Conducting the Investigation
Essential steps of an investigation

1. Notice of formal investigation
2. Initial Interviews
3. Evidence Collection
4. Report writing
The Process: Developing an Investigative Strategy

1. Receive Report
2. Develop a timeline
3. Identify Witnesses
4. Identify Potential Evidence
5. Develop Strategy to Collect Evidence
Investigation Timeline

**Prior History**
- Between the Parties
- Of the Parties

**Pre-Assault**
- Pre-Meditation
- Manipulation
- Attempt to Isolate

**Assault**
- Consent
- Type of Contact

**Post Assault**
- Behaviors
- Communications
Identify and Interview Parties/Witnesses

Interview Objectives

Connect
Build rapport
Build trust
Empower
Listen

Safety Assessment
Physical and Emotional
Safety of the Victim
Safety of the Community
Safety of the Accused

Services
Advocates
Police/Campus
Medical care
Interim action

Evidence Preservation
Text Messages
Photographs
Names and contact info for witnesses
Prior to the Interview

- Secure an appropriate meeting location
- Allow for enough time to conclude the meeting
- Prepare yourself for the meeting
- If interviewing a party, inform them of their right to have an advisor present.
Set Expectations

What they should expect of you

• That you are neutral
• That you will listen, what they are saying is important to you
• That you will keep the information they share private
• What you will do with recording/notes
• That you may have to ask difficult questions
• Patience, respect, and appreciation

What you expect of them

• Honesty
• That they will seek clarity if needed (give them permission to do so)
• That they won’t guess or fill in blanks
The importance of empowerment and the power of empathy

An investigator must make the person being interviewed feel safe, in control, and supported.

This will lead to feelings of safety and trust and will result in a more cooperative subject.

The subject will be able/willing to remember and share more information.

Increased evidence collection and quality

More accurate investigatory findings
Investigative Interviews

Start by eliciting a narrative

Listen

Interview for clarification

Listen

Avoid leading questions, questions that blame, interrogating
Evidence
Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary
Types of Evidence

Direct Evidence
• Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence
• Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence
• Evidence that differs from but strengthens or confirms what other evidence shows
Non-Testimonial Evidence

- Text Messages
- Social Media posts
- Social Media Communications
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
A Thorough Investigation

Is more than evidence collection
A Thorough Investigation Permits the Decision Maker to Assess

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight
“Relevant” Evidence

- The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
  - “Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action.”
Evidence That is Not “Relevant”

• “Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant,
  • unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  • if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

• “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

• Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition
Assessing Authenticity
Investigating the products of the Investigation

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Investigate the authenticity if necessary.
Assessing Credibility and Reliability

No formula exists, but consider the following:

• opportunity to view
• ability to recall
• motive to fabricate
• plausibility
• consistency
• character, background, experience, and training
• coaching
• Your own bias and limited experience
Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence
The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements
At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.
### Relevancy Standard

<table>
<thead>
<tr>
<th>Relevant</th>
<th>Per se Irrelevant</th>
</tr>
</thead>
</table>
| • “Evidence is relevant if:
  - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action.” | • Prior sexual history of complainant, with two exceptions
• Legally recognized and un-waived privilege.
• Records related to medical, psychiatric, psychological treatment |
Redactions
**Additional Requirements**

- Share the report with the parties and their advisors
- In electronic format or hard copy
- At least 10 days prior to the hearing
The Importance of a Quality Report
The Purpose of the Report

• To allow for advance review
• To allow for advance preparation
  • By the decision maker
  • By the parties
• Reduce likelihood of bias in final outcome
Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel
Other Recipients?

- Friends of the parties
- Parents
- Law enforcement
- Attorneys
- Judges
- Media
- Social Media
Essential Elements of a Quality Report
Essential Elements

- Intentionally organized to enhance comprehension
- Factually accurate
- Concise
- Without editorial or opinion
- Consistent format
Structure of the Report
Report and Record

Summary of the Evidence

Compilation of the Evidence
The Record

- Compilation of the evidence.
- Organized intentionally and consistently.
- Divided into appendices.
- Is attached to the report.
- Includes a procedural timeline.
Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.);
Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.);
Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint;
Appendix D: the procedural timeline.
Structure of the Report

- Overview of the Investigation
- Statement of Jurisdiction
- Identity of Investigators
- Objective of the Investigation and the Investigation Report
- Prohibited Conduct Alleged
- Witnesses
- Evidence Collected
- Summary of Evidence
- Conclusion
Report Structure
Overview

In this section, provide a very brief overview of the case.

Include:

• the names of the parties
• the applicable policy(ies)
• the prohibited conduct alleged
• the date, time, and location of the conduct
• a brief description of the alleged misconduct
Report Structure

Statement of Jurisdiction

1. Cite Jurisdictional Elements
2. State all grounds for Jurisdiction
Report Structure
Identify Investigators

1. Identify the investigators by name
2. State that they have been properly trained
3. List trainings, or cite documents in the record that detail investigators prior training
Report Structure
Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation.
3. Briefly state that all procedural steps were followed.
4. Describe the purpose of the report.
Report Structure
Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.
2. Include definitions of prohibited conduct from institution’s policy/procedures.
Report Structure
List Witnesses

• List those witnesses that were interviewed
• List witnesses that were identified, but not interviewed
• Simple List
• Detailed List
## Example of a Detailed List

<table>
<thead>
<tr>
<th>Witness Name</th>
<th>Witness Identified By</th>
<th>Information Offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Doe</td>
<td>Reporting Party</td>
<td>Mr. Doe is the Reporting Party’s best friend. He was with the Reporting Party the night of the reported incident.</td>
</tr>
<tr>
<td>Jane Doe</td>
<td>Investigators</td>
<td>Jane Doe is the Responding Party’s roommate. It is believed that she saw the Reporting Party leave the Responding Party’s residence immediately following the reported incident.</td>
</tr>
</tbody>
</table>
The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices
Report Structure
Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.
In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.
Questions?
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