

# Incapacitation



## Key Inquiry:

Whether Respondent knew/should have known that Complainant was incapacitated and *took advantage of Complainant's incapacity* to engage in sexual activity.

# Scenario

# Investigation Preparation & Information Gathering

- Obtain relevant policies.
- Consider known facts and identify potential sources of information:
  - Incident report/ disclosures, witnesses, electronic evidence (emails, texts, social media), phone records, documents, security video, card swipe records, physical site visit, forensic evidence (must be reviewed by trained forensic examiner).
  - Publicly available evidence (e.g. social media).
- Develop a working timeline of events and prepare outline of questions for parties/witnesses.
- Log of outreach, communications, investigation timeline.

# Outreach to Parties/Witnesses

- Use parallel communications for parties (updates)
- Identify and address barriers to participation by:
  - Communicating care through tone and word choice
  - Using inclusive language
  - Addressing disability accommodations and interpreter services
  - Encouraging the use of available supports/resources
- Non-responsiveness:
  - Make at least 3 attempts at outreach using at least 2 different modes before concluding that someone is intentionally not responding.
  - Think about other avenues/people for outreach.

# Interview Opening Statement

- Thank the person for coming.
- Brief explanation of matter.
- Explain recording.
- Explain process of the investigation/hearing, including expectations for participation and consequences for failure to submit to cross-examination.
- All information only disclosed on a “need to know” basis.
- Expectations of confidentiality (not parties), candor/prohibition on false statements, cooperation, no contact
- Discuss prohibition of retaliation.
- Explain amnesty policy.
- Explain guidelines regarding advisor’s participation.
- Ask: Questions?

# Basic Interviewing Techniques

- Build a rapport—don't interrogate.
- Be sympathetic in neutral manner.
- Listen to understand and do not assume.
- Be comfortable with silence.
- Plan out questions, but let conversation evolve naturally.
- What are you able to tell me about your experience → Who, what, where, when, how?
- Avoid “leading” questions (*i.e.* questions that presume an answer)
- Establish a timeline.
- Make sure to ask the difficult questions!
- Get clarification.
- Ask: Anything else?
- Opportunity for follow-up.
- Avoid asking for opinions, speculation, or character evidence.

# Interview Techniques

- Focus on sensory details.
- Pay attention to emotional cues and responses.
- Look for evidence of motive/bias/interest, even where not immediately apparent.
- Listen for “ring of truth” answers.
- Rely upon maps, photos, electronic evidence where available.
- Create running timeline.
- Be open minded, do not fill in gaps with assumptions, use language of witness, and **listen**.
- Reflexive questioning.
- Do not paraphrase or summarize.
- Considerations for Zoom interviewing.

# Complainant Interview

- Reluctant complainants → what to do?
- Open-ended, non-judgmental questions.
- Do not ask about prior sexual history (except as relevant/permitted)
- Consider impact of parents, advisors, etc.
- Handling conflicting statements (reconciliation)
- Handling difficult disclosures (explain why you need to know)
- Interview for clarification – don't interrogate.



# Complainant Interview

- What are you able to tell me about your experience?
- What are you able to tell me about . . .
  - What you saw?
  - What you heard?
  - What you tasted?
  - What you smelled?
  - What you touched/felt?
- What are you able to tell me about how that made you feel?
- What are you able to tell me about what you thought was going to happen?
- What are you able to tell me about what your thought process was when . . .
- Can you tell me more about . . . ?

# Complainant Interview

- What are you able to tell me about any specific moments that stand out in your mind?
- What are you able to tell me about your physical reactions to this experience when it happened?
- What are you able to tell me about your emotional reactions to this experience when it happened?
- What are you able to tell me about impact on your life and behavior now compared to before? Eating? Drinking? Sleeping Other routines?
- Clarify the **Who, What, When, Where, How, Why** after giving open opportunity to share.
- Anything else you'd like to share that we haven't talked about?

# Respondent Interview

- Acknowledge difficulty of conversation and affirm presumption of non-responsibility.
- Follow same structure and approach to questioning as Complainant interview.
- Allow Respondent to give statement in own words, uninterrupted.
- Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- Ask Respondent to explain inconsistencies with known evidence & provide opportunity for Respondent to explain evidence disclosed by Complainant and witnesses.
- Explore sensory and peripheral details disclosed by Complainant.
- Explore motive, bias, interest.
- Identify where there is agreement/dispute about what occurred.

# Explain Difficult Questions

What you say . . . .	What the interviewee hears . . . .
Are those the clothes you were wearing when this happened?	The investigator thinks it's my fault because of what I was wearing.
Were you drinking or doing any drugs?	I am in trouble/to blame for alcohol and drug consumption.
Did they physically hurt you or threaten you with a weapon?	I knew the person and they didn't hurt me or use a weapon. The investigator thinks I consented.
Why didn't you tell anyone about what happened?	The investigator thinks I am lying because I didn't immediately tell someone/report

# Conclusion of Interviews with Parties

- Questions for other party/witnesses.
- Opportunity/need for follow-up.
- Safety planning/interim actions.
- Next steps, manage expectations.
- Exchange contact information, details.
- Work with advisor/ intake/ Title IX Office to ensure parties understand resources and how to obtain supportive measures.
- Explain parameters of no contact and retaliation.
- Questions?

# Continued Investigation of Parties' Accounts

- Seek clarification of facts and information to help determine elements of the alleged violation or other additional evidence (who, what, where, when, how).
- Seek information about parties' behavior and communication.
- Exhaustive search for corroboration (even minor details).
- Explore motive, bias, interest.
- Explore circumstances of parties' disclosures about the incident.
- Identify witnesses, electronic evidence, other sources of evidence.

# Witness Interviews

- Explore witness's relationship to the parties.
- Ascertain the source of the witness's knowledge.
- What to do about tampering with witness testimony.
- Follow the same open-ended approach with focused follow-up questions.
- Give enough detail to illicit relevant information but be circumspect about what is shared.
- Ask witnesses about parties' motives.

**What if . . . . ?**



# Difficult Investigation Issues

- Interviewee volunteers highly sensitive information.
- Disappearing evidence (Snapchat).
- Prior complaints & pattern evidence.
- Cross complaints.
- Concurrent law enforcement investigations.
- Retractions.

# Redactions

- Investigators may redact/withhold information that is not directly related to the allegations or that is otherwise barred from use, such as as because of a legally recognized and unwaived privilege.
- Department warns against overbroad exclusion of evidence and cautions institutions to be “judicious” and “not redact more information that necessary.”
- Keep log of any documents/information that is withheld or redacted.
- “Directly related” is broader than “relevant.”

# Review of Evidence and Investigation Report

- Prior to finalizing the report, parties and advisors must have equal opportunity to inspect and review evidence that is “directly related” to the allegations, including any evidence that the investigator does not intend to rely on in the written investigation report.
- Parties and advisors have at least 10 days to inspect, review and respond to the evidence.
- Responses will be shared with other party/advisor.
- Investigator will consider responses prior to completing the investigation report and conduct any additional investigation, as necessary.
- Investigator will send report to Title IX Coordinator/designee for review.
- Parties/advisors have 10 days to review investigation report prior to hearing.

# Before You Begin Writing the Report

- Know the University's policies and procedures.
- Decide whether to consolidate multiple complaints arising from same incident in a single investigative report.
- Have both parties had an opportunity to test/explain all information relied upon in report?
- Think about how you can make the report understandable to someone who is entirely unfamiliar with process/parties:
  - Spoon-feed factual information
  - Explain acronyms
- Document efforts to obtain information/interview witnesses that were unsuccessful.
- Document delays.
- Your report must stand on its own in the event of an internal/external review.

# Report Contents

- Summary of Complaint.
- Jurisdiction.
- Procedural history– when the report was made, when the investigator was assigned, when the interviews were conducted, any delays, dates for review of evidence and responses.
- Applicable policies and procedures.
- Information considered during the investigation, including:
  - List of witnesses interviewed and when
  - List of documents and other information reviewed and who provided
  - List of witnesses proposed but not interviewed and why
  - Standard of proof (preponderance of the evidence)
  - Summary of Interviews and Evidence
  - Appendix

# Summary of Relevant Evidence

- Chronological.
- Include timeline of parties' relationship up through complaint.
- Relevant and material facts only.
- Include both exculpatory and inculpatory evidence.
- Use verbatim quotes.
- Include source.
- Use headings and bullet points.
- Identify undisputed/disputed facts.
- Isolate areas of consistency/inconsistency among interviews/evidence.

# Investigation Report

- Must fairly summarize the relevant evidence, including inculpatory and exculpatory information.
- May include direct observations and reasonable inferences drawn from the facts.
- May discuss consistencies/inconsistencies from various sources of information.
- Investigator does not make credibility assessments/determinations of responsibility under Title IX regulations – role of decisionmaker.

# Attachments

- Decide what will be attached to the report (e.g., Facebook/text messages, Snapchats, photos, police report, etc.) keeping Department's guidance on relevance in mind.
- Redact as appropriate:
  - Keep in mind Department's guidance on relevance
  - Keep unredacted originals in your file
- If the material is attached, explain the attachment and refer to it in your report.