



Conducting Title IX Investigations

October 21, 2015

Presented by:

**Megan Farrell
Natasha Baker**

233 Wilshire Boulevard
Suite 600
Santa Monica, CA 90401
(310) 255-0705

505 Montgomery Street
13th Floor
San Francisco, CA 94111
(415) 835-9000
www.HKemploymentlaw.com

5441 Kietzke Lane
2nd Floor
Reno, NV 89511
(775) 826-7100

SPEAKERS

Hirschfeld Kraemer LLP

Natasha J. Baker is a partner with Hirschfeld Kraemer LLP, in the firm's San Francisco office. Ms. Baker advises private and public institutions of higher education on a broad range of legal matters, including labor, employment, student affairs and compliance issues. She is a member of the National Association of College and University Attorneys and the co-chair of the Higher Education Council of the Employment Law Alliance. Ms. Baker recently co-authored an *amicus* brief to the United States Supreme Court in *Fisher v. University of Texas*, on the consideration of race in admissions. She also co-authored *amicus* briefs to the National Labor Relations Board on the issue of whether faculty and graduate students may be permitted to unionize under the National Labor Relations Act.

Ms. Baker's practice includes conducting preventative training and providing practical advice on a wide-range of legal issues, including ADA compliance; performance management and termination strategies that minimize risk; and labor relations issues. She is the co-founder of Title IX ASAP (Awareness & Sexual Assault Prevention) Training and she has trained administrators around the country on this topic. In addition, Ms. Baker regularly presents training sessions to administrators and faculty around the country on higher education issues including "Conducting Effective Campus Investigations," "Managing the Search Process," "Conducting Effective Faculty Evaluations," and "Managing Within the Law."

Ms. Baker also represents clients in administrative agency charges and state and federal litigation. She also regularly conducts third-party investigations into a variety of workplace issues and has trained supervisors and managers nationwide on the best practices to use when conducting an investigation. Ms. Baker advises Boards of Trustees for institutions of higher education on the negotiation of Presidential contracts and the termination of high level administrators. She assists institutions with the accreditation process, including appeals and revocation hearings. Ms. Baker is a member of the California Bar and a graduate of Tufts University and the University of Maine School of Law.

MEGAN FARRELL, J.D., M.B.A., is an educator, attorney, executive, and coach. She excels at guiding organizations and individuals at the intersection of law and business, employing her operational expertise in strategy, change management, and risk assessment. She is experienced in assisting nonprofit, higher education, and for-profit organizations achieve success. Megan was most recently Title IX Coordinator and Director of Nonprofit Program at Notre Dame of Maryland University, where she developed marketing and recruiting strategies for the program and taught a variety of courses for the Business and Economics department.

Megan now serves as adjunct faculty for NDMU and Goucher College, where she supports the MBA and MA curricula. Her background includes serving as in-house counsel for UMUC, where she supported human resources, student affairs, and procurement services. She served as claims counsel at United Educators, providing legal support to universities and school districts throughout the United States.

SPEAKERS

Hirschfeld Kraemer LLP

Megan launched her legal career as a law clerk for the Presiding Judge for the Civil Division in Camden County, New Jersey and litigated for Trump Casinos. Megan has also held executive roles in the for-profit and nonprofit sectors. As Vice President at Marsh, Inc., she provided insurance portfolio management for clients in MD, VA, and the DC. Megan was also the Executive Director of the Washington Ireland Program, an international nonprofit organization that administered an intensive leadership development program for students from Ireland, Northern Ireland, and South Africa.

Megan often speaks at national conferences on such topics as compliance, employment law, and managing risk. She also coaches leaders in these organizations to achieve strategic objectives and obtain optimal performance from staff.

TABLE OF CONTENTS

Conducting Title IX Investigations

	<u>Page</u>
I. INTRODUCTION	1
II. THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS	3
III. YOUR INITIAL MEETING WITH THE PERSON RAISING THE ISSUE	9
IV. DECIDING IF A FORMAL INVESTIGATION IS NECESSARY	23
V. INVESTIGATING DIFFERENT KINDS OF ISSUES	29
VI. ORGANIZING AND PLANNING THE INVESTIGATION	33
VII. INTERIM ACTIONS	39
VIII. PREPARING FOR AND CONDUCTING AN EFFECTIVE INVESTIGATION	47
IX. REACHING A CONCLUSION	77
X. MAKING A RECOMMENDATION	81
XI. DOCUMENTATION RETENTION	76
XII. ATTORNEY-CLIENT PRIVILEGE	79
XIII. SUMMARY CHECKLIST	83
XIV. CASE STUDY.....	89

NOTE: The information provided in this training material is intended to assist you in performing investigations for your institution. Included is a list of some of the possible steps that can be taken. The steps actually taken or not taken will depend on the characteristics and issues involved in the investigation being conducted.

INTRODUCTION

Course Objectives

Course Objectives

- ❖ To establish why effective investigation skills are important
- ❖ To build skills necessary for conducting an effective internal investigation:
 - ◆ Asking questions in the appropriate way
 - ◆ Sorting relevant from irrelevant evidence
 - ◆ Understanding the dynamics of sexual assault
 - ◆ Making credibility resolutions
 - ◆ Reaching a conclusion
 - ◆ Implementing the results
- ❖ To identify the role of the investigator in the investigative process
- ❖ To provide guidance in preparing documentation that supports the results of the investigation and meets the requirements of Title IX and the Clery Act

INTRODUCTION

Legal Standards of Proof

Legal Standards Of Proof

- ❖ Beyond a reasonable doubt
- ❖ Clear and convincing evidence
- ❖ **Preponderance of the evidence**



The Importance Of Developing Effective Investigation Skills



THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

Conducting Title IX Investigations

I. Introduction And Overview **The Importance of Developing Effective Investigation Skills**

In order to comply with Title IX Clery/Campus SaVE, your institution must be prepared to conduct a comprehensive, impartial, and professional investigation. The investigative process permits your institution to monitor itself – to ensure that its students, faculty and staff comply with both the letter and the spirit of federal and state laws, as well as internal policies and guidelines.

The purpose of an investigation is to gather facts so that the institution can make a credible determination as to what happened in a given situation. Conducting an effective investigation helps reach a conclusion that is based on the best facts available. Having accurate facts leads to a sound conclusion.

Conducting an effective investigation is an *acquired* skill. People who conduct investigations with skill know how to ask questions; they know how to extract information from people who are reluctant to communicate. Sorting relevant from irrelevant details and being comfortable making credibility resolutions are also skills that can be developed. People who conduct investigations with skill rest secure in the knowledge that the people involved were treated objectively and fairly, i.e., the way the person conducting the investigation would want to be treated in the same situation.

A. **Title IX, Clery & the Burden of Proving Misconduct as Part of an Internal Investigation**

1. **Proof of Misconduct**

For most institutions faced with the decision of whether to discipline an individual for alleged misconduct and of what remedies should be provided to the complaining party, “proving” in the judicial sense of the word (i.e., by establishing “beyond a reasonable doubt”) that the misconduct actually occurred is neither practical nor plausible. Institutions conducting internal investigations generally do not have the resources, time, or experience to conduct the kind of extended discovery that occurs in court litigation. Fortunately, the majority of courts and OCR recognize that imposing judicial-like burdens of proof on institutions making decisions in the workplace is not legally required. The same courts agree, however, that an institution’s investigation and decision must be judged by some standard to ensure that its actions are not arbitrary, capricious, or illegal.

THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

Conducting Title IX Investigations

The standard that Office for Civil Rights (OCR), the federal agency that enforces Title IX, and the courts generally use is whether the institution has acted in good faith, been impartial, been diligent and followed its own procedures. At a public institution, if an institution suspends or expels a student, the institution is required to provide what is termed as “due process,” which merely means the process that is due or appropriate given the nature of the institution’s action. In general under federal law, that means informing the student the conduct that violates the university’s policies or conduct code and providing an opportunity for the student to explain to someone why the institution should not impose that sanction. The person making the decision should be someone who can make the decision based on the evidence. Some states have laws or other requirements that establish other requirements institutions must follow to impose sanctions.

Courts rarely become involved in second-guessing an institution’s decision to discipline a student for violating institution policies and procedures. If the sanction imposed does not interrupt a student’s enrollment, i.e., suspension or expulsion, the Court will largely defer to the institution’s decision so long as the institution follows its own procedures. Even if the sanction involves suspension or expulsion, most instances where an institution is found liable are a result of the institution’s failure to follow its own procedures. Of course, public universities are expected to provide due process to students who are subject to suspension or expulsion but the process due is quite limited. In general, students at public universities must be given notice of the misconduct alleged and an opportunity to respond to the allegations.

The April 2011 Dear Colleague Letter and Campus Save establish other procedure an institution must follow. An institution’s failure to follow those might create liability as a violation of the statute but the institution’s liability to an individual would likely be based on whether the investigation amounted to deliberate indifference to an allegation and its failure, as a result, to take immediate and deliberate action.

2. What Constitutes “Preponderance of the Evidence”?

The April 2011 Dear Colleague Letter states explicitly that in deciding whether sex discrimination, including sexual harassment and sexual violence occurred, institutions must use a preponderance of the evidence standard. Thus, when determining if sexual harassment or sexual violence occurred, the institution should consider all the evidence and decide if it is more likely than not that a student experienced sexual harassment or sexual violence.

THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

Conducting Title IX Investigations

Clery/Campus SaVE does not establish a standard of proof but instead requires that students be informed of the standard of proof that will be heard. The difference in the requirements between Title IX and Clery/Campus SaVE does not authorize institutions to ignore the requirements of either. As a result, OCR expects institutions to notify students and others that they will use a preponderance of the evidence standard in deciding if sexual misconduct occurred.

Sometimes investigators worry that if they are not certain what occurred, they cannot reach a conclusion or make a recommendation. In fact, in most instances, investigators (and decision-makers) will not be absolutely certain. However, an investigator who is reluctant or unwilling to make a recommendation or reach a conclusion unless the investigator is 100% certain is using a higher standard and is not following the requirement to reach conclusions based on a preponderance of the evidence standard.

3. Negligent Investigation Claims

As noted earlier, when an individual challenges an institution's decision to terminate a student for alleged misconduct under a contract or statutory theory, the quality of the institution's investigation and the duty owed to the individual under state law will determine whether the institution could have liability. In general, the investigator's duty is likely to be to the institution, which would preclude those investigating from challenging its quality. However, because of the statutory duties created by Title IX and Campus SaVE, it is possible the investigator could have some duty to the parties, especially the complaining student. If a court concludes the institution had a duty to one of the parties, it is likely that a court would consider, on a case-by-case basis whether there was reasonable grounds to support the institution's decision. In evaluating the investigation, a court might consider if the investigator demonstrated deliberate indifference in conducting the investigation rather than whether the court would have investigated the manner in the same way. Thus, even if an individual can prove successfully that an institution incorrectly determined he or she engaged in misconduct, the individual will need to show something more to sustain a negligent investigation claim.

4. Defamation Claims

Defamation claims more often arise when an institution terminates an employee for alleged misconduct. Specifically, the terminated employee claims to have been defamed by the institution's false accusations of misconduct. Most jurisdictions

THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

Conducting Title IX Investigations

maintain that an institution has a *qualified* privilege to make statements about individuals in the workplace if the statements are made: (1) in good faith; (2) on a subject in which the party communicating the information has an interest; and (3) to individuals having a corresponding interest. If these elements are established, the individual cannot prevail merely by showing that the statements were actually false; rather, the individual must show that the institution or investigating individuals made the statements regarding the misconduct *with malice* – knowledge or reckless disregard as to the truth or falsity of the statements. While the malice standard uses different terminology from the good faith reasonable grounds standard, it essentially holds an institution to the same level of scrutiny. That is to say, institutions *need not prove* that the allegations of misconduct are true. An institution can prevail by showing good faith in making the communication. This good faith is established by showing the allegations were investigated adequately and expressed an opinion based on the investigation. Certainly the best way to avoid these claims is to limit disclosure of allegations made and evidence gathered during the investigation strictly to those individuals with a *legitimate need to know* that information.

An institution that wants to ensure that its investigations are carried out in good faith and that all determinations are supported by objectively reasonable grounds should at minimum:

1. *Develop* and implement thorough investigation procedures;
2. *Identify* and train all individuals who may carry out an internal investigation;
3. *Require* thorough and complete documentation of the investigative process; and
4. *Ensure* that the investigation contains:
 - a. Thorough interviews of the complainant, accused, and necessary witnesses;
 - b. Analysis of all relevant evidence;
 - c. Assessment of the credibility of the witnesses and strength of the evidence; and
 - d. Rational and defensible conclusion.



The Initial Meeting With The Person Raising The Issue



THE INITIAL MEETING

Purpose & Objective

Initial Meeting: Purpose & Objective

- ◆ Identifying all issues
- ◆ Gathering all material facts
- ◆ Determining if formal or informal investigation is needed
- ◆ Instilling confidence in the system and you

When an individual initiates a discussion with you regarding an issue he or she is concerned about, it is critical that you respond properly. After ascertaining the general nature of the issue, **MAKE SURE THE INDIVIDUAL FEELS COMFORTABLE THAT YOU CAN BE OBJECTIVE IN ADDRESSING THE ISSUE.**

Is the person raising the issue comfortable that you will handle any investigation fairly and objectively?

Before proceeding, you should confirm with the individual that he or she feels comfortable that you can reach an impartial resolution. Make sure that the individual articulates this comfort level to you. Ask the individual:

“Is there any reason why you feel I cannot be fair and objective?”

If the individual chose to come to you, it should be possible to establish this comfort level.

Establishing the individual's comfort level early on will help avoid problems when you reach the point of resolution. Sometimes, if an individual does not agree with the outcome of an investigation, he or she will say that the person conducting the investigation was biased. Establishing a comfort level at the beginning makes this less likely to happen at the end.

NOTE: There will also be situations when an individual does not come forward and specifically raise an issue, but the Title IX Coordinator becomes aware of an

THE INITIAL MEETING

Purpose & Objective

issue that needs attention. An internal investigation can result from these situations as well.

Gathering The Evidence

At this point, you are ready to begin your initial interview with the person raising the issue. This interview is very important. It will help you determine whether the issue can be resolved informally or whether an internal investigation will be necessary. The most important objective of this initial interview is to **GET THE FACTS!** Proceed as your journalism teacher taught you - get the **WHO, WHAT, WHERE, WHEN** and **WHY**.

- ◆ What happened?
- ◆ When did it happen?
- ◆ Where did it happen?
- ◆ How did it make you feel?
- ◆ Who was there? What did they see? What have they told? What would you have told them?
- ◆ Has it ever happened before? When? What? Where?
- ◆ Who have you told this to? What did you say?
- ◆ Are there any written documents relevant to the issue that the individual knows about? Texts? Facebook or Instagram posts?
- ◆ Has the individual kept any written records or diaries that are relevant to the issue? Any other notes?
- ◆ Who has similar concerns? What are those concerns?
- ◆ Are there any other issues this individual wants to discuss?
- ◆ What other information/facts may be important for me to know?

THE INITIAL MEETING

Before Concluding the Interview

What should you do *before* concluding the interview?

- ◆ Thank the person raising the issue for doing so.
- ◆ Inform the person raising the issue that the institution does not permit any retaliation or reprisal due to a legitimate issue having been raised.
- ◆ Advise the individual that in the event there is a need to undertake an investigation, he or she will be apprised of this fact and will be told who will be conducting the investigation.
- ◆ Tell the individual that you will limit the disclosure of information to those people having a **legitimate need to know**.
- ◆ Discuss the need to limit the disclosure of information.
- ◆ Tell the individual that the person conducting the investigation will be getting back to him or her from time to time during the investigation and that his or her continued cooperation in the investigation will be necessary to reach a resolution.
- ◆ Ask the individual for suggestions on how he or she thinks the matter could best be resolved. Does the individual have any suggestions or preferred resolutions?
- ◆ Let the individual know the institution will make any final determination regarding the best way to resolve the issue; however the individual's input is valuable and will be considered seriously.
- ◆ Thank the individual again for raising the issue and express your commitment to resolving the matter in a timely manner.
- ◆ Discuss resources and interim actions (if appropriate).

THE INITIAL MEETING

Prior To Starting An Investigation

Discuss with the Title IX Coordinator the following:

- Whether the issue(s) raised merit an investigation;
- Whether or not your legal counsel should be contacted to discuss the possibility of protecting all or part of the investigation under the Attorney-Client Privilege; and
- Which documents the Title IX Coordinator would like to review prior to being finalized or sent to the individuals involved in the investigation.

Two Critical Documents To Generate *After* Initial Interview

INDIVIDUAL-GENERATED DOCUMENTATION

- Encourage the individual raising the issue to write down his or her side of the story in order to:
 - avoid misunderstandings and
 - ensure that you correctly understand all of the facts and issues raised

INSTITUTION -GENERATED DOCUMENTATION

- An “issue confirmation” memo serves to:
 - memorialize all issues and facts raised
 - avoid misunderstandings and to confirm with the individual his or her story and facts

THE INITIAL MEETING

Individual-Generated Documentation Checklist

When an individual raises an issue meriting investigation, **encourage** the individual, if he or she has not already done so, to provide you with a summary of the issue(s) in writing. Ask the individual to include in this written summary the following:

- ◆ A list of all the individual's issues / concerns / complaints;
- ◆ The relevant facts and dates the individual believes support his or her concerns;
- ◆ The names of people the individual suggests who may have information relevant to the investigation; and
- ◆ The individual's suggestions for obtaining relevant documentation (e.g., memos, performance reviews, etc. that may include relevant information).
- ◆ The individual should date and sign this written summary.

Ask the individual to supply you with, and/or attach to the above written summary, all documentation he or she has that would be helpful in the investigation.

Individuals should not be required to provide written notification of an issue(s). When an individual chooses not to put his or her concerns in writing, take notes of the meeting or phone conversation. (See discussion on Notes.)

THE INITIAL MEETING

Institution - Generated Documentation Checklist

Issue Confirmation Memo

Whether or not an individual provides written notification of his or her concerns, a confirmation memo or letter should be given, when appropriate, to the individual, summarizing the issues raised. This generally should be done as soon as practicable, and within several business days. Issue confirmation will provide both the person responsible for handling the investigation and the individual raising the issue an opportunity to make sure that all the issues are clearly understood before starting the investigation. This confirmation should do at least the following:

- ◆ Identify issue (confirmation);
- ◆ Identify facts provided by individual to support issue;
- ◆ Confirm these are all issues raised;
- ◆ Identify name of person investigating issue and confirm his or her impartiality and fairness;
- ◆ Identify roadmap for investigation; and
- ◆ Outline the institution's expectations for the individual raising the issue.
- ◆ If someone does not want to go forward, that should be addressed as well. In that case, he or she should be reminded that he or she can come forward at a later date.

THE INITIAL MEETING

Writing Sample

CONFIDENTIAL

Date: January 15, 2014

To: Jaeden Green

From: Natasha Baker

Re: The Concerns/Issues You Raised

I am sending you this memo to confirm, and make sure I understand, the issues and concerns you raised on January 13, 2014. You raised the concern that your biology professor made comments that made you feel uncomfortable. Specifically, she said that she liked when you wear jean shorts to class. This was said in front of the entire class and made you feel uncomfortable.

In our meeting you told me that these are all the concerns you have against the institution. If I've missed something, or if you have additional concerns, please let me know immediately. I also told you that I would be the person investigating the concerns you raised. I want to make sure from the outset that you believe I will be impartial and fair in conducting this investigation. I asked if you believe I will be impartial and fair, and you stated that you believe I will be.

THE INITIAL MEETING

Writing Sample

We also discussed what you can expect as I conduct the investigation. I will review the information and documentation you provide to me. As appropriate, I will consult with other individuals to assist in addressing and resolving the issues. And I will strive to keep you informed of the progress of this investigation.

As we also discussed, the following are some of the expectations that the institution has of you:

- You are expected to cooperate fully throughout the investigation and be completely honest in answering questions and providing information to the institution.
- You are expected to provide us with all of the information and documentation that you believe may help in reviewing and addressing your concerns. You stated that you have done so. If at any time you have any additional information or documentation that you think could be relevant to your concerns, please provide it immediately.
- This is a confidential investigation. Please do not discuss this investigation with any person who does not have a legitimate need to know this information. If you have any questions or concerns about this requirement at any time, please feel free to discuss it further with me.
- (Resources and Interim actions should also be addressed.)
- If you have any questions or concerns about any of these expectations, or about any part of this investigation, you will contact me immediately.

Please let me know if you have any questions, additional information, or if you want to discuss any of this. As you know, you can reach me at (XXX) XXX-XXXX.

THE INITIAL MEETING

Documentation

Support Documentation

All documents relevant to an investigation should be identified and obtained quickly. These documents may provide background information that will help to verify facts in the investigation, as well as help to identify who may need to be interviewed, and which questions to ask.

Throughout the investigation, it is important to repeatedly ask those involved whether or not they have any documentation that might be helpful in the investigation. This documentation can come in all shapes and forms from texts to Instagram photos to notes.

In addition to the documentation collected from those involved in the investigation, the person conducting the investigation will also obtain and review other sources of documentation that may supply helpful information.

Access to Documentation

Access to the documents involved in an investigation should be limited exclusively to those who have a legitimate need to know.

Confidentiality

“Need-to-Know”

The scope of the documentation to be shared with others should be limited to those who have a legitimate need-to-know. This might include disclosing or providing access to information under, but not limited to, the following circumstances:

- ◆ Information necessary for decision-makers to make a decision;

THE INITIAL MEETING

Documentation

Confidentiality

- ◆ Information necessary for people to conduct the investigation or to take any action as a result of the investigation; and
- ◆ Information to be shared during the investigation in order to obtain more information.

If a person needs to know one piece of information in a document, share only that information rather than disclose the whole document.

- ◆ Remember: FERPA may require disclosure of a student's education records to that student.

Documentation Provided in Confidence

Individuals have a right to privacy. Institutions, however, have an obligation to investigate and resolve certain claims. These competing rights and obligations must be weighed and balanced to determine what - and how much - information will be shared.

Part of this equation is analyzing whether an individual has a “reasonable expectation” of privacy in a given situation. Determining what is “reasonable” depends partly on the circumstances under which the interviewee shared the information. **Accordingly, the interviewer should not make promises regarding confidentiality unless it is certain the confidence can be kept.** Instead, assure the interviewee that you will keep the information on a need-to-know basis.

THE INITIAL MEETING

Understanding the Role of the Title IX Coordinator

Understanding The Role of the Title IX Coordinator In The Investigation Process

- ❖ The Title IX Coordinator's primary responsibility is to see to it that things get done fairly and effectively and in compliance with Title IX.



Deciding If A Formal Investigation Is Needed



DECIDING IF A FORMAL INVESTIGATION IS NECESSARY

After The Initial Meeting

When issues are raised, one of the investigator's most important jobs is determining what additional information, if any, is necessary to resolve an individual's concerns. In order to accomplish this task, you must understand when to proceed with a formal investigation.

When is a formal investigation necessary?

- ❖ Determine the nature of the issue that was raised:
 - Is it a question that has a fairly simple answer, or is it a more complex problem that needs to be addressed?
 - Does it involve just this individual? Have other names been mentioned?
 - Does it stem from a single incident or is there a pattern of conduct alleged?
 - Do your instincts tell you this could be of major significance to the institution?
- ❖ Before reaching a conclusion do you need more facts than the individual is able to provide?

DECIDING IF A FORMAL INVESTIGATION IS NECESSARY

When is a formal investigation necessary?

Do you need to obtain the help of anyone having special expertise in order to reach a conclusion?

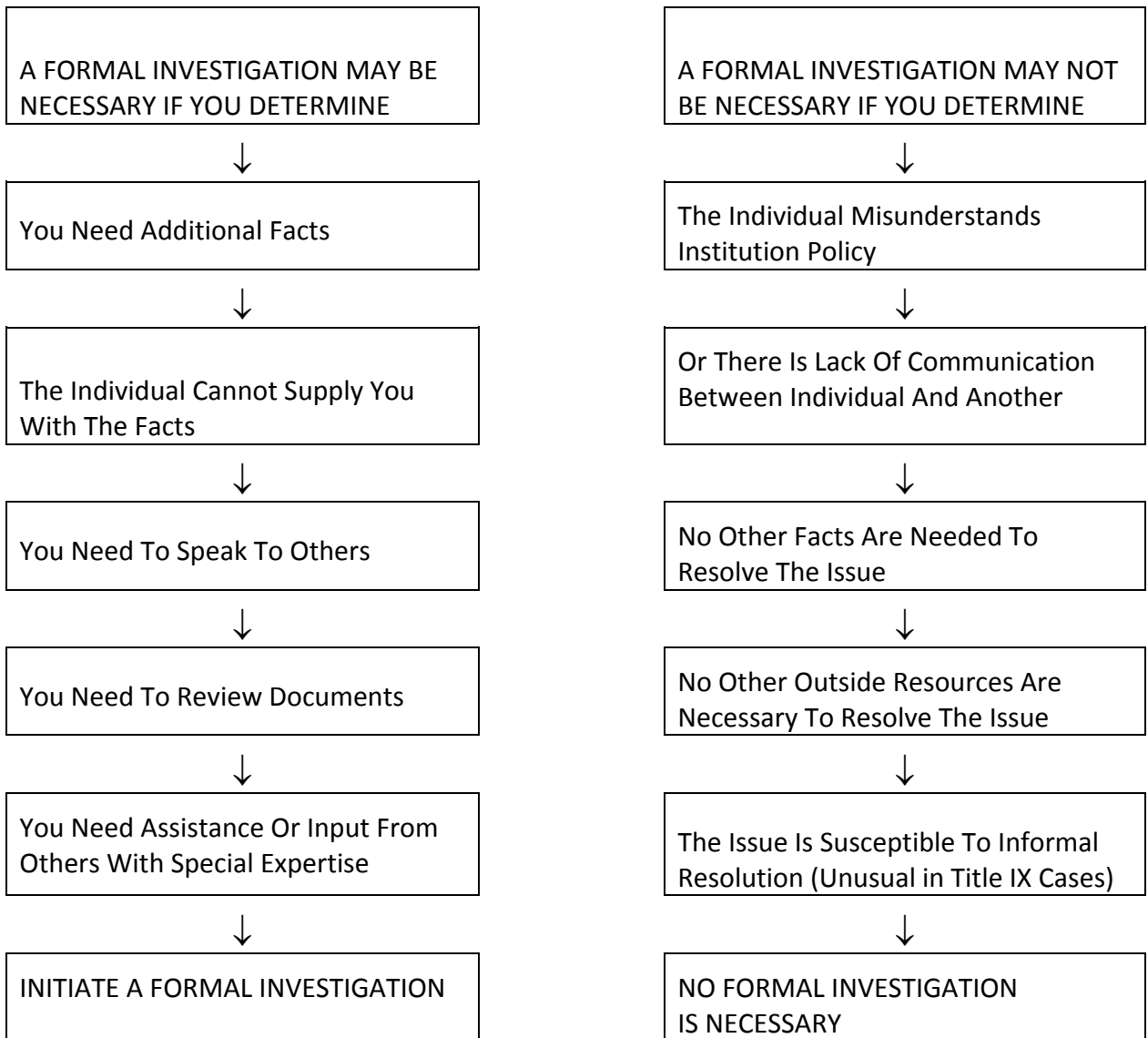
- ❖ Your in-house or outside legal counsel?
e.g., is a local, state, or federal law involved?
- ❖ Campus Safety?

If you need more information that can come only from interviewing additional sources, the issue raised by the individual will probably not be susceptible to an informal resolution. Issues that lend themselves to informal resolution include those that stem from a misunderstanding of the institution's policies or guidelines, or receipt of misinformation by an individual. These kinds of issues usually can be resolved immediately between the Title IX Coordinator and the individual.

However, when it is necessary to speak to other people and/or to review documents in order to reach a conclusion or resolve a problem, you will probably need to initiate an internal investigation.

An investigation, by definition, is the collection of facts from sources other than the person raising an issue in order to help you reach a conclusion. Thus, if you can readily and easily resolve an issue with an individual “on the spot” or with very little effort, an investigation usually is not warranted. If you need additional information that will require the involvement of other sources, an investigation likely is necessary.

DETERMINING IF A FORMAL INVESTIGATION IS NECESSARY





Investigating Different Kinds Of Issues



INVESTIGATING DIFFERENT KINDS OF ISSUES

Identifying Special Considerations with Regard to Varying Kinds of Issues

Key Considerations

- ❖ What are the **issues** the individual is raising?
- ❖ What are the institution's **obligations** (legal and organizational) with respect to these issues?
- ❖ Are there **others** inside or outside the institution with whom you should **consult** to resolve these issues?

Understanding Your Role And Responsibility With Regard To Various Kinds Of Issues That Will Merit An Internal Investigation

Obviously, different issues are handled differently. The nature of an issue determines how it is handled. As a result, before initiating an internal investigation, you must fully understand the nature of the issue and any **SPECIAL** obligations the institution may have with respect to the issue.

BEFORE you initiate an investigation, specifically *identify* what the individual is complaining about (i.e., sexual harassment, stalking, sexual assault, discriminatory application of an institution policy based on sex, etc.) and then determine *what* your obligation is with respect to resolving this issue, and *who* else in the institution is necessary to assist you in resolving the issue. Only after you have determined the answers to these questions are you ready to begin planning your investigation.

INVESTIGATING DIFFERENT KINDS OF ISSUES

Sexual Harassment Investigations

Sexual Harassment Investigations

As you know, sexual harassment issues involve special consideration. Your institution has a responsibility to investigate all allegations of sexual harassment. Once the institution ***knew or should have known*** that sexual harassment is/was occurring, it has the legal obligation ***to do everything reasonable to stop the conduct***, prevent its occurrence and remedy the effects.

Questions For Consideration

1. What if an individual tells you that he or she is being sexually harassed but does not want you to do anything?
2. What if an individual who complains requests that his or her name be held confidential in any subsequent investigation?
3. What if a female individual who complains of sexual harassment tells you (a male) that she does not believe that any man could really understand what sexual harassment is all about?



Organizing And Planning The Investigation



ORGANIZING AND PLANNING THE INVESTIGATION

Organizing and Planning

Organizing and planning your thoughts *before* you begin to conduct witness interviews is one of the most important phases of conducting an effective internal investigation.

Before interviewing anyone, there are several things you need to review:

- What Policies, Guidelines Or Practices Apply To This Situation?
- Who should you talk to?
- What Relevant Documents Can You Obtain That May Assist You In Conducting Your Investigation?

ORGANIZING AND PLANNING THE INVESTIGATION

Choosing An Appropriate Investigator

Who Should Conduct The Investigation?

Determining *who* should conduct the investigation is a critical part of the planning process. Before you decide to conduct the investigation, you should ask yourself:

- ❖ **ARE YOU** the right one to handle this particular investigation?
- ❖ **DO YOU** have the experience *and* expertise to conduct this particular kind of investigation?
- ❖ **CAN YOU** be objective with regard to the parties involved and/or the issues raised?
- ❖ **DO YOU** have any bias that will prejudice the integrity of the investigation if you are the one who handles it?

ORGANIZING AND PLANNING THE INVESTIGATION

Planning the Interviews

Deciding Who Should Be Interviewed

- ❖ The individual filing the complaint
- ❖ The individual who is the subject of the complaint
- ❖ Percipient witnesses
- ❖ Anyone with relevant information
- ❖ Authors of relevant documents
- ❖ People who the **accuser** has asked you to interview
- ❖ People who the **accused** has asked you to interview

Deciding The Order Of Your Interviewees

- ❖ Is there any benefit to be gained by “ordering” your interviews?
- ❖ Whom should you interview first?
- ❖ Do you *really* need to interview that person?

The Benefit Of Limiting The Number Of Interviewees

- ❖ Helps you stay on track with the issue raised
- ❖ Ensures effective use of time and energy
- ❖ Leads more clearly to a determination



Interim Actions



INTERIM ACTIONS

Key Considerations

After completing your initial interview with the person raising the issue, determine if any interim actions must be taken **before** you initiate an investigation. For example, consider whether steps are needed to protect the health and safety of other individuals, or to protect institution property, or to protect the integrity of the institution's policies or guidelines.

Issues Which May Give Rise To Interim Actions

- ❖ Allegations of violence or sexual harassment involving physical touching, battery or rape
- ❖ Other serious incidents

Key Points Of Consideration

- ❖ Will leave take place before or after you confront the accused?
- ❖ Will leave make things better or worse?
- ❖ Who should you consult with beforehand? Legal? Security? Is a risk assessment needed?
- ❖ How will you respond to the accused when asked why leave is necessary?
- ❖ What, if anything, should others be told about the individual's departure?
- ❖ What are the terms of the leave? Who should he or she contact? What should he or she do during that time?

Notice Of Administrative Leave

Situations may arise where removing an individual while an investigation is in process is warranted. For example, an individual suspected of ongoing conduct harmful to the institution should be removed from the institution

INTERIM ACTIONS

Notice of Administrative Leave

pending the completion of an investigation. Or, if it would be more effective to conduct the investigation without the presence of the individual being investigated, the individual should be placed on leave.

Documentation Checklist

A notice should be given to the individual being placed on leave at the time he or she is informed of the decision. This notice should include the following:

- ❖ The **issue raised** that is being or will be investigated
- ❖ Statement **explaining** the individual is to be placed on **leave** (if an employee with or without pay), i.e.:

“Pending the outcome of this investigation, you have been placed on leave, with (without) pay and benefits.”

- ❖ **How long** the investigation is expected to last
- ❖ **Who to contact** if the individual has any questions or concerns during the duration of the leave about any part of the investigation
- ❖ **What is expected** of the individual during the leave and investigation, i.e.:

“You are expected to cooperate fully throughout the investigation, and be completely honest in answering questions and providing information to the institution.”

Documentation Checklist

“Please provide us with all of the information and documentation that you believe may help us in conducting this investigation. If you have any information or documentation that may be relevant

INTERIM ACTIONS

Notice of Administrative Leave

to this matter and that you have not already provided, please provide it immediately.”

“This is a confidential investigation. You must not discuss this investigation with any person who does not have a legitimate need to know this information. If you have any questions or concerns about this requirement at any time, please feel free to discuss it further with me.”

- ❖ Explain how coordinating the individual's return to the institution will be handled, i.e.:

“Your advisor will call you on Monday to discuss whether or not you should come in on Tuesday.”

INTERIM ACTIONS

Writing Sample

CONFIDENTIAL

Date: December 10, 2014

To: Elaine Smith

From: Jessica Lee
Title IX Coordinator

Re: Administrative Leave Notification

As we discussed, the institution is investigating concerns that you may have violated our policies. Pending the outcome of this investigation, you have been placed on administrative leave, with full pay and benefits.

As I informed you, I will be the person investigating these concerns.

We also discussed what you can expect as I conduct the investigation. I will review the information and documentation you provide to me. As appropriate, I will consult with other individuals and managers to assist in addressing and resolving the issues. And I will strive to keep you informed of the progress of this investigation.

I want to emphasize some of our expectations of you during this investigation. If you have any questions or concerns about any of these expectations, or about any part of this investigation, please contact me immediately. The expectations for you include the following:

- You are expected to cooperate fully throughout the investigation, and be completely honest in answering questions and providing information to the institution.

INTERIM ACTIONS

Writing Sample

- You are expected to provide us with all of the information and documentation that you believe may help us in conducting this investigation. If you have any information or documentation that may be relevant to this matter that you have not already provided, please provide it immediately
- While this investigation is being conducted, you will remain on our payroll, receiving your full pay and benefits. During this time, you must devote your full efforts to help bring this matter to closure. You must remain available during normal working hours to meet and/or provide information to institution representatives.
- This is a confidential investigation. You must not discuss this investigation with any person who does not have a legitimate business need to know this information. If you have any questions or concerns about this requirement at any time, please feel free to discuss it further with me.
- If you have any questions or concerns about any of these expectations, or about any part of this investigation, you will contact me immediately. I will contact you within the next ten days to let you know of the progress of the investigation.

Please let me know if you have any questions, additional information, or want to discuss any of this. As you know, you can reach me at (XXX) XXX-XXXX.



Preparing For And Conducting An Effective Investigation



PREPARING FOR AND CONDUCTING AN INVESTIGATION

Laying the Groundwork

After completing your initial interview with the person raising the issue and after planning your investigation, you are ready to begin interviewing other witnesses.

Just as the effectiveness of your initial interview with the person raising the issue depended on your ability to gather facts, the success of your investigation will depend on how proficient you are at gathering facts from other people. Once you have the facts, you must sift through facts to determine which ones are relevant and which ones are not. Not all of the facts you gather will be utilized in reaching a resolution. Not all of the facts will be relevant. **Only those facts that are relevant to the issue at hand should be considered.**

There is no substitute for thorough preparation. Before you begin your interviews, anticipate the questions you are likely to be asked. Be ready with logical, coherent and reasonable responses.

Meeting With Witnesses

Key Considerations

- Contracting for expectations
- Showing sensitivity toward interviewee
- Putting interviewee at ease
- Stressing that no conclusions have been reached
- Minimizing risk of retaliation
- Protecting the investigation's integrity

DOCUMENTATION

Notes

Be Sensitive To The Fact That Being Interviewed As Part Of An Investigation Can Be Quite Stressful For The Interviewee

Generally, the person conducting the investigation is aware of the big picture. You know what it is you are investigating. You have access to all of the information that the investigation uncovers. You know the part that each interviewee is playing in the investigation. You know *why* the interviewee is being interviewed and the allegations.

Usually, the interviewee does not have all the facts you do. He or she, therefore, may be uncomfortable and may ask or say:

- ❖ Am I being investigated?
- ❖ What are you really investigating?
- ❖ How will you use the information you are given?
- ❖ Is it confidential?
- ❖ Will I get into trouble if I don't talk with you?
- ❖ Can I have someone with me?

Put The Interviewee At Ease

For your investigation to be successful, you need people to talk openly and candidly to you. To accomplish this, you must make them feel comfortable. People who feel threatened “clam up.” They are reluctant to provide any information that they feel may get themselves or their colleagues into trouble. Therefore, before you begin your interview, you **must** anticipate the questions or concerns that will be raised by each of the interviewees. Be prepared to address these questions or concerns honestly and forthrightly. Before you start, prepare an opening statement that you will make to the interviewees. That statement should address:

- ❖ What you are investigating;
- ❖ How the process works;
- ❖ What role the interviewee will play in the investigation;
- ❖ What role you play and your neutrality;
- ❖ How the information you receive from the interviewee will be used;
- ❖ How confidential you will be able to keep the information you receive from the interviewee;
- ❖ The possibility that the interviewee could be disciplined as a result of any information you receive;
- ❖ Any rights the interviewee has.

DOCUMENTATION

Notes

Stress That No Conclusion Has Been Reached

All too often, an individual feels that, although you are purporting to conduct an investigation, you already have made up your mind and are merely “going through the motions” in order to give the appearance of fairness. Communicate to the individual that no conclusion has been reached. Stress that when issues are raised, it is the institution's obligation to investigate those issues. No conclusions will be made until all of the facts are gathered and analyzed.

Discuss Information Security

Stress that you will only disseminate information as appropriate and on a “need to know” basis only. As a result, the person who is the focus of the investigation should be told that neither the fact that an issue was raised nor any facts brought forth in an investigation will be widely disseminated throughout the institution.

Stress that, while you will strive to maintain confidentiality and the individual's privacy and urge that he or she should also keep investigation information confidential. Get individuals’ commitment that they will keep the interview confidential and explain the value in doing so.

Diffuse Any Attempt At Retaliation

Inform the interviewee that it is the institution's policy to foster an environment where individuals feel comfortable raising issues and complaints. Therefore, retaliation or reprisals against participants in an investigation will not be tolerated and subject to discipline. Of course, any participant who intentionally misdirects an investigation, whether by falsehoods or omissions, will be subject to discipline. Explain to the interviewee how to report retaliation should it occur to the interviewee.

Protect The Integrity Of The Investigation

In order to protect the integrity of the investigation, the information you receive from witnesses or others absolutely must be accurate and truthful. The following steps will assist in this endeavor:

- ❖ Explain to the interviewee the seriousness of the investigation.
- ❖ Explain the importance of receiving accurate/truthful information.
- ❖ Explain that you do not want speculation or opinion. You want to know what the person knows first-hand.
- ❖ Explain that the investigation is confidential but not secret. Explain how information is shared.
- ❖ Explain that attempting to influence the outcome of the investigation by discussing it with others will undermine our efforts to have a neutral investigation and could call the interviewee's credibility into question.

DOCUMENTATION

Notes

Notes

Throughout the investigation, notes should be taken of meetings, interviews, phone conversations, and the like. Tape recording or video recording devices should not be used.

In your notes, include only the relevant facts. Factual notes will help determine what actually happened and should lead to an effective resolution.

Facts are what you see and hear (“just the facts, ma'am”). Notes should be succinct and objective. Notes should consist of factual accounts of interactions, observations of actions, and conversations with others. Do not include your interpretations, beliefs, “feelings,” frustrations, or assumptions about what you are hearing or seeing. Rather than guess at the reasons for, or the intentions behind, an individual's actions, ask the individual and record this response.

Observe and record the individual's demeanor/behavior without drawing your own conclusions at this time about why this behavior was occurring. These observations might later be important in helping you evaluate the situation overall.

For example, the following notes do not consist only of facts:

“I asked Melanie if she had been drinking. She nervously said no. I think she was lying.”

DOCUMENTATION

Notes

Notes

Notes should record only the facts, giving a description of what occurred, such as in this example:

*"I spoke with Melanie in my office from approximately 3:00 p.m. to 3:05 p.m. on January 27, 2014. Her coach was present. I asked Melanie if she had been drinking on the night of the incident. She said 'no.' She did not look at me or her coach directly when she said no, and she moved around in her chair. I then asked why she was fidgeting and not looking at us. She said, 'I'm nervous because we were on a drinking contract before our big game.'"**

Investigation notes should be kept in a separate place from notes regarding other individual or business issues. Notes should be made on separate pieces of paper or in separate Word documents. Notes should not be recorded in bound notebooks (e.g., daytimers) or other formats that might contain information outside of the particular investigation; in the event your notes are produced in litigation, your entire notebook might be required to be shared publicly, including notes that are irrelevant to the case.

*In reality, few of us may have the time to take these types of notes. Notes should be legible and provide enough information to understand what occurred or what was said. Proper punctuation and complete sentences are not necessary.

MEETING WITH THE ACCUSED

Outlining Your Approach

- ❖ **Outline your issues** - carefully analyze all issues raised.
- ❖ **List the facts** that relate to each issue.
- ❖ **Leave room** underneath each fact to write in the interviewee's answers.
- ❖ **Note-taking is critical** - do the best you can to get down the facts during the interviews and complete your notes **immediately** after the interview while the information is still fresh.

Explain The Issue To The Person Who Is The Focus Of The Investigation

It is difficult for someone to respond to broad-based allegations of wrong-doing or abstract notions of policy or guideline violations. Therefore give the person who is the subject of the investigation as detailed an explanation of the issue as practicable.

Get A Detailed Account Of The Events Surrounding The Issue From The Person Who Is The Focus Of The Investigation

Explain to the person who is the focus of the investigation that you want as much information from him or her as possible. Emphasize the importance of providing you with any facts or information that will help get to the bottom of the issue.

If the individual refuses to cooperate, explain that you have an obligation to resolve the issue. Explain that if he or she refuses to provide relevant information, you will have to base your decision on other information gathered in the investigation.

MEETING WITH THE ACCUSED

Effective Questioning

Knowing *how* to ask questions is the heart of doing an effective investigation.

Knowing how to ask questions can be learned. Keep these points in mind:

- ❖ Effective questioning begins *before* your first interview.
- ❖ Before you formulate your questions, be sure you understand the policy or guideline that forms the basis of the issue or that will be critical in reaching a resolution of the issue.
- ❖ Understand what facts are necessary for you to reach any conclusion or make any resolution.

Determine what written documents will probably be available to assist you in reaching a conclusion or at least in shedding light on certain facts.

Broad to Narrow Questions

- ❖ Start off with broad questions like:

“Were you at a party last Saturday night? Where was it? When did it start?:

“What happened?”

"Who was there?"

- ❖ Use open ended questions.
- ❖ Then, move to more narrow, pointed questions to follow-up:
 - Listen carefully to the answers.
 - Be flexible in your questioning.

MEETING WITH THE ACCUSED

Effective Questioning

Leading Questions

- ❖ Avoid leading questions, for example, “Is it true that you were trying to force Sally to drink?”
- ❖ Leading questions send the wrong message – they are too confrontational and communicate that you have already made up your mind.

Tough Questions

- ❖ Don’t start with them – develop rapport first.
- ❖ Don’t avoid them – they are critical but should be asked at the right time when the proper atmosphere and chemistry exists.

Follow-Up Questions

- ❖ Listen carefully to the answers.
- ❖ Use the 5 W’s – who, what, where, when, why.

Avoid Compound Questions

- ❖ They are confusing – ask one question at a time.
- ❖ Break the questions down into smaller parts.

Committing Interviewee To A Story/ Chronology

- ❖ Force the person to tell you the order in which things occurred.
- ❖ Use timelines to help ensure you’ve got the story and chronology straight.
- ❖ Doing so helps assess credibility and resolves conflicts.
- ❖ Ask yourself: Does the story/chronology make sense? Could it logically have happened that way?

MEETING WITH THE ACCUSED

What If The Accused Denies Wrongdoing?

If the person who is the focus of the investigation claims that the person raising the issue is “lying,” ask why he or she thinks someone would do this. Did something happen between them that might explain why someone would file a meritless complaint or would want to injure another person's reputation or job?

Explore possible ill-motives

❖ Ask:

“Do you have any idea why she/he would make this up?”

❖ Ask:

“Have you had any conflicts or problems with her/him?”

Before Concluding The Interview

Before concluding the interview, encourage the individual to come to you with any additional information. Let the individual know that if he or she has forgotten to tell you anything, he or she is welcome to get back to you at any time, but preferably before you complete the investigation.

Give The Individual A Time Frame

Try to give the individual a general time frame within which you expect to complete your investigation. This will encourage the individual to get back to you with any additional information within a relatively short period of time and will also relieve some of the stress the individual may feel with respect to the probable outcome.

INTERVIEWING WITNESSES

Classifying Witnesses

- ❖ **The “reluctant” witness**
- ❖ **The witness who loves the limelight**
- ❖ **The witness with an ax to grind**

It is only natural that people who are not being investigated will feel less anxious than the person who is being investigated. However, just because someone is not the subject of an investigation does not necessarily mean that the individual will give his or her full cooperation. Some individuals may feel uncomfortable giving you information. Most people do not like to get someone else in trouble. Others feel that by “getting involved,” they may become the focus of the next investigation.

On the other hand, some people enjoy being part of the investigatory process. They enjoy what they perceive as “being in the limelight.” They feel empowered by having information that someone else wants. Your calling them in for an interview makes them feel important.

Still others may have “an ax to grind.” They may view the interview as an opportunity to retaliate against the person who is being investigated because of either a real or imagined injury that was done to them in the past.

Remembering these traits – i.e., “where the interviewee was coming from” – is an important part of credibility resolution.

INTERVIEWING WITNESSES

Closing The Interview

Develop a standard “close” to an interview. This should include:

- ◆ Asking the interviewee if there is anyone else he or she thinks you should talk to who would have information that might assist you in reaching a resolution.
- ◆ Reviewing the interviewee's answers with him or her before closing the interview so that you agree on what was said.
- ◆ Instructing the person that if he or she remembers additional information after the interview, he or she should give you these additional facts. Stress that everyone forgets things from time to time.
- ◆ Telling the person that if he or she has or learns of additional documents, he or she should provide those to you.
- ◆ Re-emphasizing the confidentiality of the investigation.
- ◆ Answering any questions the person may have.
- ◆ Explaining what will happen with regard to the investigation from this point on. (In most cases, it would be appropriate to share only the broad outlines of future activity, e.g., “I will be speaking to other people in order to conclude my investigation.”)

ASSESSING CREDIBILITY

Assessing A Person's Credibility

As soon as the interviewee leaves the room, make some notes that will help you assess his or her credibility later on. Factors that may help assess credibility are quickly forgotten. Run through the following checklist as soon after the interview as possible:

Demeanor

- ❖ What was the interviewee's demeanor/"body language?" (e.g., nervous, obviously uncomfortable, sweating, uneasy tone of voice)?
- ❖ But be aware that racial/cultural issues could play a factor in demeanor. Similarly, those who have experienced trauma such as sexual assault may react differently than you might expect.
- ❖ How did he or she react to the allegations (e.g., argumentative, defensive, hostile)?
- ❖ Does this person inspire confidence in the listener – i.e., does he or she make an overall credible impression?
- ❖ You need a **baseline** for comparison. How does the interviewee's demeanor compare to the way he/she "normally" acts?

Logic/ Consistency Of Story

- ❖ Did the person's chronology of events differ greatly from the chronology of any other interviewees?
- ❖ Does the person's version make sense? Is it plausible or far-fetched?
- ❖ Don't throw common sense out the window.
- ❖ Did the person give you a plausible explanation of why an issue may have been raised?
- ❖ Was the person forthcoming or did you have to "pull" information from him or her?

ASSESSING CREDIBILITY

Corroborating Evidence

- ❖ Did the interviewee make any admissions during the interview? For example, “the only reason why I thought it was OK was because she was flirtatious.”
- ❖ Did the person specifically deny anything?
- ❖ Are there supporting *percipient* witnesses? Were they credible?
- ❖ Was the person’s version of the facts different from anyone else’s version?
- ❖ Did the person’s statements conflict with any written information collected?
- ❖ Are there any texts, photos, other writings or messages that help substantiate the person’s story?

Circumstantial Evidence

- ❖ Are there things that the accused has said or done in *other* situations that make it more likely than not that the fact(s) in dispute actually happened?



Reaching a Conclusion



REACHING A CONCLUSION

When analyzing facts, don't throw basic life experiences to the wind. You will have to apply your skills of logic in order to reach a conclusion. Unless the subject of an investigation makes admissions that make your job easy, you will frequently have to view the relevant facts against the foundation of your experience.

**REMEMBER: DON'T BE
AFRAID TO BE WRONG!**

REACHING A CONCLUSION

IN DETERMINING WHAT ACTUALLY HAPPENED, EXAMINE THE OBJECTIVE FACTS IN ORDER TO REACH A LOGICAL CONCLUSION

Timeliness

- ❖ Did the person raising the issue raise it in a timely manner? If not, why not?
- ❖ Why was the issue raised now?

Pattern and Practice

- ❖ Did similar things happen in the past that were not raised? Why?

Motivation

- ❖ What motivation would the person raising the issue have to fabricate facts?

Truthfulness

- ❖ What motivation would the person who is the subject of the investigation have for denying the incident(s)?
- ❖ Did either the person raising the issue or the person being investigated say anything at any point that you subsequently found to be untrue?



Making a Recommendation



MAKING A RECOMMENDATION

Issues to Review

Issues To Review

After analyzing the facts you have gathered during your investigation and after reaching a conclusion as to what happened, you should be prepared to give your report or recommendation to those who are decision makers. In formulating a recommendation, consider the following:

Notice

- ❖ Were any of the institution's policies' conduct code standards, guidelines or practices violated?

Investigation

- ❖ Are you confident that you have gotten the accused's side of the story?

Process

- ❖ What does the process require, occur next?

MAKING A RECOMMENDATION

Writing Sample

Investigation Report

Once the facts have been collected and analyzed, and the final decision(s) has been made, the findings and conclusions should be documented. The nature, extent and form may depend on the circumstances or on your procedures. You should consult with your legal counsel if you have questions about what you should include in your report.

Investigation Background

The following identifies information you might want to include:

- name of complainant
- name of the respondent
- date institution learned of the allegation
- statements summarizing the allegation
- date when investigation was started and completed
- names of person(s) conducting the investigation
- names and dates of people interviewed including the complainant and the respondent
- date investigation completed

MAKING A RECOMMENDATION

Writing Sample

Application Of Institution Guidelines Or Policies

This section should refer to the specific code provisions or Title IX standards violated.

Key Factual Findings Of The Investigation

This section would include the key facts on which you based your final decision, collected from any of the following sources:

- ❖ interview(s) with individual raising the issue,
- ❖ interview(s) with the investigated individual(s),
- ❖ interviews with others who provided relevant information, and
- ❖ any relevant support documentation

Include only facts. Do not draw conclusions in this factual summary section.

Do not include extraneous information that was collected in the investigation but is not relevant to the issue.

MAKING A RECOMMENDATION

Writing Sample

Key Factual Findings Of The Investigation

Next analyze these key factual findings. Describe how the facts collected in the investigation were analyzed, including but not limited to:

- ❖ any conflicting or inconsistent information produced in the investigation;
- ❖ how the credibility of the individuals supplying information was assessed (What did they say that you believed and why? What was said that you did not believe and why?); including the respondent and complainant.

Conclusion

Based on the findings and analysis of the investigation, the following should be included in this section:

- ❖ how the code or policies apply to the situation
- ❖ the bottom-line factual conclusions:
- ❖ any issues that were not resolved in the investigation and why they were not resolved.

MAKING A RECOMMENDATION

Writing Sample

Conclusion

In reaching and documenting the conclusion, recommendation or findings, use facts (not assumptions) and use your guidelines or policy. Facts are objective, assumptions are not. Avoid legal definitions since they are better suited to a court of law. Legal definitions usually involve several components all of which must be present for a legal term to apply. For clarity, refer instead to violations of the code or policy.

The Investigation Summary should not reflect the content of conversations or written communications with legal counsel. These conversations and communications are “privileged” (see the discussion on Attorney-Client Privilege).

Be as brief and concise as possible. Use “bullets” when appropriate. Write in an objective, neutral style.



Document Retention



DOCUMENT RETENTION

Final Investigation File

During an investigation, a variety of documentation may be produced or collected. At the conclusion of the investigation, a Final Investigation File may be assembled. The Final Investigation File consists of what needs to be kept for the institution record. The actual contents of any given file will vary, depending on the particular circumstances. The file will show the key steps that were taken to investigate and respond to the issue(s) raised. The file should include only the documents that are consistent with your institution's student record retention policy:

File Contents

Only final copies of documents should be placed in the Final Investigation File. Drafts of the documentation listed above are not to be included in this file; all drafts should be destroyed, unless required to be retained by the institution's record retention policy.



Attorney - Client Privilege



ATTORNEY-CLIENT PRIVILEGE

Why use the Attorney-Client Privilege?

In gathering the facts and documentation during an investigation, keep in mind that such information may ultimately have to be disclosed to the public and, thus, could come into the hands of business competitors or opponents in future litigation. Any kind of relevant documentation may be legally required to be produced as evidence in a case from Post-It™ Notes to scribbled notes of meetings and conversations at the water fountain. In the normal course of business, an institution discards and shreds information, files are purged, drafts are thrown away, and old information is discarded. However, an institution does not have the option of destroying information to prevent its being disclosed once the institution is aware a formal charge or lawsuit has been, or may be, filed. So, when deciding what to write and what to save in an investigation, consider the impact if it were to be made public or introduced as evidence.

To ensure a thorough investigation while minimizing the risk of required disclosure and protecting the confidentiality of communications, the Attorney-Client Privilege may be used. This privilege exists to encourage institutions to communicate openly about, and address problems and solutions with, their attorneys without having these communications used against the institution in a subsequent lawsuit. However, in order for this privilege to apply, certain guidelines must be followed. If these guidelines are not followed, the privilege may be lost, and the material may be required to be disclosed.

The attorney-client privilege protects only communication between attorney and clients not the underlying facts. In other words, you cannot “vaccinate” facts against disclosure by putting them in a memo to an attorney. The privilege also may not protect communications between administrators when no attorney is present.

DOCUMENT RETENTION

How to Use the Attorney-Client Privilege

Consult your legal counsel. He or she will advise you, when appropriate, as to how to protect the investigation information under Attorney-Client Privilege. Based on the circumstances, the attorney's instructions will vary. However, general guidelines on how to use the Attorney-Client Privilege include:

- Address written communication to the attorney.
- Label the top of the communication:

*“Privileged and Confidential
Not Subject to Discovery”*
- Copy only a limited number of people who have a legitimate business need to know the information. Do not copy or share the document with others or the privilege may be lost.
- Do not communicate the information discussed with the attorney with others, unless you have discussed and agreed with the attorney that you will do so, and the manner in which it will be done. For example, the attorney may say that it would be permissible to share the information with the coach, who may need to know the status of the investigation.



SUMMARY

CHECKLIST



SUMMARY CHECKLIST

I. YOUR INITIAL MEETING WITH THE INDIVIDUAL RAISING THE ISSUE

- A. Be sure the person raising the issue is comfortable with your handling any investigation.
- B. When conducting your initial interview, get the facts - WHO, WHAT, WHEN, WHERE, HOW and WHY.

II. DETERMINING IF AN INTERNAL INVESTIGATION IS NEEDED

- A. Will a single answer resolve the issue?
- B. Are other individuals involved?
- C. Do you need more facts than the individual is able to provide?
- D. Do you need the help of any other resource in order to reach a conclusion?

III. DETERMINING THE NATURE OF AN ISSUE BEFORE INITIATING AN INFORMAL INVESTIGATION

- A. Identify what the individual is complaining about (e.g., which institution policy, guideline or procedure).
- B. Determine what the institution's obligation is with respect to resolving the issue.
- C. Decide who else is necessary to assist you in resolving the issue.

IV. PLANNING THE INVESTIGATION

- A. Determine what policies, guidelines or practices apply to this situation.
- B. Obtain all relevant documents that will assist you in conducting your investigation.
- C. Determine who is suited to conduct this investigation.
- D. Decide who you should interview.

SUMMARY CHECKLIST

- E. Decide the order of your interviewees.
- F. Determine if any interim actions are necessary before you initiate the investigation.
- G. Outline the questions you will ask.

V. CONDUCTING THE ACTUAL INVESTIGATION

- A. Anticipate the questions that each of your interviewees will ask.
- B. Before you begin the interview, be prepared to explain what you are investigating, why the interviewee is being interviewed and how the information obtained will be used.
- C. Remember to stress that no conclusion has yet been reached.
- D. Be sure to emphasize your institution's policy regarding confidentiality and reprisal.

VI. CONDUCTING AN EFFECTIVE INTERVIEW

- A. Give the person who is the focus of the investigation a detailed account of the claim.
- B. Obtain the interviewee's detailed account of the events surrounding the claim.
- C. Get as much information as possible from the interviewee.
 - 1. Understand what policy or guideline forms the basis of the issue.
 - 2. Understand what facts are necessary to reach a conclusion.
- D. Effective techniques for asking questions.
 - 1. Draft a preliminary list of questions you want to ask.
 - 2. Save unfriendly or embarrassing questions until the end of the interview.

SUMMARY CHECKLIST

3. Don't begin with hostile or tough questions.
4. Start with “broad” questions.
5. Do not put words into the interviewee's mouth.
6. Ask the tough questions.
7. Go beyond your pre-planned questions.
8. Ask questions designed to elicit relevant facts.
9. Ask *who, what, when, where, why, and how* type questions.

VII. BEFORE CLOSING THE INTERVIEW

- A. Relate the seriousness of the investigation.
- B. Remind the interviewee of the confidentiality of the investigation.
- C. Ask if there is anyone else you should talk to.
- D. Review the interviewee's answers with the interviewee.
- E. Encourage the interviewee to come back with any additional information and/or documents.

VIII. ASSESSING CREDIBILITY

- A. Make notes that will help assess credibility as soon as the interviewee leaves.
- B. Review the interviewee's chronology of events.
- C. Note the interviewee's demeanor.
- D. What, if any, admissions were made during the interview?
- E. Did the interviewee deny anything?

SUMMARY CHECKLIST

- F. Were there conflicting statements made?
- G. Was the interviewee's explanation plausible?

IX. MAKING A RECOMMENDATION AFTER COMPLETING YOUR ANALYSIS

- A. Were any of the institution's policies, guidelines or practices violated?
- B. Is the violation serious or minor?
- C. Do any local, state, or federal laws require you to take certain actions?
- D. What is the individual's history at your institution regarding length of employment, prior complaints and/or problems, performance, etc.?
- E. What, if any, factors would mitigate against instituting discipline in this case?
- G. Follow-up as appropriate.

X. COMPLYING WITH THE INSTITUTION'S POLICIES REGARDING DOCUMENTATION

- A. Review the documentation guidelines to be sure you have documented your investigation properly.
- B. Distribute your findings and conclusions to appropriate people pursuant to your institution's guidelines.
- C. Be sure that the "personnel files" of the individual raising the issue and the individual who was the focus of the issue are appropriately documented.

XI. UTILIZING AND CONSULTING WITH COUNSEL

- A. Should in-house counsel be consulted?
- B. Will in-house counsel's role be as counselor or active investigator?
- C. Should outside counsel be consulted?

Make a decision on attorney-client privilege and work product privilege.



CASE STUDY



CASE STUDY

CASE STUDY, PART ONE: INTAKE INTERVIEW

It's Saturday night in October. The College has just won a major sporting event. Parties are everywhere on and off campus. Students have been tailgating since dawn. Jaeden, a transfer student and Maddy, her roommate are both seniors. They have been diligent students during their first three years but decide that it's time to enjoy life before they have to join "the real world." They normally hang around with the outdoor learning and adventure club and are generally camping and hiking during fall weekends. However, Maddy just started dating a swimmer, Ethan, who has invited them to a big party that's going down after the tailgating. They are excited to attend this type of party. They've never been to a party like this and spend a long time deciding what to wear and drinking while getting ready. Jaeden has felt anxious this year about her weight and did not eat very much during the tailgating. By the time Maddy and Jaeden leave for the party, they are both buzzed. They take selfies while walking over and post them on Instagram. Another student, Blake, immediately likes the photo. Jaeden shows Maddy and smiles. She knows Blake from her senior seminar and thinks he is cute.

The party is at an off-campus apartment where a group of co-ed seniors live. Every time Walk the Moon's song "Shut Up and Dance" plays, the party-goers are supposed to drink when they hear the word "dance." There is a game of beer pong happening on the illegal roof deck. After about 30 minutes, Maddy and Jaeden go out on the deck where Ethan and Blake are playing beer pong. Blake is the reigning champion. Blake spots Jaeden and asks her where her drink is. Jaeden is holding her outdoor learning and adventure club water bottle and says that she is recovering from tailgating. Blake tells her about the "Uptown Funk" rule and hands her a drink. Jaeden sips it and continues talking to the group. Blake and Ethan are pretty drunk and win the next round of beer pong. Blake turns to Maddy and Jaeden and says "you're up." Maddy laughs and takes the pong ball. Jaeden, trying to be brave, chugs the drink that Blake had previously handed her and starts to play. Maddy and Jaeden are not very good at beer pong and end up drinking most of the cups on the table. Blake looks at Jaeden and asks her if she wants to make it more interesting. He refills the cups with Fireball and the group plays again, Maddy and Jaeden again losing. A large group of swimmers come out on the deck to get Ethan and Blake for a new game inside. Maddy and Ethan go inside with the group. Only a few people remain outside in the corner by the bar. Blake takes Jaeden by the arm and says "why don't you stay out here with me? You looked super hot in your selfie that you posted earlier." Jaeden is flattered

CASE STUDY

by the compliment and decides to stay outside with Blake. Blake pours her another glass of Fireball and they begin kissing on the deck.

Subsequently, Jaeden wakes up in a room that she doesn't recognize. Her clothes are off and she has semen on her stomach and pubic hair. Blake is passed out next to her. She doesn't remember what happened or how she got to this room. She looks for her phone and texts Maddy "where are you???" Maddy responds "OMG where are you? I tried to take you home but you were wasted and wanted to stay with Blake." Jaeden quickly gets dressed and leaves the off-campus house. While walking, she texts Maddy "I need to find you." Maddy responds that she is in their room. When Jaeden returns to the room, she tells Maddy what just happened. Maddy is immediately upset and wants to tell the RA. Jaeden doesn't want anyone to know. She doesn't remember what happened and she doesn't want to get Blake in trouble. She tells Maddy that she had a lot to drink and that she is probably to blame as well. Maddy agrees to keep it a secret because she knows that Jaeden lacks self-confidence and has very religious parents so Maddy doesn't want her to feel uncomfortable.

The next day, Maddy, who has had trouble sleeping since Jaeden told her what happened, told Ethan about what Jaeden told her. Ethan looks upset and says that Blake is known for being kind of sketchy around drunk girls. He said he thought Jaeden knew that and didn't care because it seemed like she was having fun with him. Maddy asks what Ethan means about Blake being sketchy and Ethan tells Maddy a story about a freshman swim team member that Blake got drunk and had sex with earlier that semester. Maddy decides she has to tell the RA about what happened to Jaeden. The next night, Maddy tells the RA about Jaeden and then convinces Jaeden that she has to tell the RA. During the conversation with the RA, no mention of the freshman female swimmer was made. The RA has come to you (in your role at the College).

What questions should be asked of the RA?

What disclosures/information should be given to Jaeden?

Do you have that responsibility?

If not, who does?

CASE STUDY

CASE STUDY, PART TWO: DETERMINING WHETHER AN INVESTIGATION SHOULD GO FORWARD

The Title IX Coordinator receives the information and emails Jaeden to set up a meeting for Monday. Jaeden doesn't respond. The Title IX Coordinator finally convinces Jaeden to meet later that week. Jaeden gives a brief overview of the night and says that she does not want to bring a complaint or go to law enforcement because she was drunk too and she doesn't want to get Blake in trouble. She is clearly embarrassed and does not want to talk about it. She asks the College to respect her request for confidentiality. The Title IX Coordinator is unable to get any details from Jaeden.

The Title IX Coordinator checks and is unaware of any other complaints or disciplinary proceedings against Blake or the men's swim team or members of the house where this occurred.

What else should the Title IX Coordinator do to determine whether to go forward with an investigation?

If the investigation goes forward, what should Jaeden be told? When?

Are any interim actions necessary? Which ones would you recommend?

When determining whether to go forward, the Title IX Coordinator checks Twitter, Instagram and Facebook. There is an Instagram photo of Blake from Saturday night from what appears to be an off campus roof deck with a beer pong table. The photo was posted by another senior and the caption reads "Blake the Snake, Looking for His Next Drunk Girl #dirtyboy."

The Title IX Coordinator decides it's time to talk to Maddy to see what she knows. Maddy discloses that Ethan told her that Blake is kind of sketchy. Maddy bawls because she feels terrible that she and Ethan left Jaeden with Blake. She says it seemed like they were having fun and Jaeden wanted to stay with Blake but Jaeden was wasted. Maddy also discloses that Ethan told her that Blake had done something similar with a freshman swimmer earlier in the semester.

CASE STUDY

CASE STUDY, PART THREE: GATHERING INFORMATION FROM THIRD PARTIES

By this time, the Title IX Coordinator has determined that an investigation should go forward. You have been designated as the investigator and received all of the information that the Title IX Coordinator had gathered. No formal complaint has been filed and there is nothing in writing from Jaeden. The Title IX Coordinator informs Blake you are investigating concerns that Blake may be responsible for one or more sexual assaults.

Who should you talk to?

What order?

What do you disclose to third parties when talking to them?

What information do you need from each of the witnesses?

How do you control group dynamics? I.e. the men's swim team gets together and takes a united stand for Blake.

How do you mitigate retaliation and information-sharing?

While conducting the investigation, you learn the identity of the freshman swimmer, Casey, who may have had a similar problem with Blake.

What do you do?

What can you disclose to this person?

CASE STUDY

CASE STUDY, PART FOUR: MEETING WITH THE RESPONDENT

Blake's attorney has called you several times and demanded to see the formal written complaint against his client pursuant to FERPA. The attorney also demands any notes that reference his client that have been created during the course of the investigation. The attorney indicates that his client will not meet with you due to the potential for criminal implications resulting from his testimony.

What are your obligations?

How can you incentivize Blake to meet with you?

After a lengthy round of negotiations, Blake and his attorney agree to meet with you. At this time, you have information from all involved College personnel, and you have spoken to Maddy, Ethan, other members of the swim team and several of the party goers from the night of the incident. You have also spoken to the female freshman swimmer, Casey. Casey reported that Blake had pushed her to play beer pong and that she felt pressured to drink with him because he was a popular senior on the swim team. She also passed out and woke up naked next to Blake. She told her friend from high school via text when it happened but did not tell anyone else. She has consented to the investigation but fears retaliation and shunning by the team.

How do you interview Blake?

What do you say about the allegations?

During the interview, Blake asks if Casey is the complainant. Blake discloses that Casey is obsessed with him and that she texts him constantly. He produces six weeks of text messages from Casey. The text messages indicate that Casey is extremely interested in pursuing a relationship with Blake and is upset that he has not reciprocated this interest.

CASE STUDY

CASE STUDY, PART FIVE: EVALUATION OF THE SITUATION

What do you think probably happened between Blake and Jaeden?

What factors weigh in favor of/against a finding of responsibility?

What do you think probably happened between Blake and Casey?

What factors weigh in favor of/against a finding of responsibility?

What if you don't know what happened? Is there additional information that you need?
What?

If you were a decision maker or make a recommendation, what do you think should happen based on what you know?