

The logo of the University of Iowa, featuring a stylized 'H' and 'I' stacked vertically, with a 'T' below them, all in white on a blue background.

**HUSCH BLACKWELL**

# **University of Iowa: Investigator Training**

November 2021

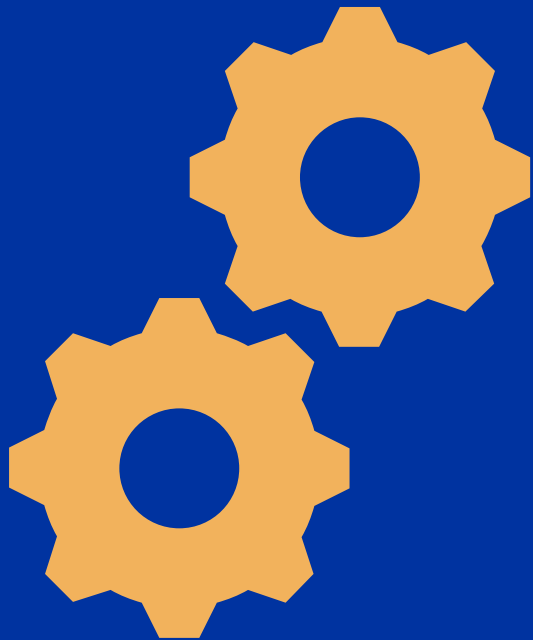


# Housekeeping

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- **Recording is not permitted**
- Slides will be provided by email
- Raise hand or use chat function to ask questions
- Anticipated breaks at about 12:30 and 2:15
- Other breaks—take individually as needed

## Group Scenarios



# Breakout Groups

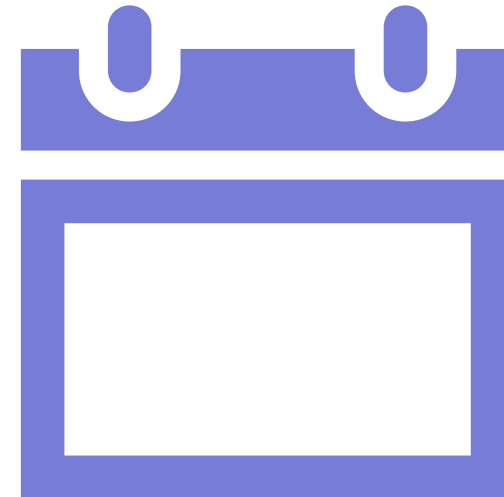
- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson, if needed
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



# Agenda



- Applicable Legal, Regulatory and Policy Requirements in a Changing Environment
- UI Policies
- Case Processing
- Investigation Issues
- Trauma-informed Investigative Practices
- Conflicts of Interest, Bias and Stereotyping
- Investigation Reports
- Evidentiary Concepts
- Resolution Options and Processes
- Hearings and Appeals Summary for Coordinators and Investigators





# Goals

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- Understand investigation processes for UI policies
- Identify investigative issues for consideration, including interviewing techniques
- Understand how to evaluate evidence
- Consider approaches to effective report writing



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**Applicable Legal,  
Regulatory and Policy  
Requirements in a  
Changing Environment**

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# Title VII of the Civil Rights Act of 1964

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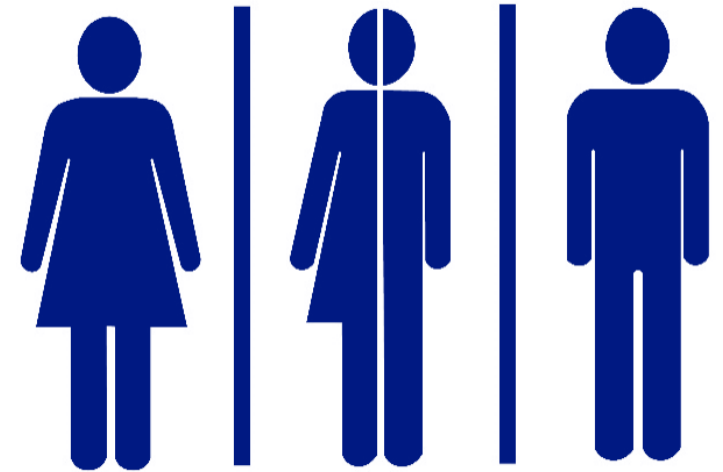
- Prohibits protected class discrimination in the workplace
  - Race, color, sex, religion, national origin
- Includes protected class harassment and pregnancy discrimination
  - Note that sexual harassment under Title IX is defined differently and institutions are subject to significantly different obligations in responding to such harassment under Title IX



# Title IX, 1972 (Amended the Higher Education Act of 1965)

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- Prohibits sex-based discrimination in educational programs or services
- Applies to institutions that receive federal funds or federal financial assistance







# Title VI of the Civil Rights Act of 1964

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- Prohibits discrimination on the basis of race, color, or national origin in any program or activity that received federal funds or federal financial assistance

# Applicable disabilities statutes

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- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act



# ADA – Title II and III

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- Title II: Prohibits disability-based discrimination in state and local government programs, services, and activities (including public education)
- Title III: Prohibits privately-owned “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .”
- Colleges and universities must make reasonable accommodations in policies, practices, and procedures



# Section 504 of the Rehabilitation Act

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- The first statute to require disability accommodation (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . .”



# Age Discrimination in Employment Act

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- Federal law that prohibits employment discrimination against individuals age 40 or older



# Iowa Civil Rights Act

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- The Iowa Civil Rights Act also prohibits protected class discrimination in employment, housing, provision of credit, public accommodations, and education
- Iowa's protected classes include:
  - Race, color, religion, age (employment and credit), sex, sexual orientation, gender identity, mental or physical disability, national origin, familial status (housing and education)



# Contract and Due Process Considerations

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- Many aspects of the legal relationships between faculty, staff, and students and the UI are grounded in contract law.
  - Employment relationships (including tenure)
- Due process considerations also bear on the rights of UI faculty, staff and students
  - Clear expectations about behavior
  - Entitled to notice of any alleged violations and a meaningful opportunity to respond



# Does the First Amendment matter?

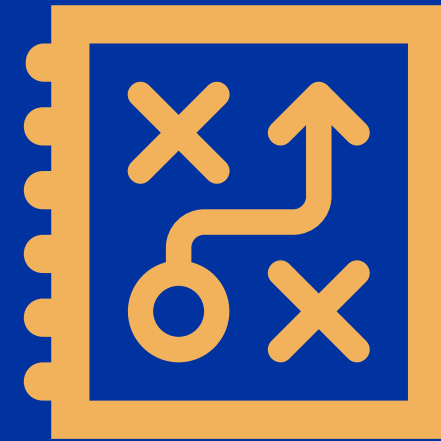


- First Amendment free speech principles applies to state action, including action by the UI
- While harassment can be verbal or written in nature, harassment that violates federal or state law, as well as UI policy, is not protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



# Example (First Amendment Protection)

- Prof. J tweets out their support of a prominent political candidate who has been accused of race baiting throughout the campaign.
- Offended Student files a complaint that Prof. J's political support of the candidate constitutes race-based harassment.





# Academic Freedom

- What is academic freedom?
- Why is it important?
- How does academic freedom relate to the behavioral standards set forth in our policies?



## Example (Academic Freedom)

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- Prof. A assigns a controversial reading assignment relating to the Holocaust.
- Undergrad's harassment complaint contends that the reading is offensive and Prof. A should have given students an alternative reading assignment.
- Prof. A responds that academic freedom protects her absolute right to assign materials she sees as appropriate and refuses to respond to your request for an interview.
- How do you respond?



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# University of Iowa Policies





# UI Anti- Harassment Policy (OM II-14)

## Harassment Definition (Prohibited Behavior):

"Harassment" means intentional conduct, including speech, directed toward an identifiable person or persons that

1. threatens serious harm and is directed or likely directed to provoke imminent unlawful actions; or
2. is sufficiently severe, pervasive, and subjectively and objectively offensive that it unreasonably interferes with work or educational opportunities or benefits, including, without limitation, on-campus living or participation in a University activity on or off campus

## Evidence/Examples:

- Repeated phone or electronic contact
- Criminal harassment
- Stalking, dating violence, domestic violence



# UI Anti- Harassment Policy - Process

- Reporting parties – impacted party, third-party reporter (including those who are not UI-affiliated), or an AAO
- Harassment by visitors is covered; report to an AAO or EOD office (now known as the Office of Institutional Equity)
- Informal resolution is available
- Formal Complaints
  - All protected class allegations should be brought to EOD
  - Non-protected class allegations and the responding party is a
    - Faculty member – Provost or Dean’s office
    - Staff member – responding party’s Senior HR Representative
    - Student – Dean of Students (undergraduates) or Dean of the Graduate College (graduate students)
- Standard of evidence: “reasonable basis for believing that a policy violation has occurred.”
  - An objective person in similar circumstances



## UI Anti- Harassment Policy - Process (cont.)

- Notice to responding party
  - Identify the impacted and/or reporting parties and alleged facts
  - Opportunity to respond, including written statement of facts
- Written finding
  - Summary of evidence
  - Conclusion – reasonable basis
  - 60-day timeline is the target with notification to parties and explanation of delays
  - Each party receives the written finding
- Refer to appropriate administrator for discipline for violations: Provost (instructors), VP or Dean (staff), Dean of Students (students)
- Administrator may accept or reject any or all of the findings.



# UI Policy Provisions – Anti-Violence Policy (OM II-10)

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## Prohibited Behavior:

- Physical assault or abuse
- Sexual assault or abuse
- Threats with a weapon
- Verbal or other threats of physical or sexual assault
- Domestic/dating violence (involving a current or former romantic partner) that is coercive, abuse and/or threatening
- Stalking
- Property damage
- Violent conduct under the Iowa Code

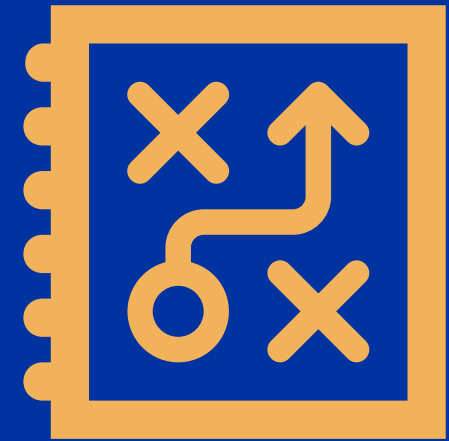




# Example of dating violence

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- Prof. D and the Statistics Department DEO are engaged to be married but live separately and have no children in common.
- Prof. D and DEO get into an argument over sex in DEO's car in university parking lot.
- During the argument, DEO slaps Prof. D's face and tells chair to "shut your mouth."



# Example of stalking



- Prof. P is infatuated with Sophomore who has rebuffed Prof. P's romantic advances.
- Thereafter, Prof. P dresses in black and sneaks up to the window of Sophomore's on-campus apartment at night in an attempt to see Sophomore.
- Prof. P does this twice before being caught in the act during Prof. P's third attempt.



# UI Anti-Violence Policy -- Process

- Reporting parties – any UI community member or the UI itself
- Informal resolution is available
- Formal Complaints
  - All protected class allegations should be brought to EOD
  - Non-protected class allegations and the responding party is a
    - Faculty member – Provost or Dean’s office
    - Staff member – responding party’s Senior HR Representative
    - Student – Dean of Students (undergraduates) or Dean of the Graduate College (graduate students)
- Notice to responding party
  - Identify the impacted and/or reporting parties and alleged facts
  - Opportunity to respond, including written statement of facts
- Standard of evidence: “reasonable basis for believing that a policy violation has occurred.”



## UI Anti-Violence Policy – Process (cont.)

- Notice to responding party
  - Identify the impacted and/or reporting parties and alleged facts
  - Opportunity to respond, including written statement of facts
- Written finding
  - Summary of evidence
  - Conclusion – reasonable basis
  - 60-day timeline is the target with notification to parties and explanation of delays
  - Each party receives the written finding
- Refer to appropriate administrator for discipline for violations: Provost (instructors), VP or Dean (staff), Dean of Students (students), appointing dean or VP (graduate assistants)
- Administrator may accept or reject any or all of the findings.



# UI Policy Provisions – Anti-Retaliation Policy (OM II-11)

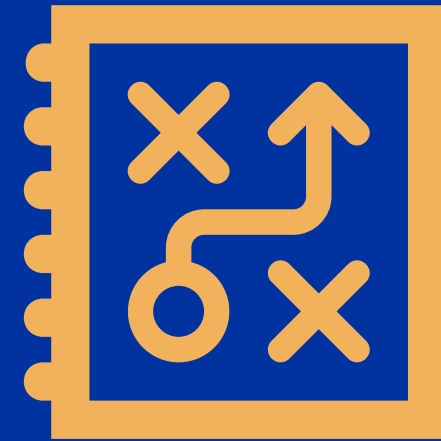
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## Prohibited Behavior:

- “No members of the University community shall engage in retaliation in response to the filing of a report of University-related misconduct.”
- "Retaliation" means any materially adverse action or credible threat of a materially adverse action by the University, or member thereof, taken against any faculty member, staff member, or student for having made a good-faith report of University-related misconduct, or taken to deter such a report in the future, or taken against another covered individual because of a close association with someone who has made or may make such a report.
  - “Zone of Interest”
- "Materially adverse action" means any action that causes or threatens to cause significant injury or harm to an impacted party, a third-party reporter, or other covered person such that it would likely dissuade a reasonable member of the faculty, staff, or student body from making or supporting a good-faith report of University-related misconduct.

# Example of retaliation?

- Office Worker files a harassment complaint against DEO.
- When Office Worker later asks DEO to approve a work-from-home schedule, DEO declines, saying “You have some nerve asking me for this after what you did.”





# UI Anti-Retaliation Policy - Process

- Reporting parties – impacted party or third-party reporters
- Informal resolution is available
- Formal Complaints
  - If the responding party is a
    - Faculty member – Provost or Dean’s office
    - Staff member – responding party’s Senior HR Representative or department head (or Dean/VP if the responding party is a department head)
    - Student – Dean of Students (undergraduates) or Dean of the Graduate College (graduate students)
  - Alternatively, report to the office that responded to the underlying report of misconduct.
  - Cases involving financial matters may be reported to Internal Audit
  - Retaliation arising from protected class complaints may go to EOD
- 60-day timeline is the target with notification to parties and explanation of delays



## UI Anti-Retaliation Policy – Process (cont.)

- No direction regarding notice to responding party
  - Follow best practice
- Standard of evidence: “reasonable basis for believing that a policy violation has occurred.”
- Refer unresolved complaints to Provost (faculty and graduate assistants), VP (staff), Dean of Students (students)
  - Faculty cases resolved under the Ethics provisions (OM III-29.7) in the Faculty Dispute Procedures and for instructional faculty, follow OM III-10.11 grievance procedures
  - Staff cases resolved through the Conflict Management process (OM III-28)
  - Student cases resolved through the Code of Student Life and Student Misconduct Procedures





# UI Policy Provisions – Professional Ethics and Academic Responsibility (OM III-15)

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- The PEAR outlines faculty responsibilities in five general categories
  - Responsibilities to Students
  - Responsibilities to Scholarship
  - Responsibilities to Faculty and Staff Colleagues
  - Responsibilities to the Institution
  - Responsibilities to the Community
- Complaints of violations of the PEAR are processed under the Faculty Dispute Procedures (OM III-29), specifically under the Ethics provisions of those procedures (OM III-29.7)



# UI Faculty Dispute Procedures – Ethics (OM III-29.7)

- Complaints filed with the Provost’s Office
- Provost conducts preliminary inquiry
- If there is a “reasonable basis,” issue Notice of Charges to the Presiding Officer of the Faculty Judicial Commission (composed of 30 members)
- The case then proceeds to a hearing under OM III-29.7 where a faculty hearing panel will make written findings and recommendations
  - Applying the preponderance of the evidence standard
- President then acts on the hearing panel report



# UI Policy Provisions –Ethics and Responsibilities for UI Staff (OM III-16)

- The UI Staff Ethics and Responsibilities policy sets forth general standards of ethical behavior for staff.
- The E&R policy details behavioral expectations in several areas:
  - Professional conduct
  - Fairness
  - Respect
  - Compliance
  - Information and data management
  - Stewardship
- The E&R policy also incorporates by reference the expectations in numerous other UI policies
- Violations are investigated by the employee’s supervisor and other UI community members may initiate Administrative Review proceedings under the Conflict Management policy for UI staff (OM III-28.2)



# UI Disciplinary Proceedings: An Overview

- Staff (OM III-28 – Conflict Management)
  - Administrative Review
  - Merit System grievance procedure (4 steps, concluding in arbitration)
  - P&S Grievance Process (4 steps, concluding in arbitration)
- Faculty:
  - Faculty Dispute Procedures (concluding in a Faculty Judicial Commission hearing)
- Students: Student Misconduct Procedures
  - Investigator may impose sanctions short of suspension/expulsion
  - Director of Student Accountability may impose suspension/expulsion



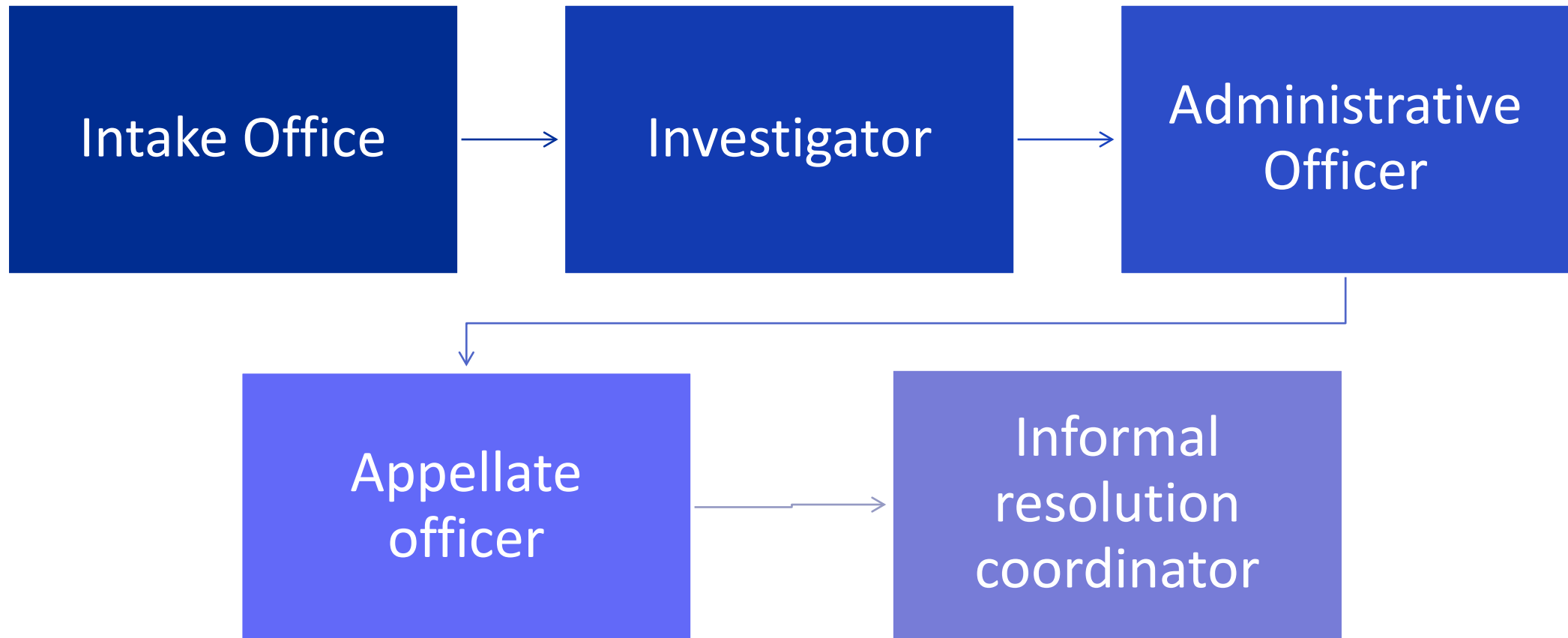
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# Case Processing



# Who are the key institutional actors in a complaint process?





# Elements of sound and reliable complaint process

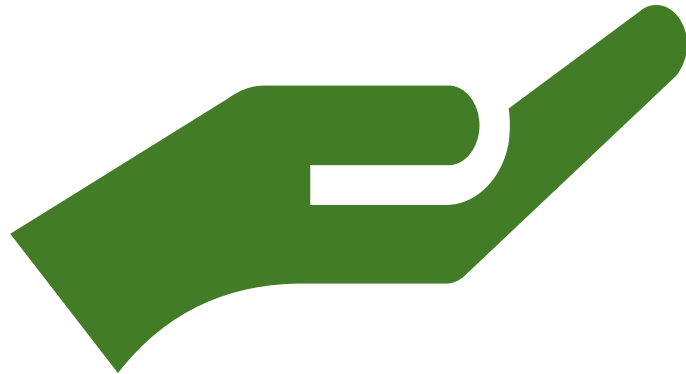
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- Timeliness – reasonably prompt
- Transparent – steps/sequence is clear
- Impartial – complaint is not pre-judged; no presumption of a policy violation
- Thorough – reasonable efforts to collect and consider relevant evidence
- Fair – parties are given the opportunity to present and respond to evidence



# What are supportive measures?

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- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party




# Examples of supportive measures

 Counseling


 Academic accommodations

 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts

# Common complaint process steps

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Investigation to collect relevant inculpatory and exculpatory evidence

Investigation report shared with administrative official who makes final finding and takes any resulting action (sanctions or remediation)

Appeal



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# Investigation Issues

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Including effective questioning, responding to common fastballs in investigations, and report preparation.



# What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported policy violation occurred



# What is inculpatory evidence?

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- Evidence tending to support the proposition a respondent committed a policy violation as alleged
- Example: A text message sent the day after an incident from the respondent stating: “I know you really wanted this promotion but you didn’t do yourself any favors by filing that complaint.”





# What is exculpatory evidence?



- Evidence tending to support that the respondent did not commit a policy violation as alleged
- Example: An email confirming that the respondent was traveling the day that a complaint alleges they engaged in religious harassment of a co-worker at the office



# What are the general principles of an investigation?

- Parties must have ***sufficient notice*** to prepare and meaningfully participate
- Investigator has an independent duty to ***collect relevant*** inculpatory and exculpatory evidence
- Parties have an equal opportunity ***to present*** their statements, evidence, and to identify witnesses
- Parties have equal opportunity ***to review*** and comment on evidence developed
- Investigation is ***evidence-gathering*** and ***fact-finding***



# How do we tell the parties about an investigation?

- Typically, institutions provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how”



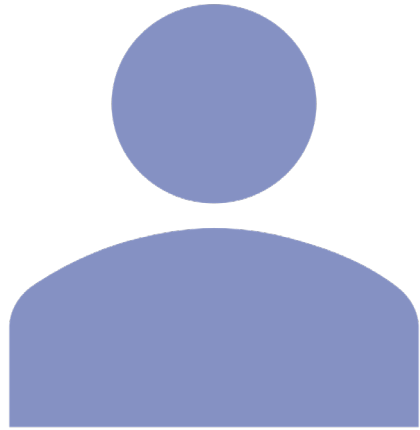




# What does the notice need to say?

- Written notices should address the following:
  - Explanation of process, including immediate next steps and timeline
  - Reference to any applicable presumptions regarding the alleged policy violation (i.e., “innocent until proven guilty”)
  - Right to an advisor and the advisor(s) role
  - Right to inspect and review evidence, if any
  - Prohibition on providing knowingly false statements or information
  - Anti-retaliation admonition
  - Confidentiality rules/expectations
  - Available support resources

# How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of  
non-testimonial evidence

# What are some general principles about interviewing?

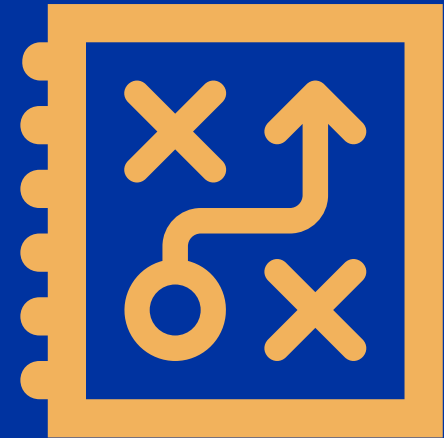
Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain and explain your role as a neutral fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready

# Example question

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From student witness: “Will I be disciplined if I don’t show up for the hearing?”

Answer: “It’s very important for you to attend so we have accurate and complete information. And I’m personally asking you to attend if your presence is requested. But no, you won’t be disciplined for failing to attend.”



# Another example question



- From a party: “I want to tell you something ‘off-the-record.’ Is that okay?”
- Answer: “The nature of the interview is that everything is ‘on-the-record.’ So no, I can’t have an ‘off-the-record’ conversation with you. But you can have a confidential conversation with one of the University counselors.”

# How do you structure an interview?

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Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase



# How do you build rapport?

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- Take the time to learn basic information about the interview subject before conducting the interview
- Learn something about the subject and share something about yourself; find commonality
- Explain the nature of the investigation, your role, and the rules of the interview
- Explain why you need accurate and detailed information
- Acknowledge the stresses the subject is likely feeling



# Example of rapport building

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“I saw in the directory that you are from Colorado. My family likes to visit the state. Are there any places you’d recommend we visit?”







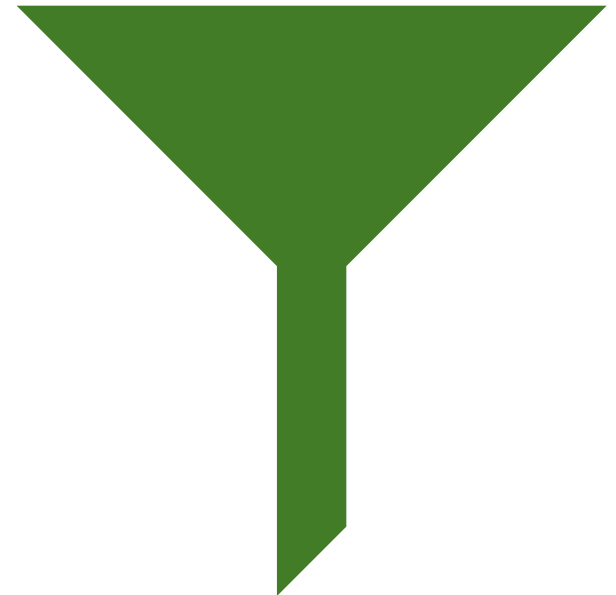
# Things helpful to say in every interview . . .

- “If I ask a question you don’t understand, please tell me.”
- “If I ask a question and you don’t know the answer, it’s okay to say you don’t know.”
- “If you think I’ve misunderstood anything you say today, please tell me.”
- “I want to get as much information as possible, so please be detailed in what you share. And if I don’t ask about something you think is important, please tell me.”
- “To do my job, I need accurate information. So I always remind every witness that it’s important to tell the truth.”



# How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of recognition prompts as long as possible
- Avoid suggestive or leading questions
- Save externally derived information for last



# Examples of open invitations



“Tell me what happened that night.”



“Will you walk me through what you remember?”



“Tell me more about that.”



“What happened next?”

# Examples of facilitators



## Examples of cued invitations

“You mentioned that . .  
. . . Can you tell me  
more?”

“You said that . . . .  
What did you mean?”

“You used the word  
‘pressured’ to describe .  
. . . . Can you be specific  
about what they did?”

“If I understood you  
right, you said that after  
. . . . Did anything  
happen in between?”

# Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

## Examples of suggestive questions (avoid)

“I’m sure it’s difficult when you see them on campus. Do you agree?”

“You probably thought that was an invitation to have sex, right?”

“If I were in your position, I would probably feel threatened. Did you?”



# Interview preparation

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- Review the applicable policy – what are the factual elements that must be established to conclude the policy has been violated?
- Identify lines of questioning
- Does the witness have “non-testimonial” evidence?
  - If so, what rights do you have to obtain it?
- Will you have the opportunity to question this witness again?





# “Elements” of the policy

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- The policy language defines the behavioral standard (i.e., the rule).
- Identify the elements of the policy
- Example: Anti-Retaliation Policy
  - What are the elements?
  - In other words, what facts must be proven to establish a violation?



# Interviewing witnesses: Common challenges

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- Fear of retaliation
- Skepticism about the process (“nothing ever happens”)
- Refusal to answer
  - “That’s too personal”
  - Potential criminal prosecution
- Conclusory answers



# How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview



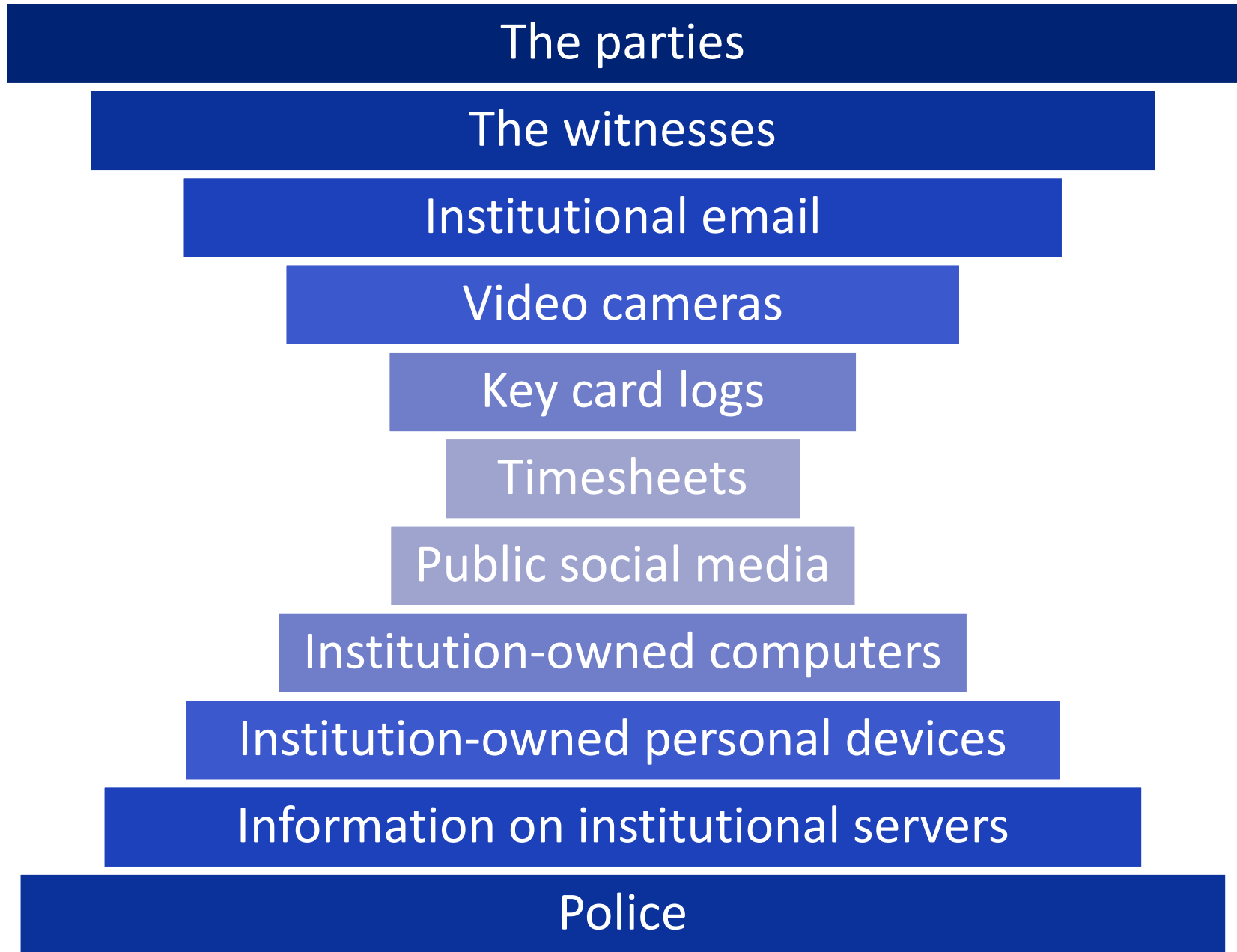


# Do parties/witnesses have a right to record the interview themselves?

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- No – parties do not have the right to insist on recording an interview (even in a “single-party state” like Iowa)
- If the interview is recorded, the institution should make the recording and give the parties access as required at the appropriate time

**Example  
sources of  
non-testimonial  
evidence**





# May an investigation collect and rely on privileged records?

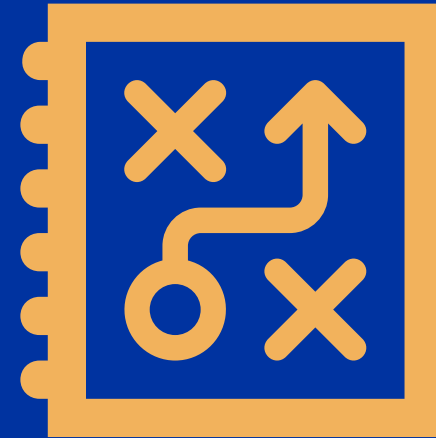


- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

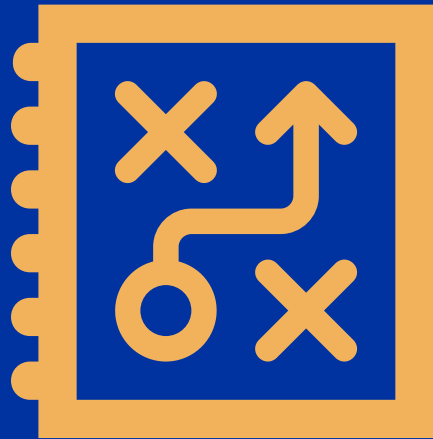


# Example of permissible use

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Student who makes report of assault executes a HIPAA-compliant release requesting and authorizing the hospital to provide a copy of the examination report to the investigator.



# Example of impermissible use



- Respondent tells investigator Respondent met with an attorney the day after the alleged assault. The investigator demands that Respondent reveal what was said to the attorney.
- When Respondent declines, the investigator notes that in the report and advises the hearing panel to draw an adverse inference against Respondent for “failing to cooperate.”





# May parties have an advisor during the investigation?

- Generally, yes. Parties may be accompanied to any investigative interviews and meetings by an advisor.
- Confer with OGC/HR/OIE about who may fill that role and the ground rules for participation.
- Institution may confine advisor to a passive role.
- Institution is not required to provide an advisor.





# What if the advisor breaks the rules?



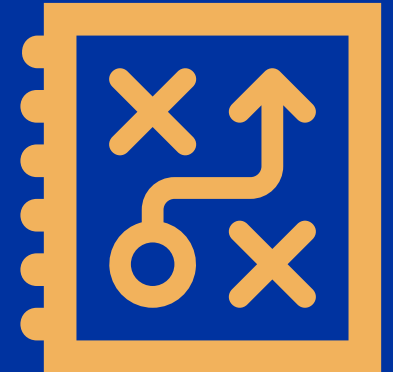
- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but must pause the relevant interview, meeting, or interaction until the party has a new advisor



# Example of advisor breaking the rules (#1)

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- A professor brings an aggressive lawyer as an advisor to an interview.
- The institution's policy states that advisors are to remain passive and not argue on behalf of the parties they are advising.
- During the interview, the lawyer repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.

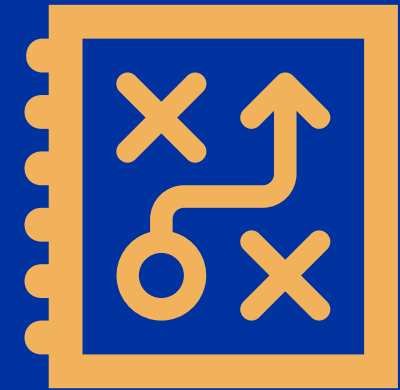




# Example of advisor breaking the rules (#2)

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- Psychology student names the student's mother as advisor.
- The institution's policy states that advisors may not obstruct communications between the institution and a party.
- The mother tells the investigator the investigator is to communicate solely through the mother and not send any emails directly to the student.
- When the investigator emails the student directly to schedule an interview, the mother calls and verbally attacks the investigator.





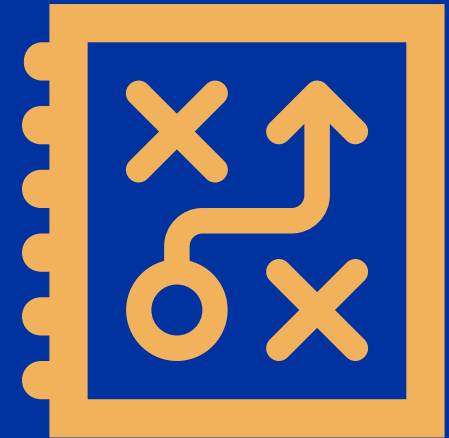
# Are parties subject to a “gag” order during the investigation?

- Generally, no – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses
- But institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.

# Example of permissible conduct

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- Respondent accused of harassment sends text messages to various co-workers who may have observed Complainant joining in with Respondent's allegedly harassing behaviors.
- Respondent's text says: "Please contact me ASAP if you believe Complainant was a willing participant in this incident."



# Example of impermissible conduct



- Respondent tells roommate that respondent has been accused of assault and “it’s important that we get our stories lined up.”
- Roommate states a belief that respondent arrived home at 2:00 a.m., about an hour after the alleged assault.
- Respondent says: “No. You’re going to say you saw me here in bed at 11:00 p.m. That’s what you need to say or I’m screwed. I’ll owe you for this . . .”



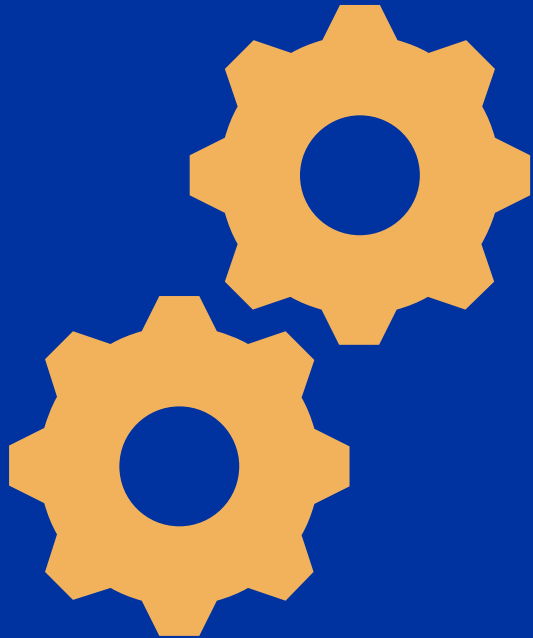
# May parties present expert witnesses?

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- If expert witnesses are allowed, parties must have equal opportunity to present such evidence



## Group Scenario



DEO is being investigated for harassment of Prof. B. DEO contacts various individuals who were present at a meeting where several of the alleged incidents that form the basis of the complaint took place. DEO asks the individuals to sign a declaration attesting that Prof. B filed the complaint because DEO would not approve some travel funding for Prof. B.

During the investigation, DEO is quoted in a news story about inequitable adjudication processes on college campuses. DEO does not name Prof. B, but the story reveals specific information about the investigative interview of DEO.

Later, DEO makes a post to social media where DEO is reading several text messages sent by Prof. B to DEO following their encounter at the meeting.



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**Trauma-informed  
Investigative  
Practices**

—



# Balance

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- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
  - Candace Jackson, Acting Asst. Secretary of Ed (2017)



# Trauma might affect any party

- Not in every case
- Not just one party
- Never assume anyone interviewed or questioned suffered any trauma

# Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame



# Trauma & credibility

---

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements

# What is the definition of trauma?



**Merriam-Webster**: a very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



**English Oxford**: Deeply distressing or disturbing experience



**Wikipedia**: is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience



## Physical reaction

- Brain—Trauma triggers chemical reaction which impacts
  - Perception
  - Ability to React
  - Memory
- Each individual reacts differently





# Trauma-informed interview

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- Provide information to the party
  - Your role
  - Policy
  - Communication
  - The process
- Acknowledge the difficult situation
- Provide as many options as possible
- Support for person
  - Personal support
  - Available services
  - Remain objective on facts





# Trauma-informed interview (cont.)

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- Important to focus on two concepts:
- What are you **able** to tell me about your **experience**?
  - Allow complainant to begin where he/she wants
  - Allow an uninterrupted statement
  - Use follow-up questions (non-leading)



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**Conflicts of  
Interest, Bias and  
Stereotyping**

—



# What is a conflict of interest?

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- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



# What is bias?

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- Bias is a prejudice (a pre-judgment) in favor or against one thing, person, or group compared with another
- Bias may be explicit or implicit and we are likely not full conscious of our own biases.



# Who is responsible for identifying conflicts of interest and bias?

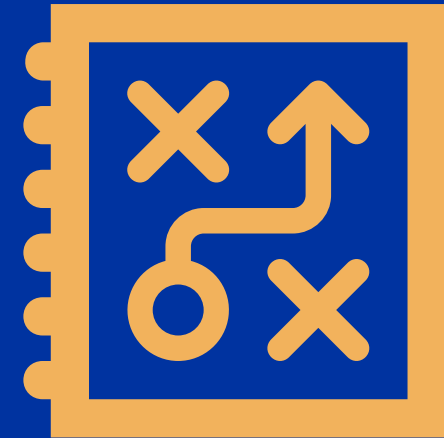
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- The office that oversees the investigation should address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias



# Example #1 - conflict of interest

Stats Student files a complaint against Math Student alleging a hostile environment. Prof. T is selected for the hearing panel, but Prof. T is also Math Student's dissertation advisor.





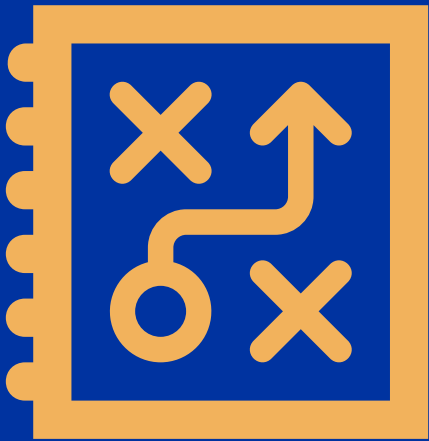
# Example #2 - conflict of interest



University Lawyer is accused of harassing a co-worker. The university assigns an investigator who serves on a local charitable board with Lawyer.



# Example #1 - bias



- Prof. R is a well-known proponent of criminal justice reform. R has published several papers questioning the validity of victim testimony, specifically the reliability of eye-witness testimony.
- Prof. R is then selected as an investigator in a case involving a complainant who was under the influence of alcohol at the time of the alleged assault.

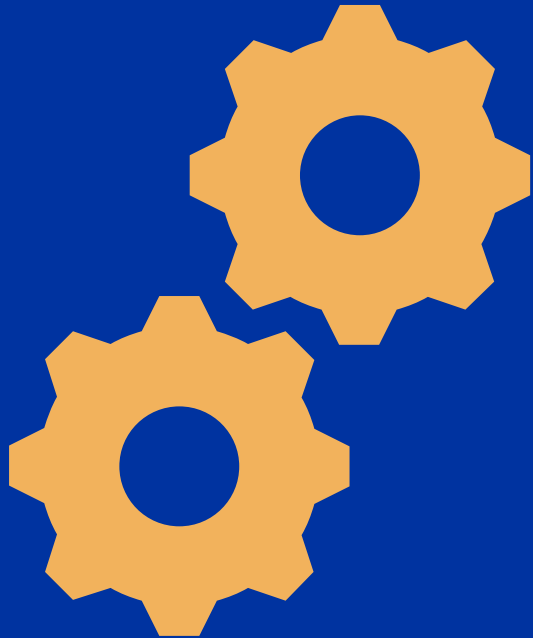
# Resource for consideration: Harvard implicit bias test

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<https://implicit.harvard.edu/implicit/takeatest.html>



# Group Scenario: Mock Interview



Prof. Z sits on Prov. L's tenure review committee. Prof. L accuses Prof. Z of using that power differential to coerce Prof. L into performing oral sex in exchange for a strong recommendation. Prof. L states that the oral sex occurred in Prof. Z's office at 9:30 pm on a Saturday in March. Prof. Z claims this encounter occurred in late May at a party after Prof. Z submitted his tenure recommendation. Prof. Z says it was a consensual "hook up."

Z claims L has falsely accused Z of misconduct because Z refused to "date" the L after the hookup. Video shows the Z and L leaving the office building together at 9:15 pm on Saturday, March 7. Z has a text message L sent to Z on May 26 stating: "I'm so happy we can finally be together. I want to spend my life with you!"

Two other faculty members in the department claim that the Z repeatedly looked at L during department meetings in a way that was "creepy." Tenure review committee records show Z expressed skepticism about L's tenure prospects before March 7 but became far more supportive after that day and ultimately recommended L for tenure.

# Investigation Reports



# Providing the parties with access to the evidence

- Consider following Title IX standards as an example:
  - Parties are given access to all evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally





# May the parties respond to the evidence?

- Again, consider the Title IX roadmap
  - Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report





# Concluding the Investigation: Investigation Report

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The written investigation report should:

1. Fairly summarize the procedural history and the various steps taken during the investigation;
2. Summarize the relevant evidence collected;
3. List material facts on which the parties agree and the facts on which the parties do not agree;
4. Make findings of fact supported by rationale; and
5. Reach a conclusion about a policy violation linking the facts to the elements of the policy



# Summarizing Allegations

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**Goal:** identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

Focus on who, what, where, when, how  
Should match the investigation notice!







# Important Language Considerations

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Use objective terms

“Complainant” and “respondent” rather than “victim” and “perpetrator”

“Violation of policy” not “guilty” or violation of “law”

Generally, credibility of **facts**, not **witnesses**, as a whole, but-for specific circumstances

Do not include speculation

Do not include irrelevant points in the analysis (but what about in the evidence summary?)

Be thoughtful about pronouns

Avoid vague phrasing



# Be Specific

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“Jane alleges that Sara had sex with her without her consent.”

VS.

“Jane alleges that Sara laid on top of her, pulled her underwear down with one hand, while pressing her elbow on her other hand, penetrated her vagina with a vibrator, and held her down so she could not move.”

# Evidentiary Concepts

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for Investigators to Consider to Inform Their Investigative Reports



# Standards of evidence

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- Preponderance of the evidence: “more likely than not”
- Clear and convincing:
- Reasonable basis: objective consideration of the circumstances
  - Related concept: reasonable person standard (how a person under similar circumstances would be expected to react)



## Additional Key Legal Principles

- Relevance
- Direct vs. circumstantial
  - Hearsay
- Weight of evidence
- Assessment of credibility



# What is relevance?

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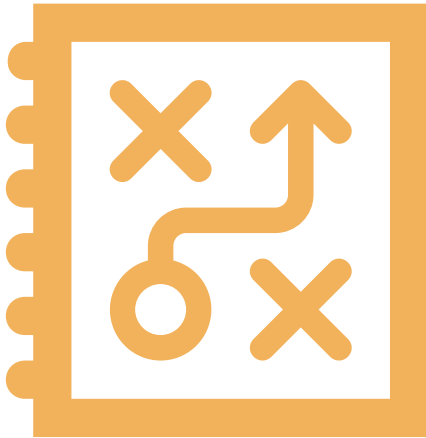
Evidence is relevant if:

- It has a tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in proving (or disproving) the allegation



# Example 1

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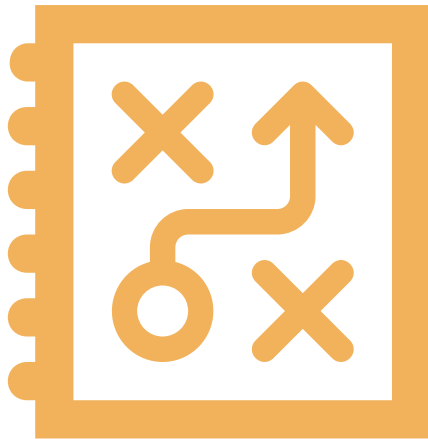
Professor is accused of failing to accommodate a Student's mental health condition. Witness states as follows:

- “I heard Professor complain that students often game the system to obtain accommodations they don't truly need.”
- Relevant?



## Example 2

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- Student has accused Professor of retaliation.
- Witness says: “Student was convicted for driving under the influence when they were a sophomore in high school.”
- Relevant?

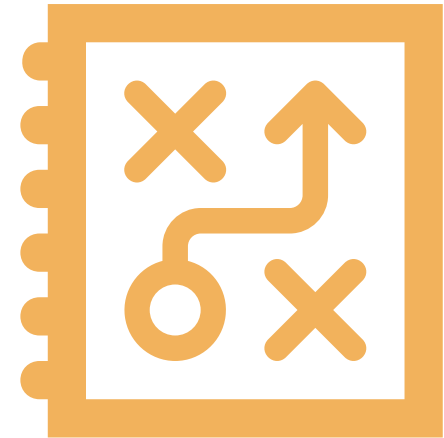




## Example 3

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- Prof. T accuses Prof. K of making a violent threat during the course of an argument.
- Prof. K denies making any threats and submits the results of a polygraph test to support his own case.
- Relevant?





# Applying the Relevance Standard in Interviews

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- Examples: in a discrimination case, respondent asks to submit hundreds of emails and other documents giving context to the poor relationship he had with complainant
- Example: in a violence policy case, respondent denies the allegations and asks you to interview three “character witnesses”



# Direct v. Circumstantial

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- **Direct** — Evidence that supports an assertion without an “intervening inference” or presumption
  - Testimony of a witness who actually observed and perceived event in question (see, hear, touch)
  - Example: security camera footage shows respondent entering a building



# Direct v. Circumstantial - continued

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- **Circumstantial (indirect)** — Evidence which, based on logic or reason, supports an inference of some fact.
  - Example: Records show Prof. Q purchased a new hot tub a few weeks after department funds went missing.



# Hearsay

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- **Hearsay** — Statement (written or oral) attributed to a non-available witness offered to prove the truth of that statement
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
  - Statement contemporaneous with the event in question
  - Excitable statement uttered in the moment being perceived



# Credibility

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- To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony
- Common factors:
  - Consistency
  - Corroboration
  - Plausibility
  - Motive
  - Demeanor



# Credibility (cont.)

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- Consider: How adept are we at determining when someone is telling the truth?
- *Talking to Strangers*, Malcolm Gladwell (2019)
  - Discusses the unreliability of nonverbal cues (shiftiness, eye contact (“gaze aversion”), firm handshake, confident speech vs. stammering)
  - Amanda Knox and “mismatch”
  - “Default to Truth” and the “Queen of Cuba”

# How does the investigator reach a conclusion?



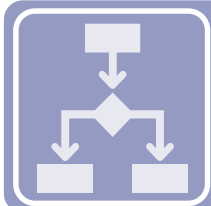
After gathering all the evidence, the investigator should consider all the relevant testimony and non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



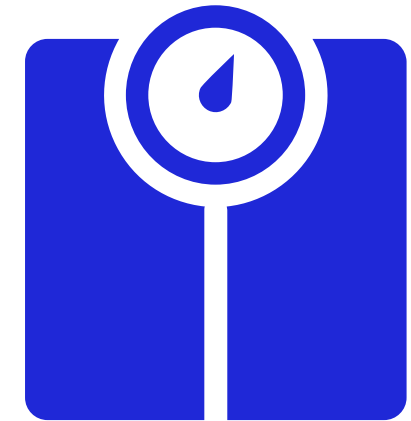
Using the facts as found, apply the policy's definitions to those facts to determine whether a policy violation occurred





# What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.



# Example of considerable weight

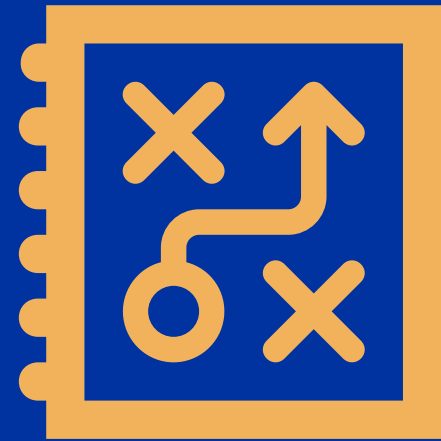
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- Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving.
- Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring.
- Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.

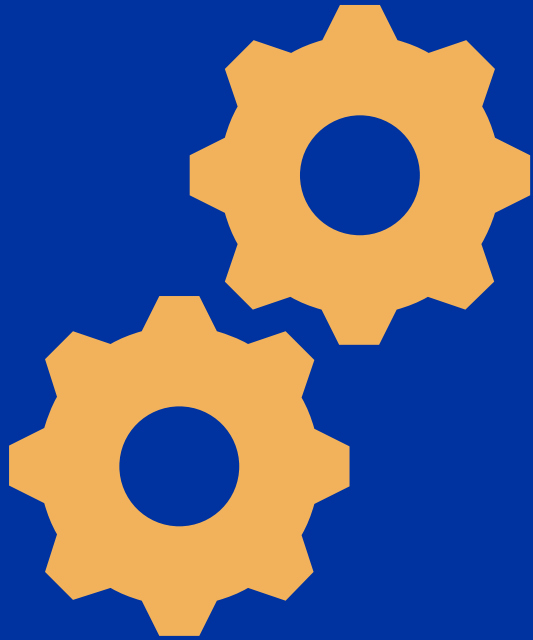


# Example of less weight

- Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when.
- Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them.
- But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”



## Group Scenario



- Jeffrey is accused of making improper charges on his p-card.
- Jeffrey contends that the expenses were legitimate charges for things like recruiting dinners and computer equipment used in a lab.
- Jeffrey further contends that it was common for employees to use p-cards in this manner and contends several other department employees engaged in the same practice.
- Jeffrey's DEO denies that there was any understanding that such expenses were authorized.
- About 3 months before the incident Jeffrey was given a written warning for his poor performance and chronic attendance issues.



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# Resolution Options and Processes





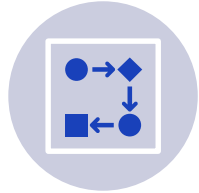
# What is informal resolution?

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A voluntary process to resolve complaints through a mechanism other than the default investigation and resolution process.

# What are the key concepts of informal resolution?

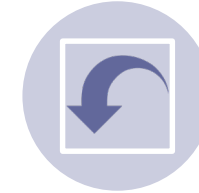
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The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



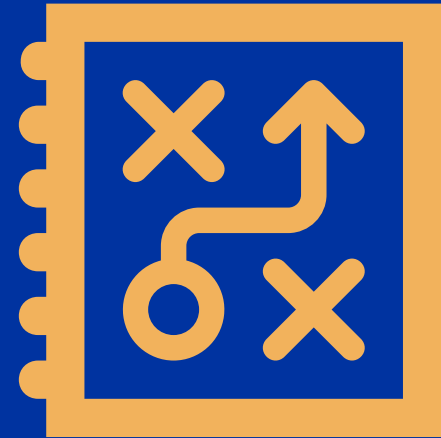
The parties must be allowed to withdraw from informal resolution up until the point it is final



## Example (informal resolution)

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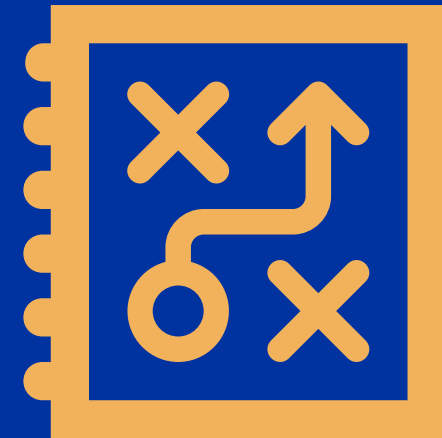
Parties agree to engage in informal resolution in the form of mediation. Parties meet with third-party mediator three times over the course of two weeks and are very near to reaching a complete agreement. The morning of the last session, the complainant indicates a desire to stop mediation and resume the formal investigation/hearing process.





# Resolution example - continued

- Investigation process would resume
- If complainant withdraws complaint, or refuses to participate, institution might elect to dismiss complaint
- But the institution might also elect to file formal complaint and cause the issue to be adjudicated fully





# What are the limitations?

---

- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment





# Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

**What are  
some  
examples of  
informal  
resolution?**

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys



# How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect of suspending any default investigation and adjudication process
- If informal resolution fails or appears futile, institution should promptly resume default investigation and adjudication process





# Is an informal resolution final?

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- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process



# Example of Informal Resolution

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Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's misconduct and attend counseling, but should respondent sexually harass complainant again, complainant will be free to file a formal complaint encompassing the entire range of sexual harassment.





# How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted





# Are investigations confidential?

---

- Investigations should be treated as confidential by the institution, with information only shared as necessary to conduct an effective investigations
- Records containing identifying information on students are subject to FERPA analysis





# Who should have access to these processes?

- Institution should restrict access to investigations and adjudication processes to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews and hearings



# Are parties allowed to talk about a case?

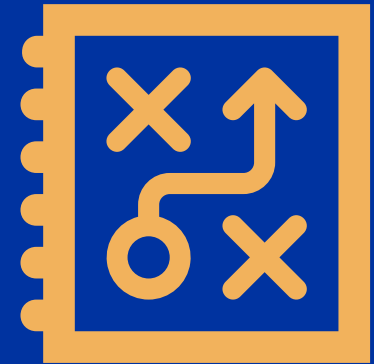
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- Due process considerations limit an institution from restricting a party's ability to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution

# Example 1

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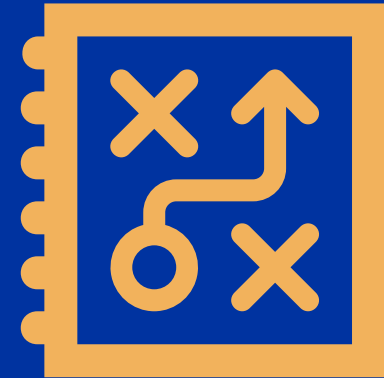
- Respondent is found responsible for a violation of the PEAR and is required to engage in some remedial measures.
- Respondent contacts several witnesses and asks them about their interviews with the investigator.
- Two of the witnesses contact the investigator to complain about this inquiry from Respondent.



## Example 2

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- A complaint against Heather results in a finding of no policy violation following a full investigation.
- Nevertheless, Heather writes an op-ed that is critical of the length and burdensomeness of the process.
- Heather's piece does not identify the complainant, but does reveal some of the specific allegations.





# What is the purpose of the arbitration or hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

# Questions



# Appeals Summary





# What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review





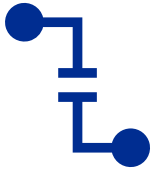
# Who can appeal?

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- Most policies provide that either party be allowed to appeal
- Typically, third-parties cannot file appeals on behalf of a party

# What are grounds for appeal?

Most policies identify limited grounds for appeal, such as:



Procedural irregularity that affected the outcome of the matter;



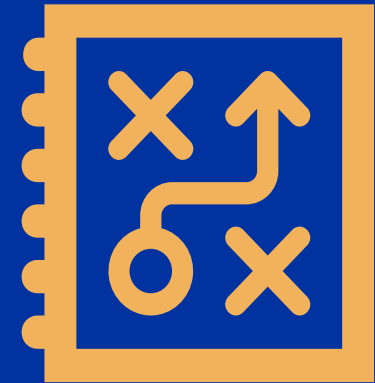
New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, that could affect the outcome of the matter; or



Decision was arbitrary and capricious, i.e., not supported by the evidence. This is a high standard to meet on appeal.

# Example (procedural irregularity)

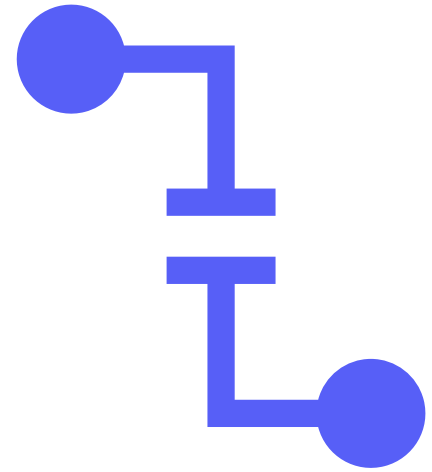
During a hearing, the hearing officer denies the respondent's advisor the right to question witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing officer must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.





# Are all procedural errors appealable?

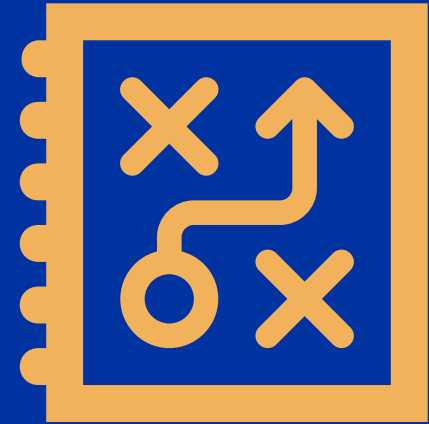
- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors





# Example (harmless error)

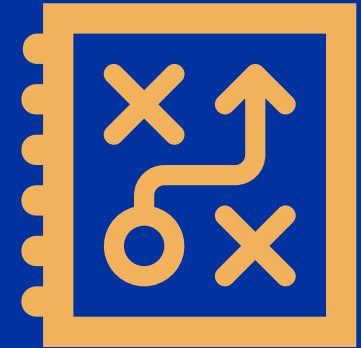
—  
Policy required hearing to be held within 60 days of submission of Formal Complaint. Hearing was held 61 days after submission of Formal Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.





# Example (new evidence)

—  
After determination is made that respondent did not commit sexual harassment, complainant secures a previously unknown video made by a bystander at a party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The bystander has been out of the country and only learned of the hearing after returning a few days ago.

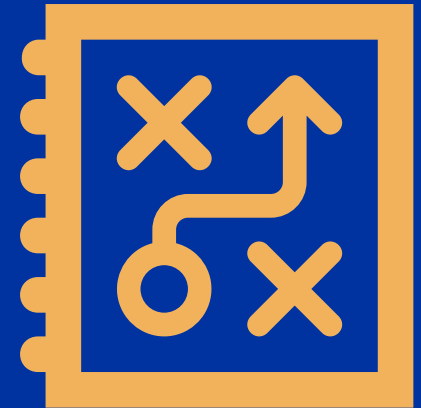




## Example (conflict of interest/bias)

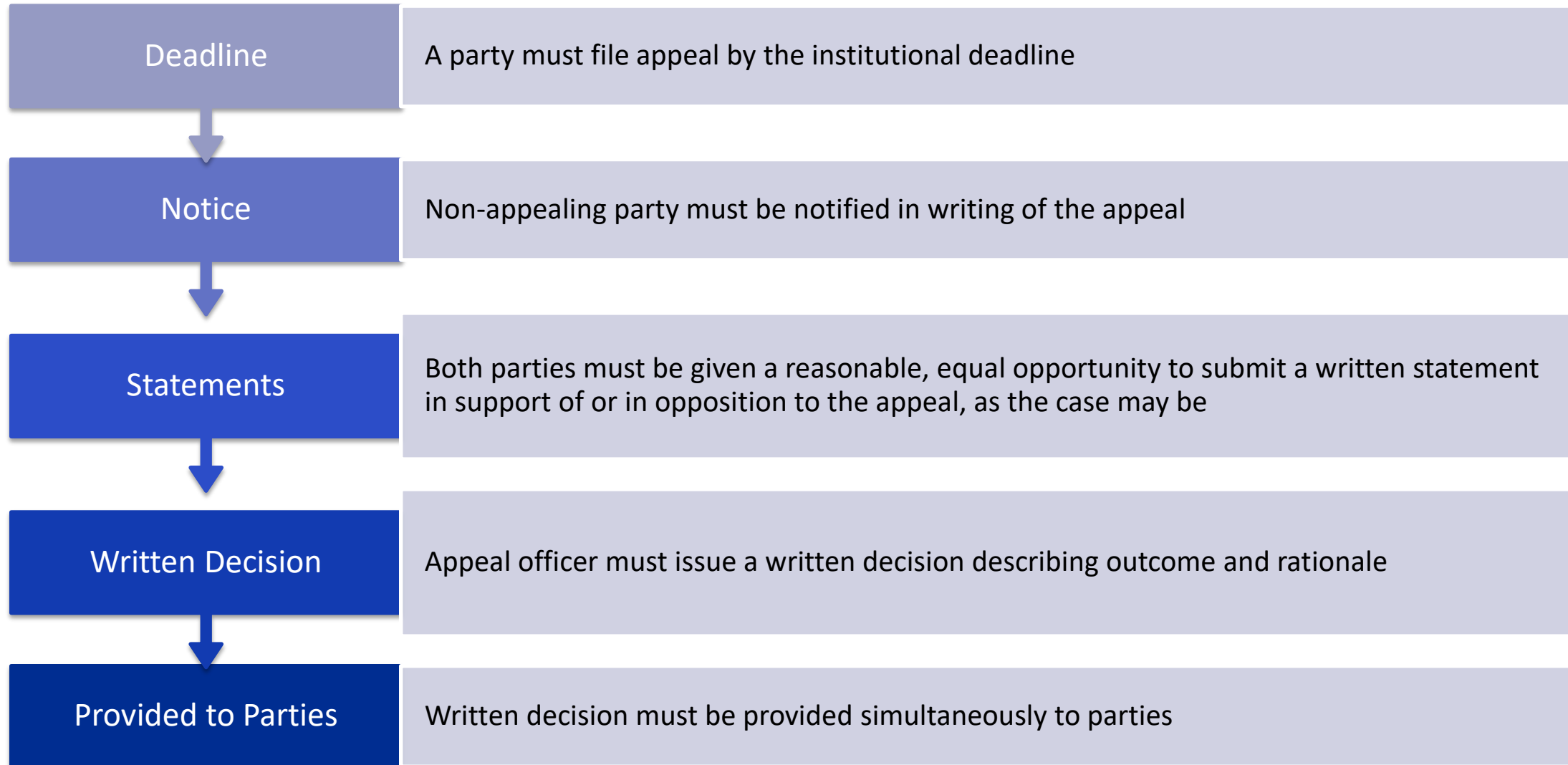
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After determination is made that respondent committed sexual harassment, respondent sees social media post by hearing officer stating: “All victims of sexual harassment must be believed. False reports of harassment are exceedingly rare. A person accused of sexual harassment probably did it in my book.” Respondent argues bias resulted in a sham hearing with the outcome predetermined.





# What is the appeal process?





# Can we require an appealing party to explain their appeal?

Yes – an institution can require that the appealing party state the grounds for appeal and also explain, with some level of specificity, why the appeal should be granted.



# How does the appeal officer make its decision?

- Appellate officer review is typically limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
- Appeal officer must review the appeal, response, and hearing record (to the extent necessary, depending on the grounds for appeal)
- Appeal officer must then draft a written decision that states the outcome of the appeal and rationale

# What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



Appeal is granted and determination is changed by the appeal officer



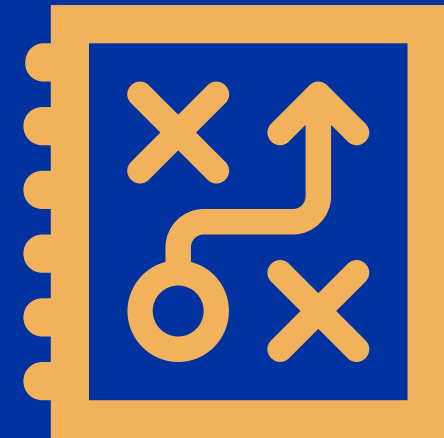
Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found



# Example (procedural error)

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Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.



# Questions



**HUSCH**  
**BLACKWELL**