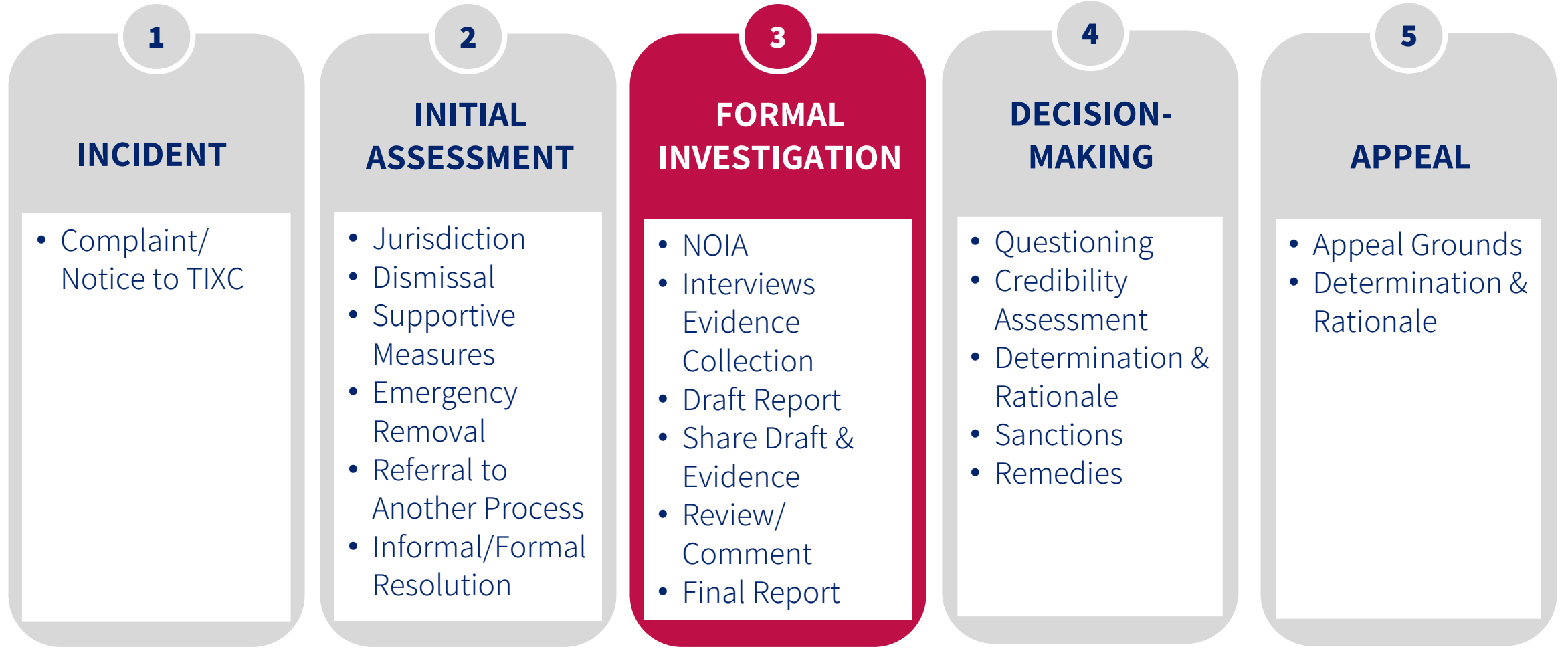
Informal Resolution

- Procedural requirements:
 - Formal complaint
 - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
 - Parties' voluntary, written consent
 - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time



Investigation

Investigation



Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment & Jurisdiction Determination
3. Determine Basis for Investigation
- 4. Notice of Investigation and Allegations (NOIA)**
- 5. Establish Investigation Strategy**
- 6. Formal Comprehensive Investigation**
- 7. Draft Investigation Report**
- 8. TIXC Draft Report & Evidence Review**
- 9. Parties Draft Report & Evidence Review**
- 10. Final Investigation Report**



Step 4: Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) letter is sent to all parties simultaneously in writing
- The NOIA includes:
 - Notice of the allegations and known details, such as identities or the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options

Step 4: Notice of Investigation and Allegations

The NOIA must outline the parties' rights in the Formal Grievance Process:

- To present witnesses, including expert witnesses
- To present inculpatory and exculpatory evidence
- To freely discuss the allegations
- To be accompanied by an Advisor of their choice
- To receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- To review all relevant and directly related evidence before the investigation report is finalized

Step 4: Notice of Investigation and Allegations

The NOIA must also include:

- Presumption that Respondent is not responsible
- Include or reference current policy and procedures
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise or allegations change during the investigation

Step 5: Establish Investigation Strategy

Investigator(s) consult with TIXC to strategize and plan the investigation:

- Elements of the specific policy provision(s) alleged to have been violated
- Challenges with the type of complaint and the parties involved
- Preliminary undisputed and disputed facts and their significance
- Initial witnesses and interview order
- Other types of possible evidence and the plan to acquire such evidence
- Anticipated obstacles and obstructions
- A working timeline for the investigation

Step 5: Establish Investigation Strategy

- Planning considerations:
 - Process delays
 - Coordination with law enforcement
 - Interview sequencing
 - Evidence collection
 - Anticipate obstacles/obstructions
 - Counter-complaints
 - Sharing information with parties and witnesses during the investigation

Process Delays

- Investigations must be completed within a reasonably prompt timeframe; avoiding undue delays
 - Investigations must proceed during academic breaks
 - Investigators should consult with TIXC if circumstances cause more than a short process delay
- Provide parties with written notice and rationale for any delays
- Parties may request reasonable extensions on a case-by-case basis
 - Grant or deny extensions equitably
 - Extensions must be documented

Coordinating with Law Enforcement

- Law enforcement may also be investigating one or more of the allegations in the Title IX investigation
- Law enforcement may request that the institution pause or stop its investigation; however, the Title IX investigation cannot be unreasonably delayed
- Pausing for a reasonable time to permit law enforcement to gather evidence is permissible
- Criminal investigation cannot substitute for the Title IX investigation



Step 6: Formal Comprehensive Investigation



THOROUGH



RELIABLE



IMPARTIAL



PROMPT



FAIR



EQUITABLE

Party and Witness Investigation Concerns

Confidentiality vs. Privilege vs. Privacy

1

CONFIDENTIALITY

Those who receive reports from students (and sometimes employees) and need not report to the TIXC

2

PRIVILEGE

A legal obligation, such as an attorney giving advice in an attorney/client relationship or clergy providing pastoral advice

3

PRIVACY

Only disclosing the allegations to those who need to know, but cannot guarantee confidentiality

Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
- “Of choice” truly means anyone
- Investigators may establish participation ground rules, if applied equitably
- Parties may request that the institution provide an Advisor for hearing
 - Institutions may choose to appoint earlier in process
- Advisors may ask questions of the other party and any witnesses on behalf of the party they advise during live hearings



Pre-Interview Planning

- Before scheduling interviews, consider:
 - Interview location
 - Interview scheduling constraints
 - Interview participants
 - Interview preparation
- Must provide written notification to parties with sufficient time to prepare
 - Date, time, location, participants, and purpose
- Cannot mandate participation in interviews
- It can be beneficial to conduct interviews in person, when possible, but videoconferences are common
- Investigator should always prepare initial questions in advance, but remain flexible

Building Rapport

- GOAL: Interviewee trusts that you are neutral and impartial
- Investigators can help set the tone for a productive interview
- Maintain professionalism
- Provide transparency about expectations and the process
- Balance neutrality with compassionate approach
- Ask questions in a straightforward, non-judgmental manner
- Follow up in a timely manner, if necessary
- Use a trauma-informed approach to working with all parties and witnesses

“The Spiel”

- Establishing rapport creates a conducive interview environment
- “The Spiel” helps an interviewee to understand the Investigator’s role and the process

- Investigator introduction and role
- Purpose of investigation
- Role of the Advisor
- Interview questions
- Notetaking practices
- Commitment to privacy
- Witness-specific information
- Post-interview steps
- Interview expectations
- Relevant policies
- Acknowledge difficulty
- Retaliation reminder

Questioning Considerations

- An interview is a conversation designed to elicit information in a non-accusatory manner
- Start with broad questions, but focus on timelines and details as well
- Explore all gaps in information; answer all questions
- Ask purposeful questions:
 - What do I need to know?
 - Why do I need to know it?
- Use policy definitions to inform questions
- Avoid unnecessary repetition or traumatic re-triggering
- Choose or blend effective questioning strategies/methodologies

Final Questions for Interviews

- “Is there anyone else that you think we should talk to?”
- “Are there any questions you expected that we didn’t ask?”
- “Is there anything else you think we need to know?”
- FOR THE PARTIES: “Are there any questions that you would like us to ask any other witness or the other party(ies)?”
- Document questions and answers provided
- Keep a running list of the questions suggested/requested by each party
 - Whether and when the question was asked
 - Rationale for not asking any question(s) based on irrelevance or impermissible evidence

Types of Evidence

Documentary Evidence

Supportive writings or documents

Electronic Evidence

Photos, text messages, and videos

Real Evidence

Physical objects

Direct or Testimonial Evidence

Personal observation or experience

Circumstantial Evidence

Not eyewitness, but compelling

Hearsay Evidence

Statement from outside the interview presented as truthful

Character Evidence

Evidence of a person's character or character traits

Specific Evidence Issues: Privileged and Medical Information

The party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist

Specific Evidence Issues: Rape Shield Provision

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - If offered to prove consent with respect to prior consent with the Respondent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

Credibility Assessment

Consider the following elements to establish credibility:

- **Corroborating Evidence:** evidence that can be verified by an independent and objective individual
- **Inherent Plausibility:** information that is believable on its face
- **Motive to Falsify**
- Additional elements that investigators should consider, but are commonly less probative are:
 - **Past Record**
 - **Demeanor**

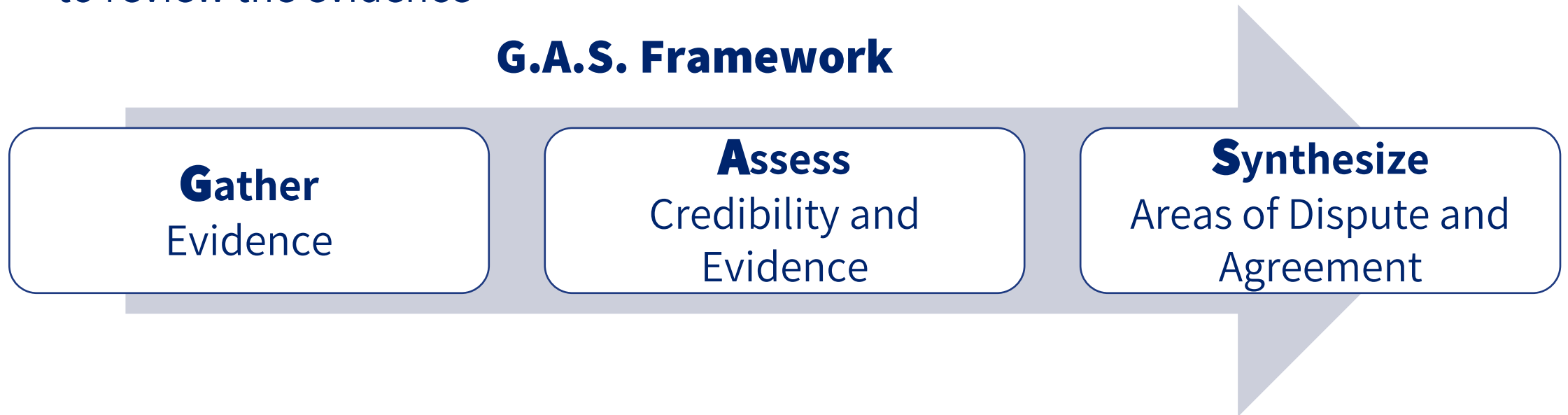
Evidence Authentication

- Not all evidence has the same degree of credibility
 - Less credible evidence may be less reliable evidence
- Investigator should seek the highest quality evidence available
- Investigators should try to authenticate all evidence provided
 - Check for possible fabrication of evidence
 - Corroborate information between witnesses
 - Try to obtain complete, rather than partial, records when possible

Step 7: Draft Investigation Report

- Title IX requires a written investigation report that fairly summarizes all relevant evidence and the investigation
- ATIXA recommends sharing draft report in Step 8 when the parties are entitled to review the evidence

G.A.S. Framework



Investigation Report Elements

Comprehensive investigation report typically includes:

- Complaint and party information
- Jurisdiction
- Scope
- Applicable policies
- Investigation timeline
- Summary of evidence
- Analysis
 - Credibility Assessment
 - Disputed and non-disputed facts
- Conclusion
- Appendices

Investigation Report Steps

Draft Investigation Report

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graph TD; A[Draft Investigation Report] --> B[TIXC/Legal Counsel Review Draft Investigation Report]; B --> C[Parties and Advisors Review Draft Investigation Report]; C --> D[Final Investigation Report];
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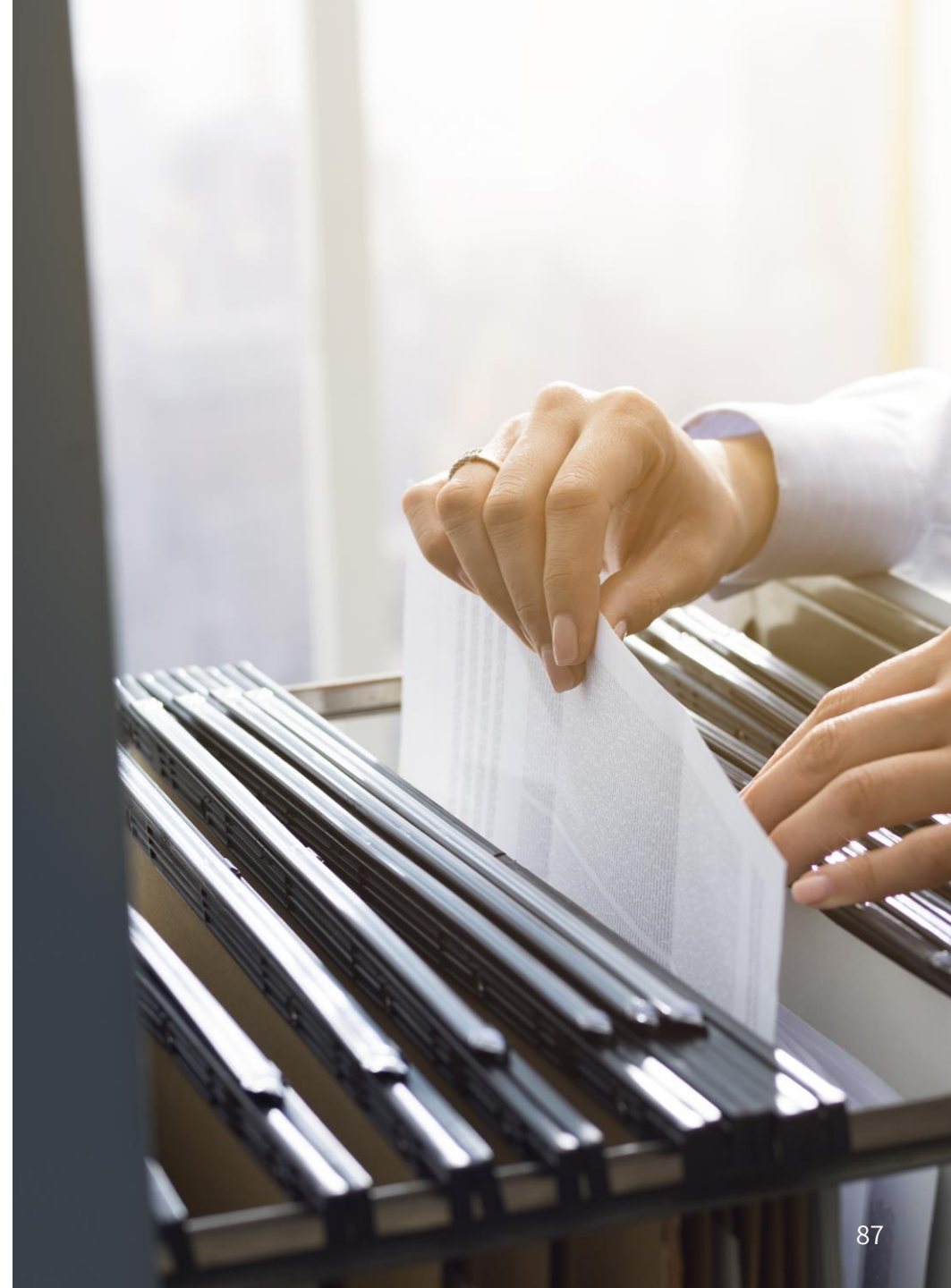
TIXC/Legal Counsel Review Draft Investigation Report

Parties and Advisors Review Draft Investigation Report

Final Investigation Report

Step 8: Report Review

- TIXC and/or legal counsel reviews draft investigation report prior to providing it to the parties
- Reviewer(s) identifies gaps, logic leaps, typographical errors, and substantive issues
- Reviewer(s) should not rewrite any section of the report but can ask questions and provide suggestions
- Investigator should review and incorporate helpful edits and suggestions
- Institutions may elect to complete this review after the parties' review or have two separate TIXC/legal counsel reviews



Step 9: Parties and Advisors Review Draft Investigation Report

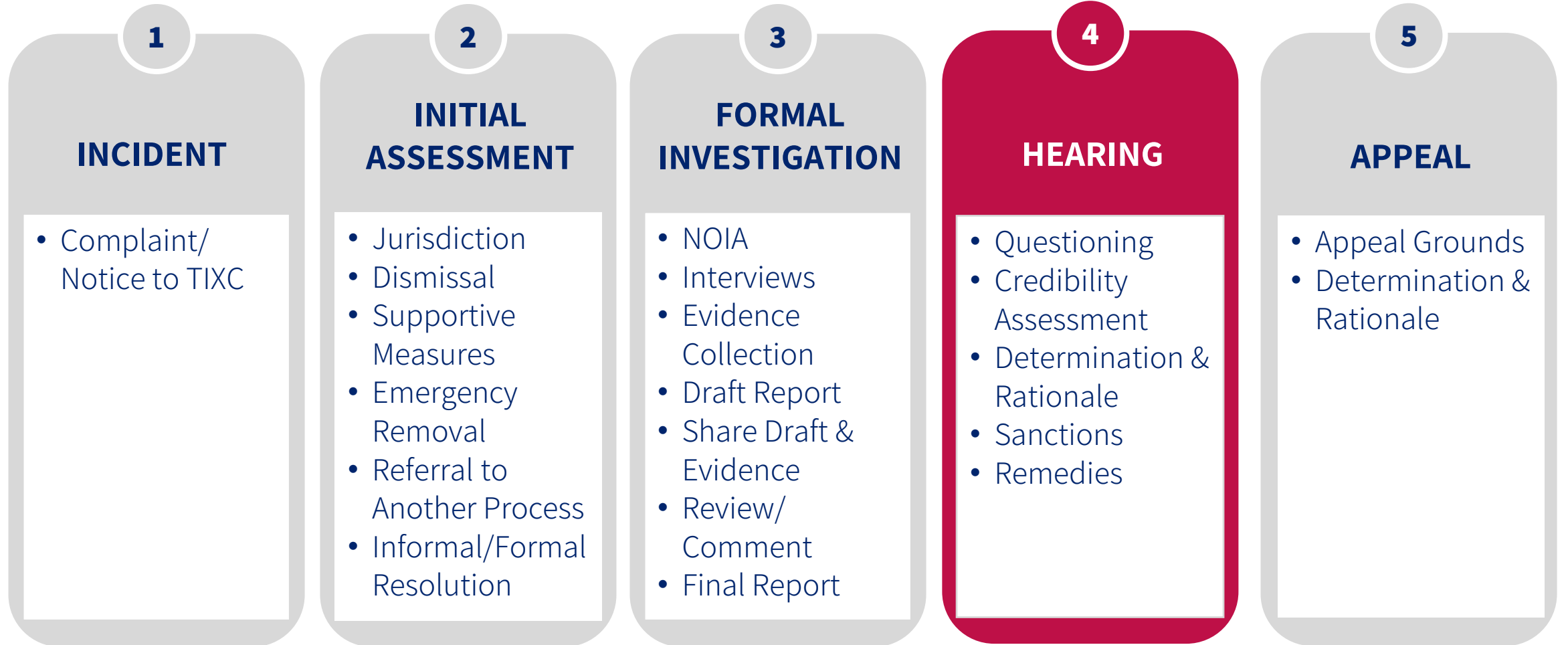
- Draft report and directly related evidence must:
 - Be sent to each party and Advisor in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
- Investigator must:
 - Allow 10 days for written response
 - Consider parties' feedback and incorporate where appropriate
 - Document rationale for not making recommended changes as appropriate

Step 10: Final Investigation Report

- Institutions determine the final investigation report review process
 - Once finalized, the investigation report is distributed simultaneously to the parties and their Advisors
 - The Title IX office provides the report to the Decision-maker(s)
- Parties and Advisors will be sent the final investigation report for review at least 10 days prior to the hearing

Decision-Making

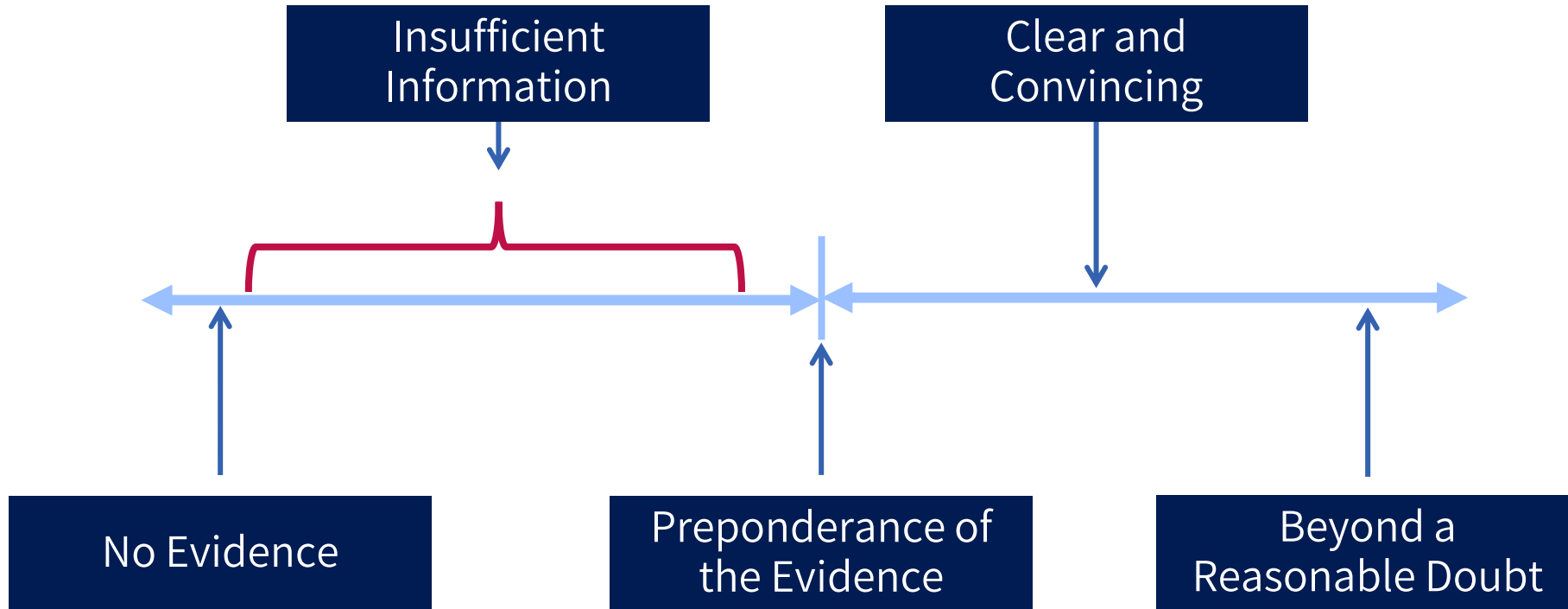
Decision-Making



Decision-Making

- Making a Finding
 - Decision-makers determine what occurred based on the standard of evidence
- Making a Final Determination
 - Decision-makers determine whether what occurred is a policy violation applying the standard of evidence
 - Consider each allegation individually for each Respondent
- Standard of Evidence
 - Apply either the preponderance of the evidence standard or the clear and convincing evidence standard
 - Standard of evidence must be consistent for all formal complaints of sexual harassment

Standard of Evidence



Preponderance of the Evidence is the current industry standard

Written Determinations

- **Written Determination**
 - Authored by Decision-maker(s)
 - TIXC/Legal counsel reviews
 - TIXC communicates to the parties simultaneously in writing
- **Finality**
 - On the date the Recipient provides a written appeal determination
 - OR the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

Appeals

Appeals

1

INCIDENT

- Complaint/
Notice to TIXC

2

INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive
Measures
- Emergency
Removal
- Referral to
Another Process
- Informal/Formal
Resolution

3

FORMAL INVESTIGATION

- NOIA
- Interviews
- Evidence
Collection
- Draft Report
- Share Draft &
Evidence
- Review/
Comment
- Final Report

4

HEARING

- Questioning
- Credibility
Assessment
- Determination &
Rationale
- Sanctions
- Remedies

5

APPEAL

- Appeal Grounds
- Determination &
Rationale

Appeals

Must offer appeals on one or more of the following grounds:

1

Procedural irregularity that affected the outcome of the matter

2

New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter

3

Conflict of interest or bias by the TIXC, Investigator, Decision-Maker that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Appeals

Appeal Decision-maker

- Must complete a written determination with rationale
- Determinations may include:
 - **Upholding** the original determination and sanctions (if any)
 - **Remanding** the complaint back to the Decision-maker for reconsideration or to the Investigator for further investigation
 - **Modifying** the original determination and/or sanctions (if any)
 - **Overturing** the determination (not recommended)
- Cannot be TIXC or serve another role in the same complaint resolution



Association of
Title IX Administrators

Title IX Investigations - Advanced Skills & Report Writing

Title IX Conference – Day 2

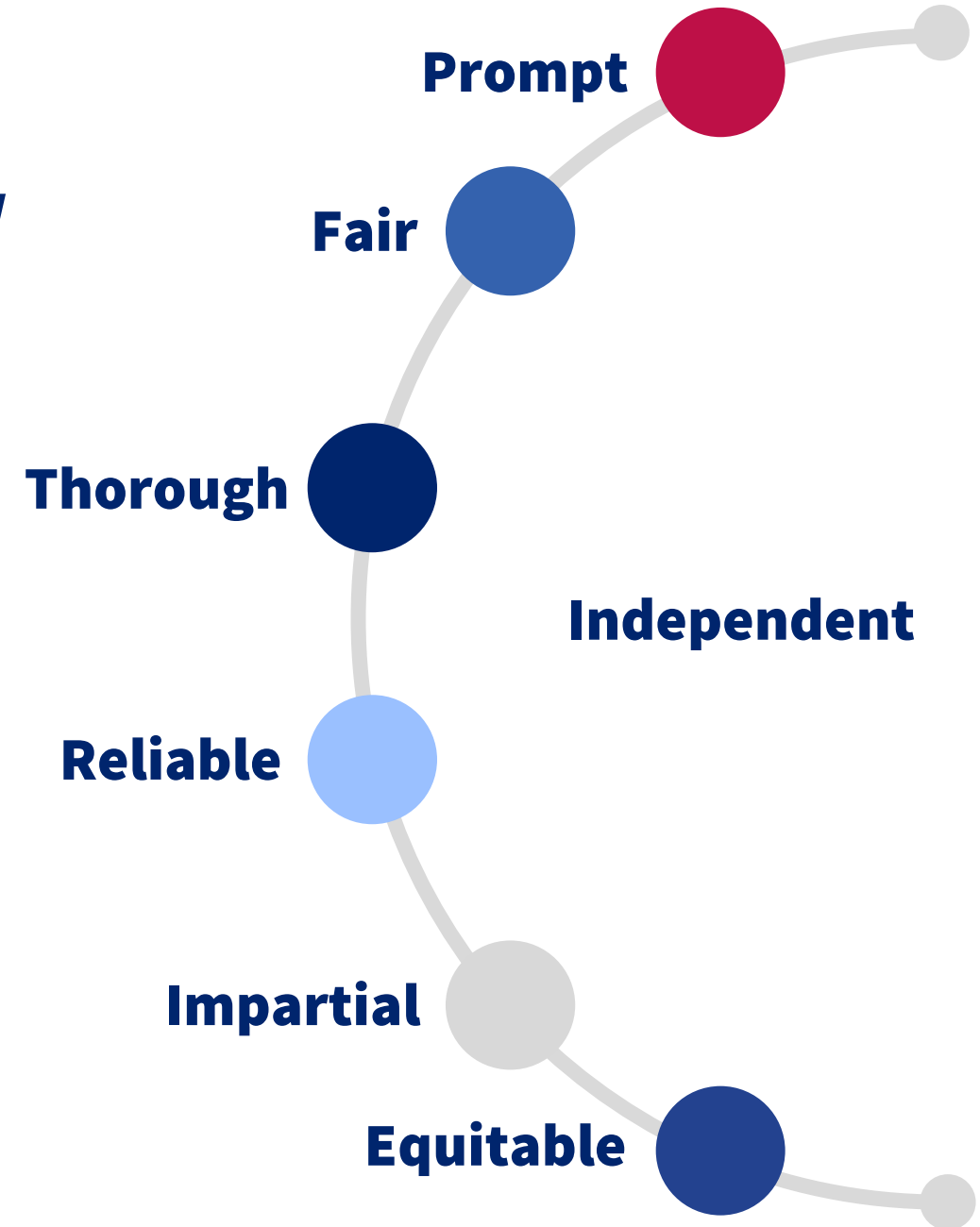
West Virginia School of Osteopathic Medicine

January 30-31, 2024

Investigation

Civil Rights Investigations Overview

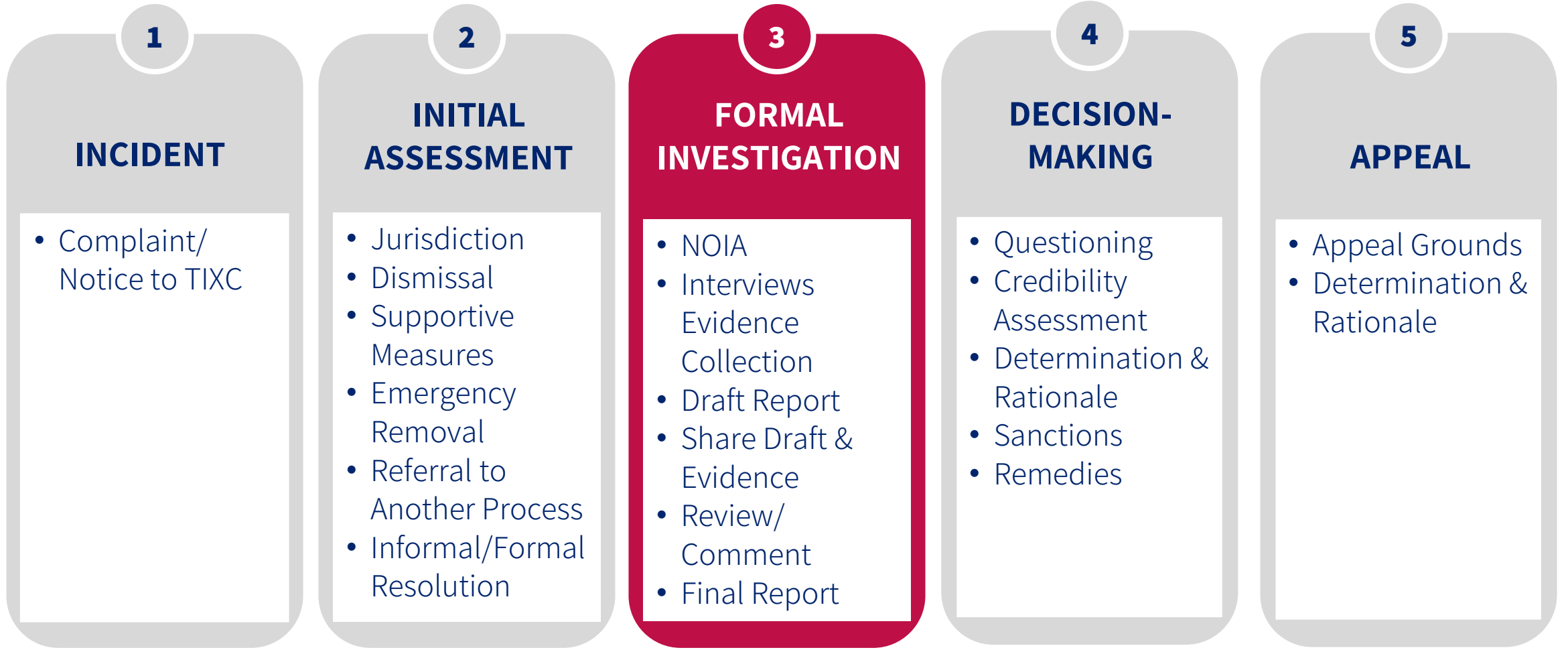
- Investigations focus on gathering all available and relevant information
- The institution is responsible for gathering evidence—not the parties



Bias and Conflicts of Interest

- Investigators must not have a conflict of interest or bias for or against the following:
 - Complainants
 - Respondents
 - Specific individuals involved with a complaint
 - Subject matter or details of the complaint itself
- Remember, Investigators have no “side” — their investment is in the integrity of the process

Investigation



Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment & Jurisdiction Determination
3. Determine Basis for Investigation
- 4. Notice of Investigation and Allegations (NOIA)**
- 5. Establish Investigation Strategy**
- 6. Formal Comprehensive Investigation**
- 7. Draft Investigation Report**
- 8. TIXC Draft Report & Evidence Review**
- 9. Parties Draft Report & Evidence Review**
- 10. Final Investigation Report**

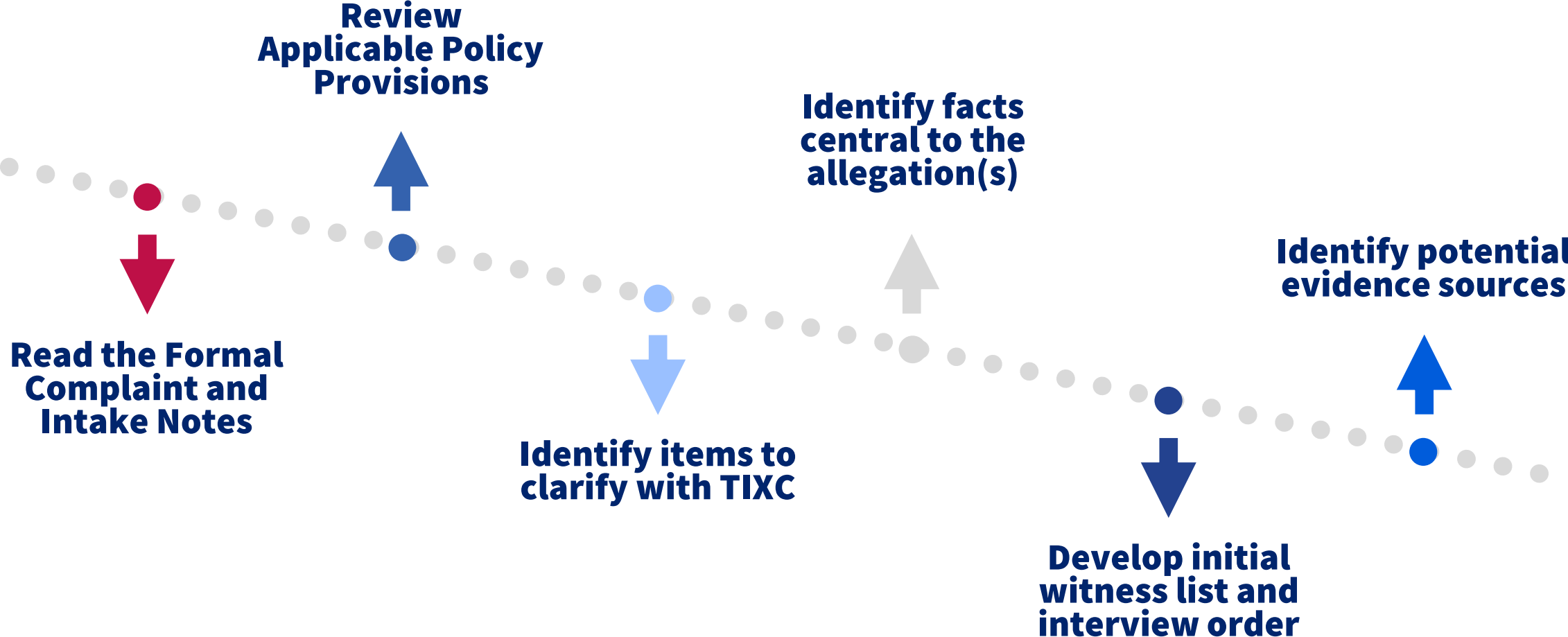


Investigation Strategy Review

Investigator(s) consult with TIXC to strategize and plan the investigation:

- Elements of the specific policy provision(s) alleged to have been violated
- Challenges with the type of complaint and the parties involved
- Preliminary undisputed and disputed facts and their significance
- Initial witnesses and interview order
- Other types of possible evidence and the plan to acquire such evidence
- Anticipated obstacles and obstructions
- A working timeline for the investigation

Activity: Investigation Strategy



Activity: Investigation Strategy

Read the Strategy Exercise document in the course lobby

- Are there additional policies that may apply?
- Who are the initial witnesses?
- Who do you want to interview and in what order?
- What other sources of evidence may exist?

Trauma-Informed Practices

Trauma-Informed Practices

- **Trauma** is exposure to an event or events that create a real or perceived threat to life, safety, sense of well-being and bodily integrity, and can be:
 - Acute, chronic, or complex
 - Neurological, biological, psychological, social, and emotional impacts
 - Developmental, intergenerational, historical, secondary, vicarious, or collective
- Responses to trauma can vary, depending on a variety of factors
- Provide all people with support that makes TIX services and processes accessible, including those who may have experienced trauma

Trauma-Informed Practices

- **ATIXA Position Statement:** Application of trauma-informed practices in our field has gotten ahead of the actual science
 - **ATIXA Recommendation:** Incorporate trauma-informed investigation and interviewing methods without compromising gathering credible, relevant evidence
 - Trauma-informed practices should not significantly influence evidence evaluation



Trauma Responses



Trauma-Informed Environments

- A soft interview room is considered an integral component of a trauma-informed interview environment
- Creating a space that is comfortable allows the interviewee to feel physically and emotionally safe and can have a significant impact on the interview process
- Soft interview rooms are useful when interviewing Complainants, Respondents, and witnesses



Source: <https://youtu.be/xGCMqxvvoCI?si=januovfATbx6U6dT>

Additional Insights

- It may not be possible to confirm or challenge a party's statements during the first interview
 - Be planful and thoughtful in follow-up interviews
- Caution parties and witnesses that repeatedly providing detailed accounts of the incident(s) in other settings can potentially impact memory accuracy
- Memory limitations may result from a variety of circumstances
 - May pre-date or post-date the reported incident(s)
 - Often impossible to determine cause

Trauma and Credibility

- Investigators and Decision-makers can only assess available relevant evidence
- Avoid substituting trauma indicators for evidence
- Trauma is neutral; it neither enhances or detracts from proof
- Lack of evidence from an individual often negatively impacts their credibility
- Biased thinking around what a person “should” or “would” have done
 - Timing of report

Applying Policy in Investigations

Applying Policy in Investigations

- Know what to look for
- **Models of Proof:** the specific elements of each violation
- Investigators collect information and evidence specific to the alleged policy violations
- Policy language informs appropriate questions
 - Policy provisions, definitions, jurisdiction
- Decision-makers use the information gathered in the investigation to determine whether all necessary elements are met for each alleged policy violation

Definition: Fondling

The touching of the private body parts of the Complainant (buttocks, groin, breasts), for the purpose of sexual gratification, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.

Model of Proof: Fondling

- ❑ The touching of the private body parts of the Complainant (buttocks, groin, breasts)
- ❑ For the purpose of sexual gratification
- ❑ Without the consent of the Complainant
 - Including instances where the Complainant is incapable of giving consent because of their age or
 - Because of a temporary or permanent mental incapacity

Consent Construct

ATIXA's Model Consent Policy Definition

Consent is:

- knowing,
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity

Overview of The Three Questions

1. **FORCE:** Was force used by the Respondent to obtain sexual or intimate access?
2. **INCAPACITY:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. **CONSENT:** What clear Complainant words or actions gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Force

Was force used by the Respondent to obtain sexual or intimate access?

Physical Violence:

- Hitting, restraint, pushing, kicking, etc.

Threats:

- Objective and subjective analysis of the viability of the threat (true threat if public)

Intimidation:

- Implied threat that menaces and/or causes reasonable fear

Coercion:

- Unreasonable amount of pressure for sexual access (isolation, frequency, intensity, and duration)

Incapacity

Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
 - Unable to understand who, what, when, where, why, or how
 - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
 - Situational awareness
 - Consequential awareness

Incapacity

- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Blackout = working memory functional; short-term memory not retained
 - Partial blackout must be assessed as well
 - Although memory is absent in a blackout, verbal and motor skills may still function

Evidence of Incapacity: Potential Context Clues

- Slurred speech
- Scent of alcohol on the breath
- Shaky equilibrium; disorientation
- Passing out/unconsciousness
- Throwing up
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)

Incapacitation determination is made contextually **in light of all the available relevant evidence.**



Incapacity Analysis

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know, **AND**
 - The Respondent would not have reasonably known of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
 - The Respondent **should have known it (reasonable person)** = policy violation
 - The Respondent's own intoxication cannot be used as a defense

Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
 - If so, was the Complainant acting differently than previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming
 - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant

Consent Analysis

What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

- Is there any relevant sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual? Non-consensual?
 - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors

Rape Shield Provision

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - **If offered to prove consent**, with respect to prior consent with the Respondent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition
 - Not inequitable

Credibility

Credibility

- **Credibility** is largely a function of corroboration and consistency
- **Credibility Assessment** involves evaluating the extent to which evidence is believable and reliable (accurate or truthful)
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing sense of “logical”

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

Demeanor

- Do they seem to be lying or telling the truth?

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

EEOC (1999)

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
- Corroboration of central vs. environmental facts
- Not simply aligning with friendly witnesses
- Contemporaneous witness accounts
- Outcry witnesses
- Allegiances

Inherent Plausibility

- Does what the party described make sense?
 - Consider environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness”
- Is the party’s statement consistent with the evidence?
- Is their physical location or proximity reasonable?
- How good is their memory?

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Academic or career implications
 - Personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant
- Reliance on written document while answering questions



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 relationships

Demeanor

- Physical presentation and speech patterns are not determinative of truthfulness
 - Humans are excellent at picking up non-verbal cues
 - Humans are terrible at spotting liars
- Demeanor cues may indicate cause for additional questioning
 - “I noticed when I asked you about...you crossed your arms. Can you tell me why your posture changed?”
 - “I noticed when I started asking you questions about...your responses became much shorter. Can you explain that for me?”
 - “I noticed you rolled your eyes when I mentioned....Can you tell me about your reaction?”

Credibility Assessments in Investigation Reports

- Indicate where to focus for the Decision-maker without rendering conclusions or making findings related to credibility

NOT GOOD

“The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”

BETTER

“Mark’s testimony about X conflicts with Mariana’s testimony about X. The accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

Credibility Analysis

- Specific and detailed credibility analysis of:
 - Each party
 - Each witness
 - Any other relevant evidence
- Point to specific details that were considered that have aided in the assessments
- May or may not include conclusions about credibility, depending on institutional policy
- ATIXA does not recommend making conclusions, but comparisons may be helpful

Common Credibility Assessment Errors

- Misinterpretation of and misplaced emphasis on nonverbal deception indicators
- Misplaced emphasis on (often trivial) information inconsistencies
- Confusion about memory
- Bias in interviews
 - Presumptions of responsibility
 - Anchor bias
- Confirmation bias
- Accepting information at face value

Activity: Credibility Analysis

Activity: Credibility Analysis

Read pages 1-21 of the Investigation Report for Activities document in the course lobby

- What information speaks to the Complainant's credibility?
- What information speaks to the Respondent's credibility?
- Is there information that should be included about evidence credibility?

Information Gathering and Recordkeeping

Keeping Information

- Keep **investigation file** in a secure location
- Compile a timeline of the investigation steps, including dates of all meetings and interviews
- Records of all contacts, including emails and phone calls with all parties and witnesses
- Documenting interviews:
 - Take specific notes or record
 - Recording is becoming more common
 - Handwritten vs. typed notes
 - **Interviewee verification is industry standard practice**

Information Flow

Option 1: Notetaking



Option 2: Recording



Notetaking and Recording

IF IT ISN'T WRITTEN DOWN, IT DIDN'T HAPPEN

- Date all records and identify who was present
- Number pages
- Keep notes describing any information shared with parties or witnesses
- Clarify anything that is unclear
- Document any refusal to answer, evasion, or refusal to participate
- Review and finalize notes immediately upon interview completion

Notetaking

- Notetaking should occur throughout the entire interview
- Taking notes may slow down the interview
- Use pre-prepared numbered questions
 - Remain flexible for follow-ups
- Summarize perceptions of credibility

Notetaking

- Don't want interviewees to feel **S.O.L.D.** out;
Avoid:
 - **S**tereotypes
 - **O**pinions
 - **L**abels
 - **D**iagnoses
- Avoid conclusions or determinations
- Interview notes may be subject to “inspection” rights under FERPA
 - “Sole Possession notes” exception is very limited



Recordkeeping

- Certain records must be maintained for at least **seven years**
 - Comprehensive complaint file
- Electronic database preferred over paper files
- TIXC is responsible for managing record retention
 - Follow applicable Title IX and/or institutional practice for record destruction

Managing Sensitive Information

Store information in secure locations:

- Electronic
 - Password protection or encryption; multi-factor authentication
 - Limited access, auditable storage
 - View or save information on appropriate devices
- Physical
 - Locked; limited access
- Remove personally identifiable information
- Communicate information storage practices to parties

Investigation Reports

Title IX Regulatory Requirements

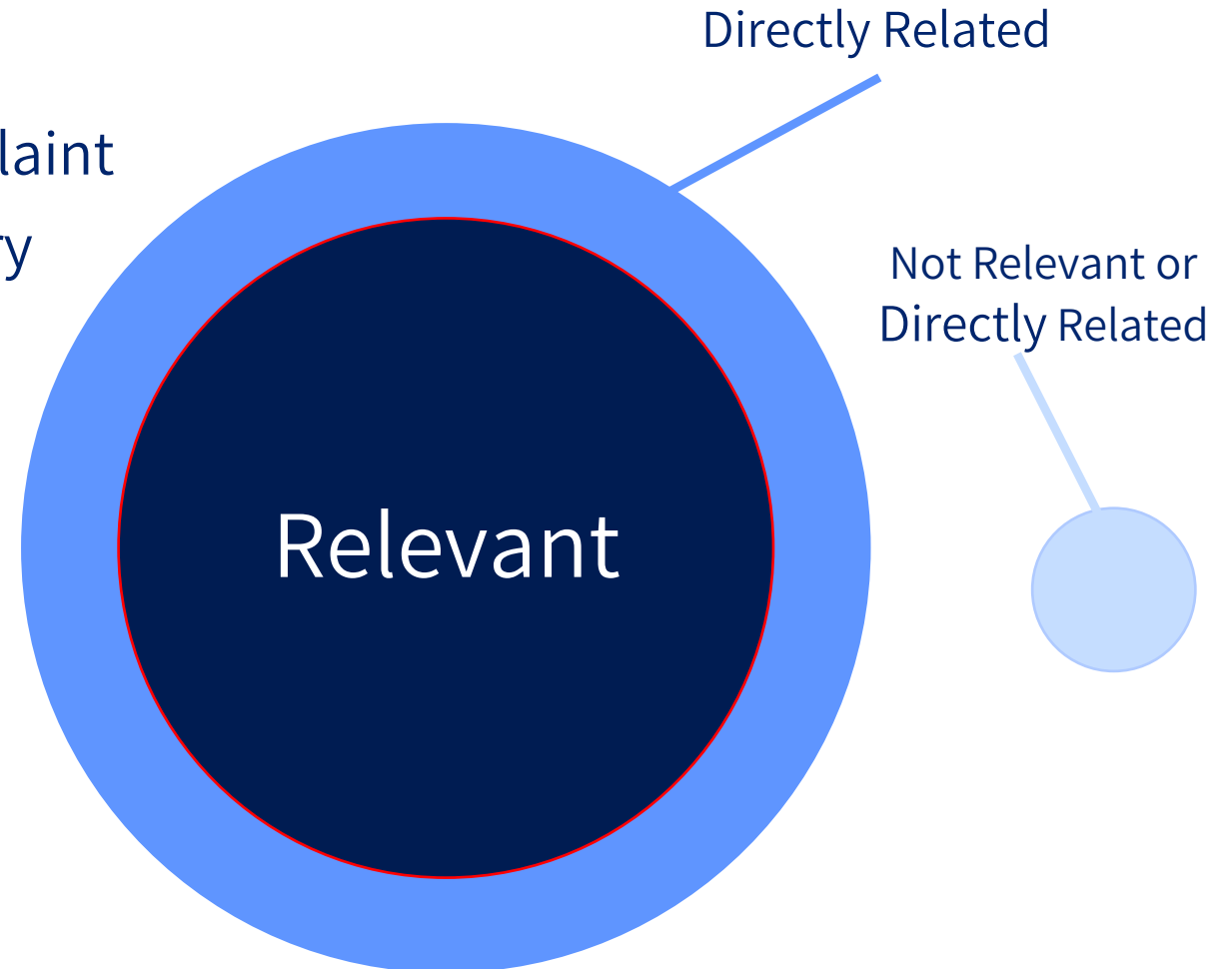
- Investigation report that fairly summarizes **all** relevant evidence
- Investigators must be trained on issues of relevance and writing investigation reports that fairly summarize relevant evidence
- Include relevant inculpatory and exculpatory evidence
- Leave considerable room for best practices

Relevant Evidence

- Investigators should include **relevant** evidence in their report
 - Evidence is relevant if it has value in proving or disproving a fact at issue
 - Evidence can also be relevant to credibility assessments
 - It is the Investigator's responsibility to obtain **relevant** evidence
- Never relevant
 - Evidence of Complainant's sexual predisposition
 - Evidence of Complainant's prior sexual behavior unless
 - Offered to prove someone other than Respondent committed the alleged conduct
 - Offered to prove consent, with respect to prior consent with the Respondent

Directly Related Evidence (DRE)

- Not defined by the regulations
- Evidence connected to the complaint
 - Not inculpatory or exculpatory



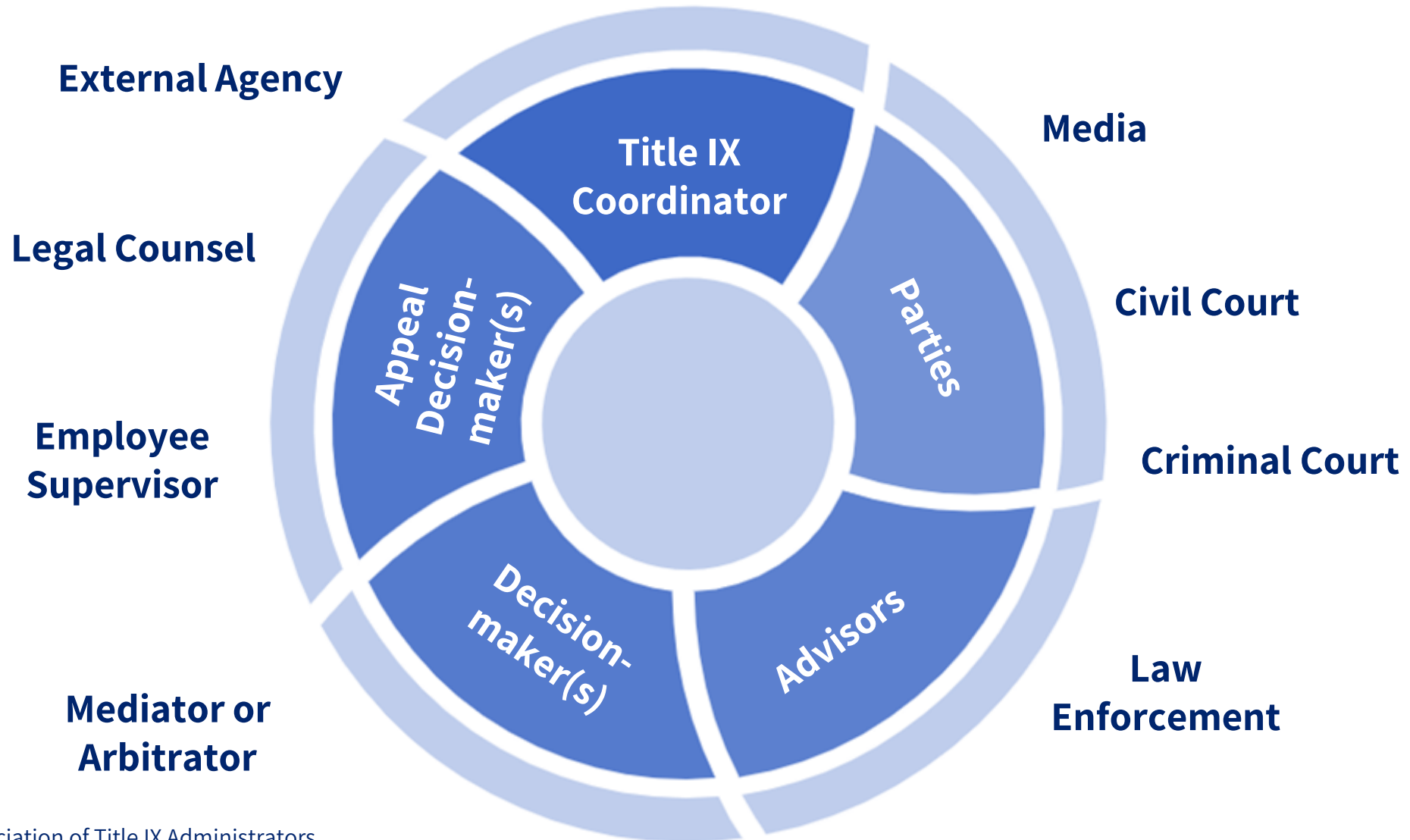
Strategies for Separating Evidence

- Color-code the evidence
 - Highlight relevant evidence or use a different font color
- Add footnotes to the investigation report indicating where the evidence can be found in the DRE file
- Some Investigators prefer to include the DRE as an appendix
 - ATIXA generally prefers a separate file

Activity: Relevant vs. Directly Related Evidence

Writing Mechanics

Consider Potential Audiences for Report



Tone, Voice, Tense, and Point of View



TONE

Writer's attitude toward the subject or audience



VOICE

Form or format through which a narrator communicates a story



TENSE

When events or actions occurred in time—in the past, present, or future



POINT OF VIEW

The position from which the author “speaks” to the reader

Formal vs. Informal Language

Formal Language

- Medical/anatomical terms
- Accurate terms for alcohol or other drugs, their composition, and use
- Full words--we would, cannot, percent
- Last name, role, titles
- Third-person writing

Informal Language

- Colloquial or slang terms for anatomy (“junk”) or sexual acts (“smashing”)
- “Weed,” “hunch punch,” “hammered”
- Contractions--we’d, can’t
- First name or nickname
- Empathic writing/taking a position

Active vs. Passive Voice

- **Active Voice:** used when the subject performs the action
 - Focuses on the doer of the action
 - Best practice
- **Passive Voice:** used when the action is performed upon the subject
 - Focuses on the action; doer is unknown, implied, or irrelevant

Examples of the Three Voices in Writing	
1. Active Voice	"You ate six donuts."
2. Passive Voice	"Six donuts were eaten by you."
3. Passive-Aggressive Voice	"You ate six donuts and I didn't get any. Don't worry, it's cool. I can see donuts are very important to you."

Tense

- **Present Tense:** expresses anything that is happening now, or is ongoing, constant, or habitual
- **Past Tense:** indicates past events, prior conditions, or completed processes
- **Future Tense:** indicates actions or events that will happen in the future
- Investigation reports are a narrative of events that have already occurred
 - Past tense is best practice
 - Avoid changing tenses
 - Exception: Investigator actions for the present or future

Point of View

- **ATIXA recommends Investigators write from a neutral, detached observer point of view (third-person)**
 - This point of view creates distance between the reader and the parties
 - Example: Complainant was scared vs. Complainant reported they were scared
- What and how much the reader learns about the events, people, and locations in an investigation report depends on the Investigator's point of view
 - How much does the Investigator know and understand?
 - How much does the Investigator want the reader to know?
 - How would the report be different if someone else wrote it?
- Does the Investigator **describe** what parties and witnesses told them, or do they **repeat** what they were told by parties and witnesses?

Writing and Structuring Investigation Reports

Format and Structure

- Templates, templates, templates!
- Transcripts vs. interview summaries
- Narrative vs. bulleted format
 - Headnotes
- Multi-party or multi-allegation investigations
- Report, Evidence File, or Appendix?
 - Transcribe texts/social media/audio recordings
 - Description of video content
 - Email or other writing description or transcript/excerpt
 - Expert statements

Enhancing User-Friendliness

- Table of contents
- Page numbers
- Line numbers
- File naming conventions
- Internal document links

Direct Quotations

**“[Their] own words will always be better than your words...this is a person talking to the reader directly, not through the filter of a writer.”
William Zinsser**

- Direct quotations and commentary from parties and witnesses can help to accurately convey their experiences and perceptions
- Advisors’ statements should not be attributed to a party
- Care must be taken to indicate whether a quote is something a witness told Investigator(s) or something another person said to a witness

Incorporating Direct Quotations

Introduce the quotation with a complete sentence

Cole described how his relationship with Devyn evolved over time: “We were friends, and then we became friends with benefits.”

Use an introductory or explanatory phrase

When asked to describe his relationship with Devyn, Cole responded, “We are friends with benefits.”

Incorporate the quotation part of the sentence

Cole described his relationship with Devyn as “friends with benefits.”

Use a short phrase as part of the sentence

Cole used the term “friends with benefits” to describe his relationship with Devyn.

Punctuation for Quotations

If words are omitted from a quotation, use an ellipsis (...)

- Three dots (...) indicate an omission of words in a sentence or sentences in a paragraph
- Four dots (....) indicate an omission at the end of one sentence when the quote continues onto the next sentence
- Do not change the meaning of the sentence by omitting text

If words are inserted or altered in a quotation to improve readability, use square brackets [] to indicate the change

- May include:
 - Letter case or verb tense
 - Replacing a word to clarify meaning

Punctuation for Quotations

Enclose “sic” in square brackets to indicate that the quote is verbatim, though there are spelling or other syntax errors

- Most needed for excerpts from documentary evidence or interview transcripts
- No need to identify the error or include [sic] unless the meaning is unclear
- Helps proofreaders know what is/is not intentional

Sensitive Information

- Offensive, triggering, or explicit language (i.e., slurs)
- Graphic images/videos
- Medical information, including test results
- Mental health information
- Sex assigned at birth vs. gender identity
- Chosen name vs. legal name



Redaction Practices

- Full redaction vs. role identifiers
 - Example:
 - Original: Teagan stated that Jesse smacked her with an open hand.
 - Full: ██████ stated that ██████ smacked her with an open hand.
 - Role Identifiers: Complainant stated that Respondent smacked her with an open hand.
 - Full redaction is a common practice in law enforcement, but is not recommended for Title IX investigations
 - Provide key with names for parties and Advisors

Redaction Practices

- Other options:
 - Include full name for first mention
 - Use initials
 - Use one- or two-letter identifiers (C, R, W1, W2, etc.)
- Create a fully unredacted copy?
 - Legal counsel
 - Decision-maker(s)

Word Choice

- Investigation report writing is beige
- Unnecessary adverbs and adjectives
- Conclusory words
- Bias language

"What's wrong with adverbs in dialogue tags?" John asked inquisitively.

"They're unnecessary and irritating," Marsha said judgmentally.

"Says who?" John said defensively.

"The poor reader," Marsha said authoritatively.

Common Pitfalls

- Repetition
- Absolutes
- Generalizations
- Clichés
- Idioms
- Exaggerations
- Jargon
- Abbreviations, initialisms, and acronyms
- Inconsistency

Word Choice Examples

- The Respondent **refused** to answer the question.
- The Respondent **declined** to answer the question.
- The Respondent **chose not** to answer the question.

- The Complainant **denied** offering to massage the Respondent.
- The Complainant **vehemently denied** offering to massage the Respondent.
- The Complainant **flatly denied** offering to massage the Respondent.

Word Choice Examples

Poor Phrasing Example: “On September 21, 2016, four upperclassmen male students brought unwelcome sexual activity to Jane Doe and another female student in a stairwell at Maplewood.”

Doe v. Metropolitan Government of Nashville and Davidson County, No. 20-6225 (6th Cir. May 19, 2022)

Recommended Revision: Four male upperclassmen engaged in unwelcome sexual activity with Jane Doe and another female student in a Maplewood stairwell on September 21, 2016.

Bias-Free Writing

- Words communicate ideas, but also reflect power, status, and privilege
- Language can reflect social capital
- Conscious and purposeful use of language can promote equity, justice, and inclusion
- Pay attention to communication with individuals in different roles
- Bias-free communication attempts to include all identities in a way that respects the subject and doesn't make assumptions about the recipient
- Bias-free writing does not discriminate

Tips for Bias-Free Writing

- Know your own biases
- Focus on what's relevant
- Recognize and acknowledge differences
- Think small
- Avoid labels
- When in doubt, ask
- Use nouns, objectives, and adjectives properly

Biased Language Example

“Allegations of sexual assault on college campuses are fraught with potential injustice for both female student victims of sexual violence and male students who may be falsely accused of improper conduct.”

Doe v. Wake Forest University, 1:23-cv-00114 (M.D.N.C., Sept. 6, 2023)

Bias Example

Email to Complainant

Thank you so much for sending your written statement. I would like to set up another meeting with you to ask some further questions and discuss the evidence that you may have, witnesses you'd like me to speak with, and any other concerns you might have. If you could just let me know if there's a time that works well for you and if you have a preferred meeting location, I'll set an appointment for us.

I hope we can find a good time to meet next week. In the meantime, take good care and please don't hesitate to reach out if there's anything you need. Thanks!

Bias Example

Email to Respondent

Thank you for sending your written statement. We will need to meet again so that I can ask any follow-up questions I have and discuss the evidence that you may have, witnesses you'd like me to speak with, and any other outstanding process pieces. Based on your class schedule, I set an appointment for us at 11 AM on Monday, February 7, 2022, in my office.

Refer to the list of resources at [website] if you need assistance before our meeting.

Sincerely,

Title IX Investigator

Footnotes

- Provide a space for definitions, context, or source information that would disrupt the flow of the report
- Description of electronic devices or applications
- References to appendices or evidence file
- Background information
- Relevant evidence source(s)
- If the Investigator is offering context from their own knowledge, make sure it is clearly indicated as such
 - Example: The Investigator notes from personal familiarity with the building that Room 19 is approximately halfway down the hall from the elevator

Footnotes

- Consider who will be reading the report now and potentially in the future
 - Technology evolves
 - Slang shifts
 - Pop culture references change
 - Businesses come and go
 - Generational differences
 - Cultural differences
- Do not assume common knowledge
- In text, the footnote follows punctuation except for the em dash (—)

Footnote Example

Respondent described this interaction as follows. Relevant portions of the transcript are below.

“At this point we were fully naked. And so we were grinding on each other. We were grinding on each other's genitalia. And then she placed her hand over her vagina and said, ‘Wait, do you have a condom?’ Then we began to discuss the use of a condom. I did not have a condom. I had just ran out the week prior. And so she asked if I could grab one from one of my friends, to which I responded, ‘They're not home. They're still at the party. And I can't exactly go searching through their things while they're gone to try to find a condom.’”²

The parties agreed they engaged in a conversation about Respondent's lack of a condom and Complainant's concerns regarding proceeding with sexual intercourse without a condom.

¹ See Complainant Interview 3.25.2022 Transcript.pdf, p.5

² See Respondent Interview 4.1.2022 Transcript.pdf, p.6

Attachments, Appendices, and Exhibits

- Complete versions of relevant information incorporated into the investigation report by reference or in excerpt form
 - Photographs
 - Video stills
 - Screenshots of text messages/social media
 - Access logs, card swipe logs, phone records
 - Academic course schedules
 - Floorplan diagrams
 - Others
- Description, date of receipt, source, method of receipt, and verification/authentication information

Incorporating Parties' First Ten-Day Review Feedback

- Include parties'/Advisors' entire feedback and any responses from the Investigator(s) as an appendix
 - Ask individuals to provide an itemized list of feedback rather than a long narrative
- Include appropriate discussion if feedback impacts credibility
- New evidence
- Clarification of earlier statements
- Requested shifts between relevant evidence and DRE

Post-Review Investigator Response

- Follow-up on all areas identified by parties, as appropriate
 - Additional evidence
 - Additional witnesses
 - Questions
- Track changes
- Include each party's review and comment in appendix
 - Note if a party declined to comment
- Include Investigator response to review and comment in appendix
 - Rationales for responses

Absent Information

Information Not Obtained

Document efforts to gather evidence or efforts to obtain unavailable evidence

- Did/does not exist
- Cannot be located
- Party/witness not available or declines to respond to question(s)
- Party/witness declined to submit
- Deleted, destroyed, damaged
- Unable to access without a court order
- Cannot be released due to an ongoing criminal and/or agency investigation

Unanswered Questions

Include unanswered questions asked during the investigation to:

- Demonstrate a thorough investigation
- Help guide the Decision-maker to topics that may need further exploration

If relevant, document in the interview summary

- Example: “Witness 2 declined to provide additional information regarding their text conversation with Complainant on February 19, 2019. Witness 2 was informed that Complainant voluntarily submitted screenshots of the text messages in question for purposes of this investigation.”



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Questions?



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