



## **TITLE IX/VAWA INVESTIGATOR TRAINING**

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#### **Agenda**

**Session 1: Introduction and Legal Landscape**

**Session 2: Overview of Process**

**Session 3: Working with the Parties**

**Session 4: Stages of Investigation**

**Session 5: Drafting an Investigation Report**

#### **Other Resources:**

- **Adjudication Checklist**
- **Web Resources**

#### **Case Study**

GP:4837-1172-7194 v1



## **TITLE IX/VAWA INVESTIGATOR TRAINING**

### **AGENDA**

**Introduction and Legal Landscape**

**Overview of the Process**

**Working with the Parties**

**Stages of Investigation**

**Drafting an Investigation Report**



## TITLE IX/VAWA INVESTIGATOR TRAINING

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### TELL US ABOUT YOURSELF

How many investigations of Title IX matters have you participated in?

1. Not applicable (I have a different role in the process)
2. None
3. 1 – 2
4. 3 – 4
5. 5 or more

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### AGENDA

- Introduction and Legal Landscape
- Overview of the Process
- Working with the Parties
- Stages of Investigation
- Case Study
- Drafting an Investigation Report



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### TERMINOLOGY



- DOE = Department of Education
- DCL = Dear Colleague Letter
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act
- CSA = Campus Security Authority
- Campus SaVE Act vs. VAWA vs. Clery Act
- Complainant/accuser/victim/survivor
- Respondent/accused/alleged perpetrator



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### COLOR CODE



- Orange text indicates new OCR guidance released September 22, 2017
- ~~Struck through text indicates OCR guidance that has been withdrawn and overruled by new guidance~~
- Green text indicates withdrawn guidance, but that the action is still permissible and recommended

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### SEXUAL VIOLENCE STATISTICS



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**SEXUAL VIOLENCE STATISTICS** 

▪ **United Educators' Study** 

- 28% of reports resulted in lawsuits, demand letters, or federal Title IX complaints
- 78% involved one or both parties consuming alcohol
- 40% of complainants delayed reporting, waiting, on average, nearly a year after the incident
- 80% of complainants were freshmen or sophomores
- 90% of complainants knew the respondent
- About 50% of incidents occurred in residence halls

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**THE LEGAL LANDSCAPE** 



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**SESSION OVERVIEW** 

- Title IX & OCR's Enforcement
- 2017 OCR Guidance
- Violence Against Women Reauthorization Act/Clery Act
- Interaction with Other Laws
- Responding to a Report
- Complaint Process
- Training Requirements



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**TITLE IX** 

▪ “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance”



20 U.S.C. § 1681

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**WHO MUST COMPLY WITH TITLE IX?** 

▪ Institutions that receive federal funds

- Students
- Employees
- Third Parties
  - Visitors
  - Vendors



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**DISCRIMINATION  
“ON THE BASIS OF SEX”** 

▪ Includes:

- Sexual harassment
- Sexual violence
- Differential treatment
- Gender-based harassment



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### TITLE IX RESPONSIBILITIES

- If a school knows or reasonably should know about sexual harassment that creates a hostile environment, it must take immediate action to:
  - Eliminate it,
  - Prevent its recurrence, and
  - Address its effects



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### OCR'S ENFORCEMENT AND GUIDANCE

- OCR's Role:
  - Issue guidance
  - Compliance reviews
  - Resolution agreements



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### THE LAW: WHAT IS SEXUAL HARASSMENT?

- Unwelcome conduct of a sexual nature or based on sex

quid pro quo

hostile environment

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quid pro quo

- Educational or workplace benefits conditioned on submission to unwanted sexual advances

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quid pro quo

- Individual in position of authority
- Conditions a benefit
- Sexual advance, sexual favors, other conduct of a sexual nature

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hostile environment

- (Student) Sufficiently serious that it denies or limits a student's ability to participate in or benefit from an education program or activity
- (Employee) Severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

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**hostile environment**

- In workplace or education environment
- Unwelcome
- Sexual nature
- Severe or pervasive (institution policy vs. legal standard)
- If institution knows, or should know, must take prompt and appropriate action to:
  - End the harassment
  - Prevent its recurrence
  - Address its effects

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**THE LAW:**  
**WHAT IS SEXUAL HARASSMENT?**

- Examples:
  - Unwelcome sexual advances
  - Requests for sexual favors
  - Offensive comments or other conduct based on sex
  - Other verbal, nonverbal, or physical conduct of a sexual nature
    - Including sexual violence

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**EXAMPLES**

- Unwelcome sexual flirtations, advances, or propositions
- Requests for sexual favors
- Verbal abuse of a sexual nature, obscene language, off-color jokes, sexual innuendo, and gossip about sexual relations
- The display of derogatory or sexually suggestive posters, cartoons, drawings, objects, notes, letters, photos, emails, or text messages
- Visual conduct such as leering or making gestures
- Sexually suggestive comments about an individual's body or body parts, or sexually degrading words to describe an individual

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### EXAMPLES



- Unwelcome touching of a sexual nature such as patting, pinching, or brushing against another's body
- Unwelcome verbal or physical conduct against an individual related to the individual's gender identity or the individual's conformity or failure to conform to gender stereotypes
- Stalking
- Cyber harassment, including but not limited to disseminating information, photos, or video of a sexual nature without consent
- Videotaping or taking photographs of a sexual nature without consent
- Sexual assault

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### HARASSMENT



- Male/Female
- Female/Male
- Female/Female
- Male/Male
- Gender Identity



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### THE LEGAL LANDSCAPE



- All schools receiving federal funds must:
  - Publish Notice of Nondiscrimination
  - Designate a Title IX Coordinator
  - Disseminate policy prohibiting sex discrimination
  - Investigate complaints
  - Adopt and publish fair and equitable grievance procedures
  - End the harassment, prevent recurrence, and remedy its effects
  - Train individuals with heightened responsibilities
  - Train students and employees



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## THE FUTURE OF TITLE IX

- **OCR Actions:**
  - Internal instructions for OCR investigators re: scope of complaints
  - **Public Statements:**
    - Trust institutions
    - Guidance should not be used for enforcement
    - Notice and comment period for regulations
    - Concerned about due process
    - **2011 DCL and 2014 Q & A's are withdrawn**
    - **2017 Q & A Guidance**
  - Listening sessions

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## THE FUTURE OF TITLE IX

- Majority of requirements regarding handling of sexual misconduct matters comes from VAWA and its regulations
- Guidance in 2011 DCL/2014 Q & A only
  - Preponderance of the evidence standard
  - Limitation on informal resolution
  - 60 day time frame
    - 2017 Q & A – “must” designate reasonably prompt time frame for each major state
  - Ability to honor request for confidentiality and still proceed with complaint resolution process

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## OCR GUIDANCE

- January 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties
- January 25, 2006 Dear Colleague Letter on Sexual Harassment
- April 4, 2011 Dear Colleague Letter on Sexual Violence
  - “Guidance” that set forth OCR’s expectation of how school should respond to allegations of sexual violence
  - Most requirements made into law by VAWA (withdrawn)
- April 29, 2014 Questions and Answers on Title IX and Sexual Violence
  - Additional guidance concerning OCR’s view on schools’ obligations under Title IX to address sexual violence
  - Intended to further clarify legal requirements and guidance articulated in the DCL (withdrawn)
- April 24, 2015 Guidance on Title IX Coordinators
  - Dear Colleague Letter on Title IX Coordinators
  - Letter to Title IX Coordinators
  - Title IX Coordinator Resource Guide
- September 22, 2017 Q & A on Campus Sexual Misconduct

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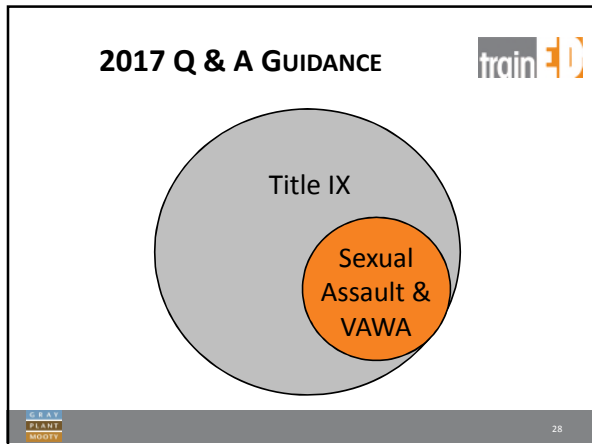
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- 2017 Q & A GUIDANCE** 
- “Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence”
  - More flexibility (standard of evidence, time frame, informal resolution process, appeals)
  - New requirements for written notice to respondent
  - “Should” create investigation report
  - “Must” provide timely and equal access to the information used in the decision-making process
- GRAY PLANT MOOTY 29

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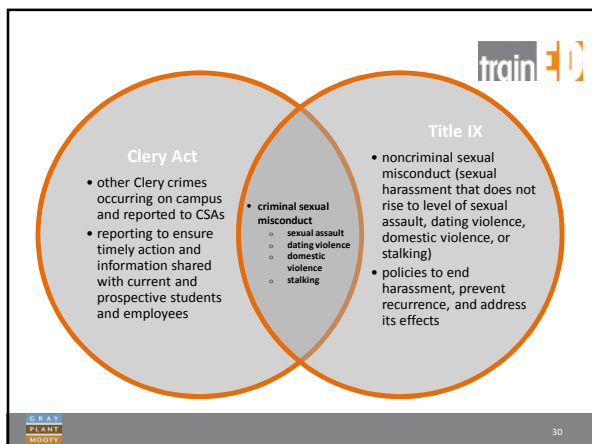
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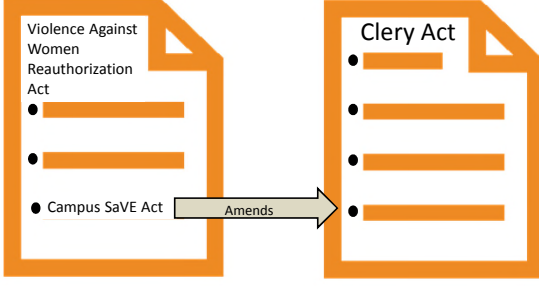
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### VAWA, CAMPUS SAVE, & CLERY



Violence Against Women Reauthorization Act

- \_\_\_\_\_
- \_\_\_\_\_
- Campus SaVE Act

Amends

Clery Act

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

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### VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT (VAWA)

- Extends Clery crimes to include VAWA crimes: domestic violence, dating violence, and stalking
- Requires discipline procedures for addressing sexual misconduct
- Requires education programs to promote awareness
- Codifies parts of 2011 Dear Colleague Letter on Title IX

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### INTERACTION WITH OTHER LAWS

- FERPA: Family Educational Rights and Privacy Act
  - Limits disclosure of student education records
  - Several exceptions permit disclosure
    - In cases involving sexual harassment (not sexual violence), exception permits school to disclose to victim the final results of any disciplinary proceedings against the alleged perpetrator and any sanctions that directly relate to the victim
    - In cases involving sexual assault/VAWA crime, exception permits school to disclose to victim any information provided to the decision-makers and the final results of the disciplinary proceedings, including all sanctions



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### INTERACTION WITH OTHER LAWS

- Mandatory reporting laws: state-specific laws requiring school employees to report child abuse
  - Mandatory reporters may include teachers, coaches, administrators, or others who interact with minors or who supervise those who interact with minors
  - Must report if know or reasonably suspect abuse or neglect of a child
  - Report to police or county department

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### OVERVIEW OF PROCESS



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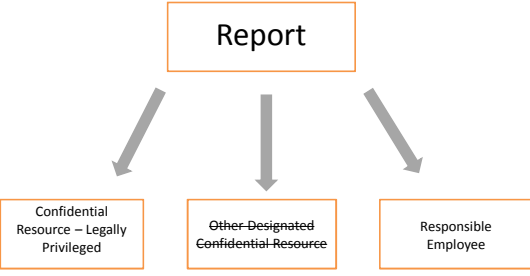
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### RESPONDING TO A REPORT



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graph TD; Report[Report] --> CR1[Confidential Resource - Legally Privileged]; Report --> CR2[Other-Designated Confidential Resource]; Report --> RE[Responsible Employee];
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**RESPONSE OF TITLE IX COORDINATOR** 

- Title IX Coordinator can delegate intake duties to others, but:
  - Avoid conflicts
  - Make roles and responsibilities clear
  - Ensure process is user friendly
  - Oversee process to ensure compliance and effectiveness



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**RESPONSE OF TITLE IX COORDINATOR** 

- Immediate Response
  - Protect the victim
  - Notify victim of his/her rights, including available interim measures and services
  - Notify victim of right to report to law enforcement and offer to help with report
  - Follow-up with written notification of rights
  - Notify campus security, if necessary
  - Clery report, if necessary



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**RESPONSE OF TITLE IX COORDINATOR** 

- Interim Measures
  - Change academic or extracurricular activities, living, transportation, dining, and working situations
  - Access to resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, legal assistance, visa and immigration assistance, and student financial aid
  - If school does not offer these services, enter into MOU with local victim services provider, if possible
  - Available regardless of whether investigation follows



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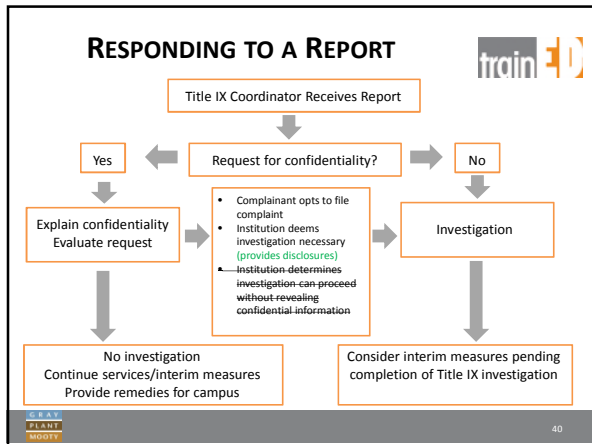
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### RESPONSE OF TITLE IX COORDINATOR: INTERIM MEASURES DURING INVESTIGATION

- Review interim measures available during an investigation
  - Periodically update victim on status of investigation
  - No contact orders
  - Available to both parties<sup>2017 Q & A</sup>
    - should not favor one party over the other
    - should make every effort to avoid depriving any student of his or her education
  - If circumstances warrant, changing the alleged perpetrator's living arrangements or course schedule (with caution)
  - All others mentioned earlier



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### COMPLAINT PROCESS

- The process the school uses to resolve sexual harassment complaints. This includes the fact-gathering investigation and any hearing or decision-making process the school uses to determine:
  - Whether or not the conduct occurred using
    - preponderance of the evidence standard ("more likely than not") or
    - the clear and convincing evidence standard<sup>2017 Q & A</sup> ("substantially more likely than not"); and
  - If the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include:
    - Imposing sanctions on the respondent;
    - Providing remedies for the complainant; and
    - Addressing the campus community



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### COMPLAINT PROCESS



- Determine whether the alleged sexual misconduct occurred
- “Prompt, thorough, and impartial” or “adequate, reliable, impartial, and prompt,” or “prompt, fair, and impartial”
- Separate from criminal investigation
- May not dissuade complainant from going to police in cases involving allegations of criminal conduct—should encourage reporting to police



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### PROMPT



- Designate time frames
- No fixed time frame under guidance<sup>2017 Q & A</sup>
  - Prior guidance was 60 calendar days (not including appeal)
- If a delay, need to give written notice to the parties about the delay and the reason for the delay



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### PROMPT



- May temporarily delay for initial police investigation
  - Prior guidance said police evidence-gathering stage typically takes 7-10 days
  - Must resume when notified that police are done gathering evidence
- May not delay for criminal prosecution



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**IMPARTIAL**



- Conflicts and appearances of conflicts disclosed and managed
- Inform parties and witnesses that retaliation is prohibited
- Pay attention to the language used
  - Complainant/respondent vs. victim/alleged perpetrator

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**THOROUGH, ADEQUATE,  
RELIABLE, FAIR**



- Interview/hear from both parties
- Equal opportunity for parties
  - Identify/present fact witnesses and evidence
  - Access to evidence (if any)
    - Must for sexual assault/VAWA
    - "Must" if Title IX 2017 Q&A (?)
  - Right to an advisor/participation by a lawyer
    - Required by VAWA regulations for cases of sexual assault/VAWA crimes
    - May limit extent of participation (must apply equally)
- Participate in pre-hearing meeting (if any)
- Identify/present character witnesses (if any)
- Appeal rights (if any)
- Written notice of outcome of complaint
- Written notice of right to appeal (if any)



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**TRAINING REQUIREMENTS**



- Institutional officials conducting proceedings (including adjudicators and individuals deciding appeals) must be trained on:
  - Institution's policy and procedures
  - Applicable law
  - Issues related to sexual assault, domestic violence, dating violence, and stalking (annually)
  - How to conduct an investigation and hearing that protects the safety of complainants and promotes accountability (annually)
  - Types of conduct that would constitute sexual violence (including same-sex sexual violence)
  - Standard of review (preponderance of the evidence)

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### TRAINING REQUIREMENTS



- (cont.)
  - Consent and the role of alcohol or drugs can play in the ability to consent
  - Importance of accountability for individuals found to have committed sexual violence
  - Need for remedial actions for the perpetrator, complainant, and school community
  - How to determine credibility
  - How to evaluate evidence and weigh it in an impartial manner
  - Confidentiality
  - Effects of trauma, including neurobiological change
  - Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds
- Training materials that apply sex stereotypes or generalizations should be avoided<sup>2017 Q & A</sup>



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### Q & A



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### WORKING WITH THE PARTIES



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**TELL US ABOUT YOUR EXPERIENCE** 

When assessing the credibility of the complainant, the following are factors that could cause me to find the complainant less credible:

1. Text messages with respondent reflecting on the encounter in a positive way
2. Delay of several months before reporting
3. Account conflicts with other witnesses
4. Subsequent sexual encounters with respondent
5. Gaps in complainant's memory
6. Complainant did not resist or seek help
7. Complainant stayed the rest of the night
8. Complainant did not report to the police

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**TELL US ABOUT YOUR EXPERIENCE** 

When assessing the credibility of the respondent, the following are factors that could cause me to find the respondent less credible:

1. Acting defensive and nervous
2. Has a reputation of being a "player"
3. Insisted on having an attorney serve as advisor
4. Was drinking heavily the night of the incident
5. Sent text messages that conflict with account
6. Was disciplined for vandalism
7. Was disciplined for academic dishonesty

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**SESSION OVERVIEW** 

- Rape myths
- Secondary victimization
- Common victim responses
- Neurobiology of sexual assault
- Impact of culture
- Working with complainants
- Working with respondents
- Incorporating advocacy
- Communication



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## RAPE MYTHS

Myth	Reality
Rape is primarily sexually motivated	Rape combines elements of power, anger and sexuality
Rapists are usually strangers	Most perpetrators are known to the victim
The victim did something to cause the rape	No behavior warrants being raped; under no circumstances can the victim be blamed
Acquaintance rape is not as traumatic	There are no differences in victim psychological symptoms between acquaintance and stranger rape

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## SECONDARY VICTIMIZATION



- Secondary victimization:
  - The attitudes, beliefs, and behaviors that victims experience as victim blaming and insensitive
  - It exacerbates their trauma, and it makes them feel like what they're experiencing is a second rape — hence the term "secondary victimization"

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## SECONDARY VICTIMIZATION

- Examples of behaviors:
  - Discouraging the victim from making the report
  - Telling victim it's not serious enough to pursue
  - Asking about dress, behavior, or what they might have done to provoke the assault
- Psychological impact on victims:
  - Blamed
  - Depressed
  - Anxious
  - Violated
  - Reluctant to seek help



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### COMMON VICTIM RESPONSES

- Initial denial of incident
- No reporting/delayed reporting
- Maintaining contact with perpetrator
- Fight, flight, or freeze



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### NEUROBIOLOGY OF SEXUAL ASSAULT

#### The Neurobiology of Sexual Assault

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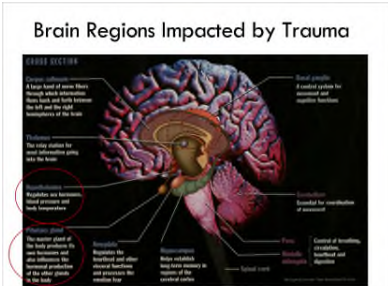
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### NEUROBIOLOGY OF SEXUAL ASSAULT

#### Brain Regions Impacted by Trauma



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### NEUROBIOLOGY OF SEXUAL ASSAULT

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#### Memory Processes Impacted by Trauma

**Hippocampus** processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

**Amygdala** specializes in the processing of emotional memories (works with the hippocampus)

Both structures are VERY sensitive to hormonal fluctuations

SOURCE: Southwick et al., 2005

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### NEUROBIOLOGY OF SEXUAL ASSAULT

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#### Like These . . .

**Catecholamines:** Fight or flight response

**Cortisol:** Energy available

**Opioids:** Prevent pain

**Oxytocin:** Promotes good feelings

THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005

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### NEUROBIOLOGY OF SEXUAL ASSAULT

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#### What Happens During A Sexual Assault

Amygdala Detects Threat → Activates Hypothalamus → HPA Axis Kicks In Hormonal Flood

SOURCE: Banks, 2002; Southwick et al., 2005

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### NEUROBIOLOGY OF SEXUAL ASSAULT



What Happens During A Sexual Assault

- Catecholamines Increase** • Impairs rational thought
- Opioids Increase** • Causes flat affect
- Corticosteroids Decrease** • Reduces energy

SOURCE: Banks, 2002; Southwick et al., 2003

GRAY PLANT MOOTY 67

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### NEUROBIOLOGY OF SEXUAL ASSAULT



What Happens During A Sexual Assault

Amygdala Detects Threat → Activates Hypothalamus → HPA Axis Kicks In Hormonal Flood

↓

Can Trigger a Complete "Shut Down" in the Body

SOURCE: Banks, 2002; Southwick et al., 2003

GRAY PLANT MOOTY 68

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### NEUROBIOLOGY OF SEXUAL ASSAULT



Tonic Immobility (TI)

- AKA: "Rape-induced paralysis"
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

SOURCE: Foa et al., 2007; DeBeno et al., 1993; Heith et al., 2003

GRAY PLANT MOOTY 69

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### COMMON BEHAVIORS DURING ASSAULT



- Impaired rational thought
- Flat affect
- Reduced energy
- Flight
- Fight
- Freeze

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GRAY PLANT MOOTY 70

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### MEMORY

#### What Happens During A Sexual Assault

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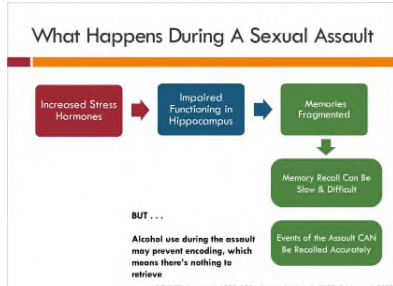
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### MEMORY

#### What Happens During A Sexual Assault



```
graph LR; A[Increased Stress Hormones] --> B[Impaired Functioning in Hippocampus]; B --> C[Memories Fragmented]; C --> D[Memory Recall Can Be Slow & Difficult]; E[Events of the Assault CAN Be Recalled Accurately];
```

**BUT ...**  
Alcohol use during the assault may prevent encoding, which means there's nothing to retrieve

SOURCE: Foa et al., 1995, 1996; Busemeyer et al., 2009; Rubin et al., 2008

trainED

GRAY PLANT MOOTY 72

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**MEMORY** 

Case Study: Memory Fragmentation

- 25 year-old woman
- Raped by a friend's brother at 4<sup>th</sup> July party
- Filed police report
- Detective interview was when it all went to hell

*"He wouldn't let up, pounding me with question after question after question. Trying to trick me, trying to get me to mess up. I wanted to say, 'hold on, give me a minute to think'. No, he kept coming at me."*

GRAY  
PLANT  
MOOTY 73

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**MEMORY** 

Case Study: Memory Fragmentation

*"It was classic good-cop / bad-cop. He stormed off and another detective sat down next to me. He offered me a cup of coffee.*

*Coffee? OK fine. How do I take it? WHAT? Why does he care how I take my coffee?*

*Well, he did.*

*He made me coffee. He gave me time to just sit, collect my thoughts."*

GRAY  
PLANT  
MOOTY 74

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**MEMORY** 

Case Study: Memory Fragmentation

*"We talked it through. And I didn't feel rattled and freaked out. I'm sure I was incoherent and he just let it roll. He was patient.*

*I felt like I was piecing it together, like a puzzle, we were putting together a puzzle together.*

*And drinking coffee."*

GRAY  
PLANT  
MOOTY 75

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**MEMORY** 


Case Study: Memory Fragmentation

**I:** So, why did you do that? (give her the coffee)

**R:** It helps. Not the coffee so much, just the moment to let it all come together in their heads.

**I:** What do you mean?

**R:** I don't know why it's like that, I've just noticed that over the years. If you give them a few minutes to breathe . . . . It starts to make more sense. I don't know why, it just does.

 **MEMORY CONSOLIDATION**  
A DOCUMENTED NEUROBIOLOGICAL CONDITION

GRAY PLANT MOOTY 76

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**MEMORY** 

Case Study: Memory Fragmentation

**I:** Were you worried that if you gave her some time, she'd just make something up?

**R:** Nah, not really. I mean, some victims lie, but most don't. Besides, if they're lying, we'll catch 'em at it eventually. I think it's just hard for victims to talk about and we just need to have a little patience.

 **MEMORY CONSOLIDATION**  
A DOCUMENTED NEUROBIOLOGICAL CONDITION

GRAY PLANT MOOTY 77

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**IMPACT OF TRAUMA ON MEMORY** 



- Memories accurately stored
- Memory recall slow
- Fragmented story
- Concentration difficult
- Alcohol exception—may impact storage and accuracy of memories

GRAY PLANT MOOTY 78

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### SENSORY DETAILS

- Victims of trauma may be able to recount vivid sensory details, including certain things the victim saw, heard, or smelled during the assault
- These details could provide more information about the incident and may help clarify the victim's memory
- Use open-ended questions
  - What can you recall about what happened?
- May also use sensory-based questions
  - What did you see?
  - What did you hear?
  - What did you smell?
  - What did you taste?
  - What did you touch?

GRAY PLANT MOOTY 79

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### IMPACT OF CULTURE

- Survivors' experiences of sexual assault are not universal
- A survivor's cultural background is one of many factors that may impact the way that the individual reacts to sexual assault
- Different cultural backgrounds will influence individuals in different ways
- Be aware of and sensitive to possible cultural influences
- Incorporate training as appropriate



GRAY PLANT MOOTY 80

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### WORKING WITH COMPLAINANT

- Slow down
- Make him/her feel comfortable
- Consider timing and locations
- Allow sufficient time for thorough exploration of the issues
- Develop rapport and allow for closure
- Explain process
- Remind the complainant of the ability to ask questions and present information during the entire process
- Normalize tonic immobility—fight, flight, or freeze?



GRAY PLANT MOOTY 81

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**WORKING WITH COMPLAINANT** 

- Recognize the impact of trauma on memory
  - Allow the complainant to give a narrative
  - Use open-ended free recall questions
  - Build in an opportunity for follow-up
  - Allow a written narrative if that is more comfortable
- Use “account” or “experience” rather than “story”
- Allow support person to be present
- Avoid secondary victimization
- Be transparent about how information will be used

GRAY  
PLANT  
MOOTY 82

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**WORKING WITH COMPLAINANT** 

- Set boundaries
  - Make objective role clear up front
  - Not counseling
  - Differentiate from your other roles within institution
  - Know how to respond when coming close to line
  - Point to resources on campus



GRAY  
PLANT  
MOOTY 83

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**WORKING WITH RESPONDENT** 

- He/she may be defensive
- Explain fair and equitable process
- Do not appear to take sides
- Use impartial language
- Afford same opportunity to provide narrative of experience, to provide physical or other evidence, etc.
- Memory may be impaired by alcohol



GRAY  
PLANT  
MOOTY 84

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### WORKING WITH RESPONDENT



- Remind the respondent of the ability to ask questions and present information during the entire process
- Ensure the respondent is fully aware of the process and prohibition against retaliation
- Be transparent about how information will be used
- Allow support person to be present

GRAY  
PLANT  
MOOTY 85

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### INCORPORATING SUPPORT/ADVOCACY

- Separate support/advocacy services from investigation/adjudication process
- Conflation of roles can:
  - Impact thorough assessment of the facts
  - Create distrust/confusion by complainant
  - Give appearance of bias/lack of impartiality



GRAY  
PLANT  
MOOTY 86

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### COMMUNICATION



- Identify contact person who will coordinate with multiple departments/people on complainant's/respondent's behalf
- Ensure regular and timely communications to both parties regarding: next steps, expectations, timing, and delays
- Ensure that parties have notice of all meetings
- Document all communications, including phone calls
- Use sensitive and informed tone and content, both to the parties and among team members

GRAY  
PLANT  
MOOTY 87

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**SOURCES OF INFORMATION** 

- NIJ Presentation by Rebecca Campbell
- trainED gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, and National Institute of Justice for allowing us to reproduce, in part or in whole, the recording The Neurobiology of Sexual Assault. The opinions, findings, and conclusions or recommendations expressed in this recording are those of the speaker(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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MOOTY 88

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**Q & A** 



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**STAGES OF INVESTIGATION**



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**PRE-INVESTIGATION OBLIGATIONS OF THE INSTITUTION** 

- Assess immediate safety and well-being for individual and campus
- Notify complainant of right to contact law enforcement (or not to) and seek medical treatment; offer institution's assistance
- Enter into crime log, assess for timely warning
- Identify resources and offer accommodations
- Identify advocate/support person

GRAY PLANT MOOTY 91

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**PRE-INVESTIGATION OBLIGATIONS OF THE INSTITUTION** 

- Get consent from the complainant to conduct an investigation
- Notify of importance of preserving evidence
- Consider interim measures
- Provide written notice to complainant required under VAWA
- Consider whether informal resolution is appropriate<sup>2017 Q & A</sup>
- Written notice to respondent: "should" provide sufficient details and with sufficient time to prepare a response before any initial interview<sup>2017 Q & A</sup>
- Notice "should" be given to each party in advance with sufficient time to prepare meaningful participation<sup>2017 Q & A</sup>

GRAY PLANT MOOTY 92

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**ROLE OF INVESTIGATOR** 

- Identify factual issues
- Give parties opportunity for input
- Compile investigation materials for decision-makers and parties
- Credibility and/or make recommendations?
  - If weigh in on credibility, must objectively evaluate parties and witnesses<sup>2017 Q & A</sup>
- Role does not include:
  - Adjudication of complaint during investigation phase
  - Providing support or advocacy to either party
  - Serving as a confidential resource



GRAY PLANT MOOTY 93

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**DIFFERENCES BETWEEN CRIMINAL AND INSTITUTIONAL INVESTIGATIONS** 

- Different standards of proof
  - Probable cause vs. beyond reasonable doubt vs. preponderance of evidence vs. clear and convincing
- Different investigation “powers”
  - Subpoena powers vs. disciplinary actions
- Timing of processes
- Cooperating with law enforcement
  - Memorandum of Understanding
  - Use of police report



GRAY PLANT MOOTY 94

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**STAGES OF INVESTIGATION** 

- Review complaint and outline investigation
- Interview witnesses and gather other evidence
- Review / revise / re-interview
- Package investigation for decision-maker(s)
  - Should prepare written investigation report <sup>2017 Q&A (?)</sup>



GRAY PLANT MOOTY 95

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**STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION** 

- Types of complaints:
  - Written complaint from complainant
  - Written summary by university personnel
  - Complainant’s statement to law enforcement
  - Oral complaint to institution official



GRAY PLANT MOOTY 96

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**STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION** 

- Prepare script of opening remarks
  - Provide general explanation of reason for interview—gathering facts
  - Explain possible uses of witness’s statements
  - If applicable, inform witness of recording and its use
  - Explain complaint process to parties
  - Explain the need to ask difficult, detailed questions
  - Ask a complainant witness not to read into questions
  - Explain to complainant witness that different people respond differently (caution!) 

GRAY PLANT MOOTY 97

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**STAGE ONE: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- Prepare script of opening remarks (cont.)
  - Explain that timelines and order of events may not be clear
  - Tell the witness to feel free to ask why a question is asked (Investigators: be prepared to answer)
  - Instruct witness regarding confidentiality
  - Assure/warn witness regarding policy prohibiting retaliation
  - If applicable, advise witness on alcohol policy waiver
  - Obtain commitment to tell the truth
  - Advise party and advisor on advisor’s limited role 

GRAY PLANT MOOTY 98

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**STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION** 

- Review institution’s policy and how it defines relevant terms
- Identify all known witnesses and gather information about them
- Begin to create chronology of events
- Strategize about the timing and location of interviews 

GRAY PLANT MOOTY 99

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**STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION** 

- Identify ultimate questions that will need to be decided
- Develop checklist for key questions—examples:
  - Consent to each act
  - Impact of alcohol
  - Ask for written communications—texts, emails, etc.
- Create list of topics for witness interviews (not questions)
- **Avoid investigative techniques and approaches that apply sex stereotypes or generalizations<sup>2017 Q & A</sup>**

GRAY PLANT MOOTY 100

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**STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION** 

- Gather and review available evidence
- Know the setting(s) of the events
- Determine whether witness interviews will be recorded
- Maintain confidentiality in cases where institution has agreed to keep complainant's identity confidential
- Stay flexible



GRAY PLANT MOOTY 101

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**STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION** 

- Prepare for parties with advisors
  - Consider having advisors review and sign document outlining purpose and role of advisor
- Also be prepared for how to handle “private” investigations by the respondent



GRAY PLANT MOOTY

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**CASE STUDY**

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**SEXUAL MISCONDUCT COMPLAINT**

- You have been assigned to investigate an allegation of sexual misconduct.
- On March 10, 2017, Emily Edwards made a complaint of sexual misconduct against Mike Morris.

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**CASE STUDY—COMPLAINT**

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Sexual Assault/Harassment Complaint Form

COMPLAINANT NAME: Emily Edwards

ADDRESS: 999 University Circle

DATE OF REPORT OF ALLEGED POLICY VIOLATION: March 10, 2017

RESPONDENT NAME: Mike Morris

ADDRESS: 1234 College Lane

TITLE IX COORDINATOR SUMMARY OF EMILY'S ORAL REPORT:

On January 28, Mike Morris sexually assaulted Emily. On that evening, she went to a party and became very drunk. Emily and Mike had been messaging each other and agreed to meet later at Mike's apartment. The last thing Emily recalls is going into Mike's bedroom and the two of them kissing. Emily "blacked out" until the next morning when she woke up in Mike's bed without any clothes on. Emily later learned from Mike by text message that they had sex the night before. A few days later, she and Mike had intercourse again. On that occasion, Mike performed oral sex on her without her consent and Mike penetrated her without a condom without her consent.

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### SEXUAL MISCONDUCT COMPLAINT

- The Title IX Coordinator notified Mike of the complaint. Mike stated that Emily is just angry with him for breaking up with her. Mike insisted that he never assaulted Emily.

GRAY  
PLANT  
MOOTY 106

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### CASE STUDY—DEFINITION OF CONSENT

- Consent means words or overt actions by a person clearly and affirmatively communicating a freely-given present agreement to perform a particular sexual act. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual activity. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent. It is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

GRAY  
PLANT  
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### CASE STUDY—DEFINITION OF CONSENT

- The definition of consent is subject to the following:
  - Consent can only be given if one is of legal age. The legal age of consent in this state is 16.
  - Consent is a mutually understood and freely given "yes," not the absence of "no."
  - Consent to one form of sexual activity cannot imply consent to other forms of sexual activity.
  - Consent can be withdrawn at any time. When consent is withdrawn, the sexual activity for which consent was initially provided must stop.
  - Silence or failing to resist does not imply consent.
  - Previous relationships or previous consent does not imply consent to future sexual acts.
  - An existing sexual, romantic, or marital relationship does not imply consent.
  - Prior sexual activity with other individuals does not imply consent.
  - Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or coercion, as that term is defined below.
  - There can be no consent to sexual activity with someone known to be—or who should be known to be—mentally or physically incapacitated, as that term is defined below.
  - Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.

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PLANT  
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**CASE STUDY—DEFINITION OF CONSENT** 

- A person who is incapacitated cannot give valid consent to sexual contact. Incapacitation means the inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol.

GRAY  
PLANT  
MOOTY 109

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**CASE STUDY—DEFINITION OF CONSENT** 

- Where drugs and/or alcohol are involved, incapacitation is determined based on the facts and circumstances of the particular situation looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation, whether the individual was able to communicate decisions regarding consent, nonconsent, or the withdrawal of consent, and whether such condition was known or reasonably known to the respondent or a reasonable person in respondent’s position. Use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct and does not diminish personal accountability or criminal liability.

GRAY  
PLANT  
MOOTY 110

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**CASE STUDY—DEFINITION OF COERCION** 

- **Coercion** refers to intimidation that would compel an individual to do something against their will by the use of psychological pressure, physical force, or threats of severely damaging consequences. Coercion is more than an effort to persuade or attract another person to engage in sexual activity. Coercive behavior differs from seductive behavior based on the degree and type of pressure someone used to get consent from another.

GRAY  
PLANT  
MOOTY 111

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### STAGE TWO: GATHER EVIDENCE

- Types of evidence:
  - Witness interviews
    - Notify parties of one another's interviews
    - Handling unwilling witnesses
  - Physical evidence
    - Text messages/emails/photos
    - Social media
    - Evidentiary examination
    - Student/personnel records
    - Surveillance video



GRAY PLANT MOOTY 112

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### STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES

- Review script of opening remarks with each witness
  - Provide general explanation of reason for interview—gathering facts
  - Explain possible uses of witness's statements
  - If applicable, inform witness of recording and its use
  - Explain complaint process to parties
  - Explain the need to ask difficult, detailed questions
  - Ask a complainant witness not to read into questions
  - Explain to complainant witness that different people respond differently (**caution!**)

GRAY PLANT MOOTY 113

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### STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES

- Review script of opening remarks with each witness (cont.)
  - Explain that timelines and order of events may not be clear
  - Tell the witness to feel free to ask why a question is asked (Investigators: be prepared to answer)
  - Instruct witness regarding confidentiality
  - Assure/warn witness regarding policy prohibiting retaliation
  - If applicable, advise witness on alcohol policy waiver
  - Obtain commitment to tell truth
  - Advise party and advisor on advisor's limited role



GRAY PLANT MOOTY 114

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- “Do you know why you were asked to come speak with me today?”
  - “Highway” or “Scenic Route” interview?
- If Scenic Route, use “funnel” approach
- If Highway interview, download everything they “know” about relevant events

GRAY PLANT MOOTY 115

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- Scenic Route: Funnel Approach
  - Start broadly; avoid leading questions
    - “I understand you were at a party off-campus last Saturday; did anything unusual happen while you were there?”
    - “You take Professor Johnson’s architectural drafting course on Wednesday afternoons; did you observe anything out of the ordinary last week?”
  - Decide whether to ask more detailed questions
  - More reliable responses and less rumor mill



GRAY PLANT MOOTY 116

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- Create chronology of events
- Identify the who, what, where, when, and how
  - If don’t know names, figure out other identifiable information
  - If helpful, consider drawing a map/diagram
  - If exact times aren’t known, what events were going on to help fix a time
  - Avoid “why” questions
- Close “chapters” by recapping events
- Distinguish between personal knowledge and hearsay



GRAY PLANT MOOTY 117

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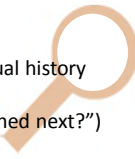
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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- Ask about evidence (text messages, photos, emails)
  - Expect that the parties and witnesses may be talking to each other during the complaint process—ask for these communications later in the process
- Ask about other witnesses who may have information
- Don't share information unless necessary
- Don't focus on writing exhaustive notes
- Don't inquire into complainant's prior sexual history with anyone other than respondent
- Let witness do most talking ("What happened next?")



GRAY PLANT MOOTY 118

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- Don't avoid questions because answers seem too obvious or too personal
- "Is there anything else we haven't discussed?"
- Invite further contact if recall additional/different events
- Remind regarding confidentiality and retaliation
- Ask witnesses to forward information immediately
- Prepare a summary immediately following interview



GRAY PLANT MOOTY 119

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**CASE STUDY** 



Prepare for the Unexpected

GRAY PLANT MOOTY 120

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- You hear from the Title IX Coordinator that the parties’ interviews have been scheduled.
- You receive a call from Emily and she tells you that she will need to type out her answers to your questions on her laptop.

GRAY PLANT MOOTY 121

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- The day before Mike’s scheduled interview, Mike calls you and tells you that he needs to push his interview back a week because his advisor, who is a practicing attorney, has a conflict and is not available.

GRAY PLANT MOOTY 122

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**CASE STUDY**  

Ask questions of the actors

GRAY PLANT MOOTY 123

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES – ADVISORS** 

- Advisors, particularly attorney advisors, have become increasingly common participants
- Tips for addressing disruptive advisors:
  - Signed advisor agreements
  - Be prepared to enforce the agreement parameters
  - Set the ground rules at the outset (e.g., “potted plant”)
  - Don’t engage with the advisor; only address the party (even in response to the advisor’s statements)
  - Hold the party responsible for the advisor’s actions
  - Don’t be afraid to consider pausing the process if the advisor continues to be disruptive
  - Be consistent

GRAY PLANT MOOTY 124

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**STAGE TWO: REVIEW/REVISE/ RE-INTERVIEW** 

- Assess what more needs to be done
- Determine whether additional witnesses are necessary or merely duplicative
- Determine whether new facts/allegations require additional interviews
- Inform Title IX Coordinator of any new allegations (related or unrelated)
- **Be sure that each party has adequate notice of the other party’s allegations**
- Inform parties in advance of close of evidence date



GRAY PLANT MOOTY 125

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**CASE STUDY** 

Prepare for the Unexpected

GRAY PLANT MOOTY 126

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- During Emily’s interview, she mentions that Mike keeps “accidentally” showing up to choir practice on the wrong day when it is Emily’s turn to attend choir practice. Mike leaves right away, but it is still making Emily uncomfortable.
- Should you address this?

GRAY PLANT MOOTY 127

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- You meet with Mike the following week for his interview. Mike’s lawyer is accompanying him as his advisor. The advisor keeps interrupting you and is basically coaching Mike on what to say for his answers to your questions.
- What do you do?

GRAY PLANT MOOTY 128

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- During Mike’s interview, you ask him if he has any questions before you proceed with the questioning. Mike says that he hasn’t been given information about Emily’s allegations and he wants to know specifically what Emily says he did.
- How do you respond?

GRAY PLANT MOOTY 129

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- During Emily’s interview, she suggests three witnesses, including her sister who is serving as her advisor.
- During Mike’s interview, he suggests six witnesses; five of them appear to be character witnesses and would not have firsthand information about the incidents.
- Should you interview each of them?

GRAY PLANT MOOTY 130

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- You complete three witness interviews and have one more witness you would like to interview. You find out that the witness is out of the country on a study abroad trip and will not be back until the summer.
- What should you do?

GRAY PLANT MOOTY 131

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- One of the witnesses tells you during her interview that participating in this process is hard for her because she, too, has been a victim of sexual assault. The witness goes on to tell you that Mike assaulted her last year.
- What do you do with that information?

GRAY PLANT MOOTY 132

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- A few days later, you get a call from Mike’s attorney. She informs you that she interviewed the six witnesses suggested by Mike. She plans on sending you summaries of those interviews, along with the audio recordings. She requests the names of Emily’s witnesses so that she can interview them, too.
- How do you respond?

GRAY  
PLANT  
MOOTY 133

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- Later that day, you receive an email from Mike. He attaches the witness summaries and requests the names of Emily’s witnesses.
- What should you do with this information?

GRAY  
PLANT  
MOOTY 134

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- You review the summaries, which all discussed Emily’s character, particularly that she liked “drama,” regularly tried to instigate conflict between people, was a known liar, and had previously accused another ex-boyfriend of assault.
- Should you include these summaries?

GRAY  
PLANT  
MOOTY 135

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- During Emily’s second interview, Emily tells you that she was sexually assaulted once before. You believe it is relevant.
- Should you include this in the report?

GRAY PLANT MOOTY 136

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- You have completed all the interviews, but you are still waiting on additional evidence from Mike. Mike has told you that he has a few important text messages between him and Emily that he will be sending. You have followed up a couple times and Mike still hasn’t sent them.
- What should you do?

GRAY PLANT MOOTY 137

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- The Title IX Coordinator lets you know that she has notified the parties of the close of evidence date, after which no new evidence will be reviewed.
- On the day of the close of evidence deadline, you receive a flash drive delivered from Mike. It contains hundreds of text messages exchanged between him and Emily while they were dating.

GRAY PLANT MOOTY 138

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**STAGE TWO: GATHER EVIDENCE – INTERVIEW WITNESSES** 

- As you go through the messages, it appears as if some of the threads are incomplete and that Mike may have deleted some of the messages in the threads.
- Should you address that issue in some way?

GRAY PLANT MOOTY 139

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**STAGE THREE: PACKAGE INVESTIGATION FOR DECISION-MAKERS** 

- Options for packaging your investigation:
  - Record each interview
    - And provide written summary of other evidence
  - Compile witness statements/summaries and other evidence
    - Allow parties and/or each witness to review the summary of their interview(s); if substantive objections to summary, note them in summary, but do not change if your notes support the summary
    - Allow parties to supplement with written statements



GRAY PLANT MOOTY 140

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**STAGE THREE: PACKAGE INVESTIGATION FOR DECISION-MAKERS** 

- Options for packaging your investigation (cont.):
  - Draft an investigation report
    - Should prepare written investigation report <sup>2017 Q&A (?)</sup>
    - Allow parties to supplement with written responses
      - Parties should have opportunity to respond in writing or at hearing <sup>2017 Q&A</sup> (recommended if parties are given access to information)
    - Not a fact-finding report
    - Use careful, equal language—e.g., use “according to” for both
  - Parties must have the same access as officials to all information that will be used during informal and formal disciplinary meetings and hearings
    - Mandatory for sexual assault/VAWA
    - Must if Title IX <sup>2017 Q&A (?)</sup>



GRAY PLANT MOOTY 141

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trainED  
Q & A

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trainED  
DRAFTING AN INVESTIGATION REPORT



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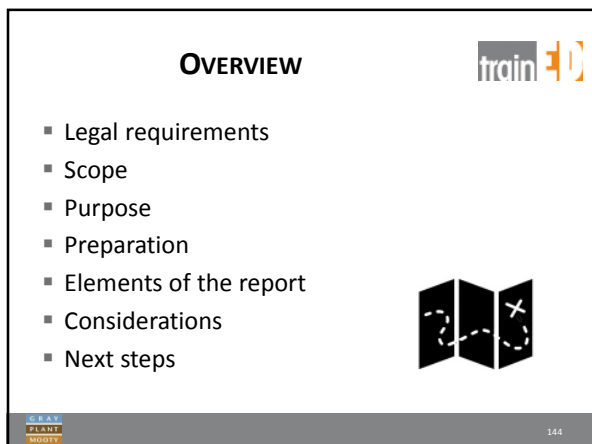
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OVERVIEW

- Legal requirements
- Scope
- Purpose
- Preparation
- Elements of the report
- Considerations
- Next steps



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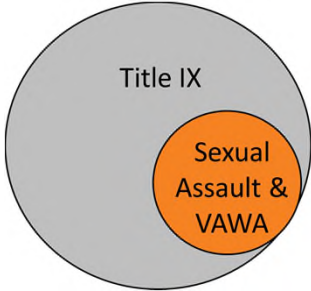
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**LEGAL REQUIREMENTS** 



Title IX  
Sexual Assault & VAWA

GRAY PLANT MOOTY 145

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**LEGAL REQUIREMENTS** 



- Prompt, fair, and impartial
- Fact-gathering investigation phase
- Adjudication phase
- ~~No requirement to have an investigation report~~
- **Should prepare written investigation report** <sup>2017 Q & A (?)</sup>
- Parties must have access to information used in the decision-making process
  - Must for sexual assault/VAWA
  - "Must" if Title IX <sup>2017 Q & A (?)</sup>

GRAY PLANT MOOTY 146

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**LEGAL REQUIREMENTS** 



- VAWA requires:
  - A prompt, fair, and impartial proceeding includes a proceeding that is conducted in a manner that provides **timely and equal access** to the accuser, the accused, and appropriate officials to **any information that will be used during informal and formal disciplinary meetings and hearings**

GRAY PLANT MOOTY 147

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**LEGAL REQUIREMENTS** 

- VAWA requires:
  - Proceeding must “provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the **opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice**”



GRAY PLANT MOOTY 148

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**LEGAL REQUIREMENTS** 

- VAWA requires:
  - Proceeding will “[n]ot limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties”

GRAY PLANT MOOTY 149

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**LEGAL REQUIREMENTS** 

- Sexual history
  - “Questioning about the complainant’s sexual history with anyone other than the alleged perpetrator should not be permitted.”
  - “[T]he alleged perpetrator should not be given access to . . . information regarding the complainant’s sexual history.”
- Investigator should redact any information about the complainant’s sexual history from the investigation file



GRAY PLANT MOOTY 150

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**LEGAL REQUIREMENTS:**  
**2017 Q & A**



- “An equitable investigation . . . requires a trained investigator to analyze and document the available evidence to support reliable decisions
  - *objectively evaluate* the credibility of parties and witnesses
  - *synthesize* all available evidence – including both inculpatory and exculpatory evidence –
  - and to take into account the *unique and complex circumstances* of each case.”
- “The investigation should result in a written report summarizing the *relevant* exculpatory and inculpatory evidence.”

GRAY PLANT MOOTY 151

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**PURPOSE**



- Know the purpose of your investigation and report under your institution’s policies
  - Provide a summary of your investigation
  - Allow parties to submit a response?
  - Allow adjudicators to make a decision
  - Play a role in prompt, fair, and impartial proceeding



GRAY PLANT MOOTY 152

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**SCOPE**



- Confirm that the adjudicator(s) want a written report
- Will adjudicator(s) listen to recordings?
- Will you have conversation(s) with the adjudicator(s)?
- Are you conducting fact gathering only or fact finding?
- Are you weighing in on credibility?
- Determine whether the adjudicator(s) want you to provide a recommendation
- Will you use witness summaries or summary of facts/events?
- Will you serve as a gatekeeper?

GRAY PLANT MOOTY 153

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**SCOPE** 

- Reassess the scope of your investigation report as appropriate
  - Different cases may lend themselves more to one report-drafting method or another
  - Ensure that your policy and procedures provide for such flexibility
- The institution's approach as to having the investigator weigh in on credibility or make a recommendation should be consistent



GRAY PLANT MOOTY 154

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**SCOPE** 

- Consider scope of report if the same person has the dual role of investigator and adjudicator
  - What information are you using when making a decision?
  - Report lets parties see what you are considering
  - Report gives parties a chance to respond prior to the decision



GRAY PLANT MOOTY 155

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**PREPARATION** 

- Prepare for report drafting during your investigation by—
  - Staying organized
  - Taking good notes and/or recording interviews
  - Review recordings, notes, and evidence to assess whether you need more information
  - Think about how you will summarize the facts in your report to help assess whether you've gathered all of the evidence you need
  - Consider outlining or drafting the report as you conduct your investigation



GRAY PLANT MOOTY 156

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**ELEMENTS OF THE REPORT** 

- Introduction
- Summary of allegations/complaint(s)
- Documents/evidence reviewed
- Witnesses interviewed
- Interview methodology
- Summary of facts by allegation OR witness summaries



GRAY  
PLANT  
MOOTY 157

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**ELEMENTS OF THE REPORT** 

- Introduction
  - State the reason for your investigation
  - Date of complaint(s)
  - Your appointment as investigator
    - Refer to policy/procedures
  - Purpose of report
  - Scope of your role (e.g., credibility, recommendation)



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PLANT  
MOOTY 158

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**ELEMENTS OF THE REPORT** 

- Summary of allegations/complaint(s)
  - Include allegations from original complaint and those gathered during interviews; consider whether to differentiate between the two
  - If no written complaint, get information from individual who took oral complaint



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PLANT  
MOOTY 159

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**ELEMENTS OF THE REPORT** 

- Summary of allegations/complaint(s) (cont.)
  - Make it clear who made each allegation
    - Multiple complainants
    - Other witnesses
  - Cover details later in the report



GRAY PLANT MOOTY 160

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**ELEMENTS OF THE REPORT** 

- Include a list of documents and evidence reviewed
  - Policies
  - Written complaints
  - Text messages
  - Social media screen shots
  - Letters from institution to parties
  - Emails from witnesses to investigator
  - Other written documentation
  - Physical evidence



GRAY PLANT MOOTY 161

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**ELEMENTS OF THE REPORT** 

- Witnesses interviewed
  - List witnesses
  - May include dates of interviews



GRAY PLANT MOOTY 162

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**ELEMENTS OF THE REPORT** 

- Interview methodology
  - Dates of interviews
  - Location
  - Individuals present—e.g., advisors
  - Recorded or not recorded
  - Reasoning for choice of whom to interview



GRAY  
PLANT  
MOOTY 163

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**ELEMENTS OF THE REPORT** 

- Interview methodology (cont.)
  - General questions asked by investigator
  - General approach used in interviews
  - Statements made by investigator
  - Information shared with or withheld from witnesses



GRAY  
PLANT  
MOOTY 164

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**ELEMENTS OF THE REPORT** 

- Summary of the facts—two approaches:
  - Summary of facts by allegation
    - Separate out each allegation
    - Give account from each party/witness
    - Describe other evidence supporting or refuting allegation
  - Witness summaries
    - Recap account from each party/witness
    - Describe other evidence offered by or gathered from witness



GRAY  
PLANT  
MOOTY 165

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### ELEMENTS OF THE REPORT

- Summary of the facts 
  - Include facts that may impact a credibility finding
  - Weigh in on credibility if that's part of your role
    - *objectively evaluate the credibility of parties and witnesses*<sup>2017 Q & A</sup>
  - Consider whether to point out disputed facts and agreed-upon facts
  - Exclude facts that are irrelevant and/or prejudicial depending on probative value
    - Investigator must *synthesize all available evidence*, including inculpatory and exculpatory evidence<sup>2017 Q & A</sup>
    - Should result in written report summarizing *relevant* inculpatory and exculpatory evidence<sup>2017 Q & A</sup> (*recommended*)

GRAY PLANT MOOTY 166

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### SPECIAL CONSIDERATION

- Always consider relevance:
  - Expert reports?
  - Character evidence?
  - Lie detector test results?
  - Prior violation by respondent?
  - Allegations of similar misconduct?
- Best to have a policy addressing 

GRAY PLANT MOOTY 167

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### SPECIAL CONSIDERATION

- Decision-Makers will need to weigh evidence / assess credibility: 
  - Is information the witness provided accurate based on other evidence?
  - How did the witness learn the facts?
  - How well did he or she recall facts?
  - How forthcoming was the witness? Did the witness seem honest and sincere?
  - What are the possible motives for being less than truthful?
  - What is the witness's relationship to the complainant and respondent?
  - Are there other factors that bear on the believability of the witness?

GRAY PLANT MOOTY 168

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**ROLE OF TITLE IX COORDINATOR DURING INVESTIGATION PHASE** 

- Determine who will provide ongoing communication with the parties throughout the complaint process
  - Notify parties of delays and reason for delays
  - Notify parties of meetings with the other party
- Ensure that respondent receives adequate notice of any new allegations
- Oversee process to ensure compliance with policy and designated time frames
- Review investigation report, party responses, and rebuttals
  - Redact impermissible content
  - Evaluate whether further investigation is necessary
- Intake, investigate, adjudicate, and/or oversee appeal?
  - Beware of conflicts when filling multiple roles

GRAY PLANT MOOTY 169

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**CASE STUDY**  

Investigation Report:  
summary of facts gathered

GRAY PLANT MOOTY 170

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**CASE STUDY—SUMMARY OF THE FACTS** 

**Investigation Report Excerpt**  
*Summary of Facts/Background*

- The parties are both students at the College. Emily Edwards is a junior, and Mike Morris is a senior. They agree that they met through a mutual friend last fall, and began dating in January. The parties agree that during the few weeks that they dated, they engaged in consensual sexual interactions including kissing, touching, and digital penetration. Emily stated that, during this time, Mike consistently asked to take their sexual relationship further, including asking her to perform oral sex on him and asking to have intercourse. Emily stated that she was resistant to this and told him numerous times that she wanted to take things slow.

GRAY PLANT MOOTY 171

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**CASE STUDY—SUMMARY OF THE FACTS** 

**First Alleged Incident**

- The parties agree that the evening of January 28, they were together at an off campus apartment of a mutual friend, Shawn. Emily stated that after leaving Shawn’s apartment, she went to a party with another friend, Lauren. Emily stated that Mike was not at the party, and that he had plans to go to the bar. Emily stated that she was at the party for approximately three hours. Emily stated that, while at the party, she drank two, maybe three, cups of beer from a keg. Emily stated that towards the end of the party, someone gave her a cup of “jungle juice.” Emily stated she recalled finishing one cup and thinks she may have drank part of another cup also. Emily stated that it felt like her intoxication went from “0 to 100” after drinking the jungle juice.

GRAY  
PLANT  
MOOTY 172

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Emily stated that she and Mike were messaging each other while they were out, and had agreed to meet at Mike’s apartment later. Emily stated that she met Mike at his apartment around midnight, and that she still felt very drunk by the time she arrived. Emily stated that she realized how very “faded” she was while walking to his apartment and said she has “never been that drunk in [her] life.” When asked how far she walked from the party to Mike’s apartment, Emily stated that she believed it was about 5-6 blocks. Emily stated that the room was spinning and she thought that she was slurring her words. Emily stated that she decided she would spend the night at Mike’s place because she was so drunk.

GRAY  
PLANT  
MOOTY 173

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Mike stated that he saw Emily earlier in the night at Shawn’s apartment. Mike stated that he left Shawn’s at the same time as Emily. Mike stated that Emily told him she was going to a party, and he went out to a bar to celebrate a friend’s birthday. Mike stated that they had not discussed seeing each other again that night. Mike stated that, after he had been at the bar for awhile, he received a message from Emily that stated “I’ve been thinking about you all night. Let’s meet at your place later to pick up where we left off last night.” Mike stated that he responded that he would be back at his apartment by midnight, and she could come over any time after that.

GRAY  
PLANT  
MOOTY 174

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**CASE STUDY—SUMMARY OF THE FACTS** 

*Emily's Account*

- Emily stated that her memory is “very fuzzy” after she arrived at Mike’s apartment. Emily stated that Mike did not appear drunk “at all” when she arrived. Emily stated that she was not aware if Mike had been drinking that night, but she knew that he had gone to the bar.
- Emily stated that the last thing she recalls is going into Mike’s bedroom and the two of them kissing. Emily stated that she then “blacked out” until the next morning when she woke up in Mike’s bed partially clothed. Emily stated that when she woke up, Mike was still sleeping. Emily stated that, because she wasn’t feeling well, she quickly dressed and left his apartment while he was still sleeping.

GRAY  
PLANT  
MOOTY 175

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Emily stated that she received a message from Mike later that same day, and they exchanged the following messages:

Mike:	How are u feeling? We okay?
Emily:	Not well. IDK what happened
Mike:	I was worried when you weren't here. Not surprised to hear thou since u were sick and all
Emily:	Sick? What?
Mike:	Yeah. U threw up
Emily:	When? I kind of remember this now. What else happened?
Mike:	Ha, ha
Emily:	Why are you laughing??
Mike:	Wait, what? you don't remember?
Emily:	Rebeber what?
Mike:	the sex?

GRAY  
PLANT  
MOOTY 176

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Emily stated that she was “shocked” to hear that she had sex with Mike that night. Emily stated that after Mike mentioned that she had been sick, she recalled throwing up at some point while she was in his bed. Emily stated that, other than that, she has no memory of any events that occurred in Mike’s bedroom and said she “blacked out.” Emily stated that she immediately called Mike and told him that she did not remember having sex with him. Emily stated that she told him that she “couldn’t believe he would have sex with [her] when [she] was so drunk.” Emily stated that Mike should have known she was drunk and that she “couldn’t and wouldn’t have agreed to have sex.” Emily stated that Mike responded by telling her that he had no idea she was blacked out but she didn’t understand how that could be true. Emily stated that Mike told her he would never take advantage of her, and kept saying “I need you to believe me.”

GRAY  
PLANT  
MOOTY 177

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### CASE STUDY—SUMMARY OF THE FACTS



#### Mike's Account

- Mike stated that Emily arrived at his apartment around midnight. Mike stated that they talked for the first 15 minutes after she arrived and that Emily was also on her phone during this time. Mike stated that Emily told her she was messaging Lauren to let her know she had made it to his apartment okay. Mike stated that he knew that Emily was going to a party and that she'd been drinking, but they did not discuss how much she had to drink and she did not seem "hammered." Mike stated that Emily appeared "fine." When asked how he knew Emily had been drinking, Mike stated that he assumed she would be drinking at the party and that she was talking a little loud and was "giggly" and "flirty." Mike stated that Emily's behavior was no different than the other times he's seen her drinking. Mike stated that they have been to a few parties together since they started dating, they have both drank alcohol when with one another at these parties, but he has never seen Emily wasted.

GRAY  
PLANT  
MOOTY

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### CASE STUDY—SUMMARY OF THE FACTS



- Mike stated that as soon as they entered his bedroom, Emily began kissing him. Mike stated that shortly after, Emily then removed both his and her clothing. Mike stated that Emily did seem "more aggressive" than she had been in previous intimate encounters. Mike stated that Emily then initiated performing oral sex on him. Mike stated that "one thing led to another," and they had sex. Mike stated "everything [we] did that night was consensual." When asked what words or overt actions led him to believe Emily consented to their sexual contact, Mike stated that Emily initiated coming to his place, initiated removing each of their clothing, and initiated performing oral sex on him. Mike stated that, during their sexual encounter, Emily also lay on her back, grabbed his hand and moved his hand between her legs, and pulled him closer to her. When asked who initiated intercourse, Mike stated that he believes he initiated intercourse but only because "all the signs were there that it was what she wanted." Mike stated that he asked Emily "You sure you're good with this?" immediately before they had sex and she said "yes."
- When asked in a follow-up interview, Emily stated that she could "vaguely remember" performing oral sex on Mike, but her memory was "in and out."
- Mike stated that, minutes after they finished having sex, Emily leaned over his bed and threw up in a nearby trash can. Mike stated that this surprised him because he didn't think Emily was drunk and had never seen Emily get sick. Mike stated that he then asked Emily if she was drunk, and she responded "no."

GRAY  
PLANT  
MOOTY

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### CASE STUDY—SUMMARY OF THE FACTS



- Mike stated that they both fell asleep in his bed. Mike stated that when he woke the next morning at 11:00 a.m., Emily was gone from his bed and had left his apartment. Mike stated that he was worried about her because she had become sick, and sent her a message later that afternoon asking if she was okay. Mike stated that while he was messaging Emily, she told him that she didn't remember having sex with him. Mike stated that Emily then called him, and accused him of taking advantage of her. Mike stated that he also remembers Emily asked him whether he wore a condom. Mike stated that during their call he told her that he had no idea she was blacked out. Mike stated that he became very worried and wanted her to believe him.

GRAY  
PLANT  
MOOTY

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**CASE STUDY—SUMMARY OF THE FACTS** 

*Witness Account*

- Lauren stated that she was with Emily at a party that night and that they both consumed alcohol there. When asked about Emily's intoxication level, Lauren stated that she wasn't really paying attention to how much Emily drank, and that they spent quite a bit of time apart at the party. Lauren stated that she was drunk by the end of the party and that Emily was buzzed the last time she saw her, which was about an hour after they arrived. When asked, Lauren stated that she thought Emily was buzzed because she thinks she remembers Emily laughing and dancing in place with their friends. Lauren stated that at some point, she could not find Emily and that worried her so she texted Emily.

GRAY  
PLANT  
MOOTY 181

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Lauren provided the following text message exchange:
  - Lauren: Where r u?
  - Emily: I left, with Mike
  - Lauren: When? Why didn't you tell me?
  - Emily: Sorry. I think u r 2 wasteff
  - Lauren: ?
  - Lauren: You ok?
  - Emily: Yeah, I will sleep here That last drink to to much
- When asked, Lauren stated that she frequently communicates with Emily by text messages. Lauren stated that these messages were a typical exchange between the two of them, and she would not have been able to gauge Emily's intoxication level based on this communication.

GRAY  
PLANT  
MOOTY 182

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**CASE STUDY—SUMMARY OF THE FACTS** 

The Parties' Communications and Interactions in the Days and Weeks Following

- Emily stated that in the days following, Mike continued to contact Emily and continued to apologize. Emily stated that she interpreted Mike's apology as him acknowledging "his poor judgment in having sex with [her] while [she] was drunk." Emily stated that she decided to forgive Mike because she really liked him. Emily stated that she felt partly responsible because she drank too much and then went to Mike's house. Emily and Mike agreed that they continued to spend time together nearly every day.
- Emily stated that, within days of his apologizing, Mike then began "heavily pressuring" her to have sex. Emily stated that Mike said things to "coerce" her, including "if you really like me" and "I have needs." Emily stated that she also recalls a conversation in which Mike told her she was making "too big a deal" because they had already had sex.

GRAY  
PLANT  
MOOTY 183

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Mike stated that during this time, he tried to continue to be intimate with Emily because he really liked her. Mike thought Emily was interested in the same thing because she consistently sent him “provocative” messages. Mike stated that when he would try to be intimate with Emily, he was reacting in part to what he thought she wanted because of her messages. Mike stated that he always made sure that she was okay with whatever they were doing. When asked about these messages, Emily stated that she sent Mike “flirty” messages during this time because, while she didn’t want to rush things with Mike, she did like him and didn’t want him to get bored of her. When asked for the text messages, Emily stated that she had deleted them at the time because they weren’t important.

GRAY  
PLANT  
MOOTY 184

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**CASE STUDY—SUMMARY OF THE FACTS** 

- The parties agreed that they had sex again, on February 4th. Mike stated that the sex was consensual, that neither of them had been drinking, and that he was careful to ask for verbal consent. Emily stated that she did consent but this was after Mike pressured her for the past week and continuously for nearly two hours on the night they had sex. Emily stated that during this time Mike threatened to break up with her if she didn’t say yes. Emily stated that Mike said things like “you must not be very serious about this relationship” and “people who love each other express those feelings through sex.” Emily stated that, at that time, she wanted to take things slow and would never have agreed to have sex with him if he hadn’t threatened to break up with her. When asked about these statements, Mike stated that he said these things to Emily because he was beginning to question how serious Emily was about dating him. Mike further stated that Emily was pretty experienced sexually and that made him even more insecure about how slowly their relationship was progressing.

GRAY  
PLANT  
MOOTY 185

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**CASE STUDY—SUMMARY OF THE FACTS** 

Second Alleged Incident

- The parties agreed that on February 8, they again had intercourse in Mike’s apartment. The parties agreed that their sexual interaction began with kissing, touching, and digital penetration, and that they each consented to these acts.

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PLANT  
MOOTY 186

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**CASE STUDY—SUMMARY OF THE FACTS** 

*Emily's Account*

- Emily stated that shortly after the digital penetration began, it became painful for Emily. Emily stated that she put her hands on Mike's shoulders to push him away and repositioned her hips so that he was no longer penetrating her. Emily stated that Mike then ducked down and began performing oral sex on her. Emily stated that she did not want this and immediately froze. Emily stated that she "did not say anything or do anything" while Mike performed oral sex on her. Emily stated that Mike had never attempted to perform oral sex on her during previous sexual encounters, and they had never discussed the topic. Emily stated that in order to get Mike to stop performing oral sex, she pulled him up and said "let's have sex."

GRAY  
PLANT  
MOOTY 187

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Emily stated that, right around this time, she heard someone or something outside his bedroom door and asked him if the door was locked. Emily stated that Mike left the bed, turned off the lights, and locked the door. Emily stated that Mike then took a minute to get back to bed, and she assumed he was putting a condom on because they had previously only had sex with a condom on.

GRAY  
PLANT  
MOOTY 188

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Emily stated that she realized after Mike penetrated her that he was not wearing a condom and it surprised her. Emily stated that she believes she said "this doesn't feel right" initially, and Mike did not respond. Emily stated that shortly after, she again said to Mike "what are you doing?" and "did you take the condom off?" Emily stated that Mike responded by saying "we don't need a condom," and continued penetration while moving her hips with his hands. Emily stated that this discussion about the condom went on for a few minutes, all the while penetration continued. Emily stated that she was "annoyed" that Mike was not listening to her and said, "Stop, I don't want to have sex without a condom." Emily stated that after she told Mike to stop, he continued penetrating her for at least another couple minutes. Emily stated that she was then able to break free from his hands holding her hips and to stop the penetration.

GRAY  
PLANT  
MOOTY 189

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**CASE STUDY—SUMMARY OF THE FACTS** 

*Mike's Account*

- Mike stated that at some point they were "making out," while he was digitally penetrating Emily. Then Emily "pushed down on his shoulders" and moved her hips towards him. Mike stated that this was a "clear sign" to him that Emily wanted him to perform oral sex on her. When asked to further describe how Emily pushed his shoulders, Mike stated that she "kind of pushed him a little down and to the side." Mike stated that Emily appeared to enjoy the oral sex, and she moved her hips and made noises indicating her pleasure throughout. Mike stated that Emily then initiated intercourse and said he recalls she verbally stated that she wanted to have sex. Mike stated that before they began to have sex, she asked him if he locked the door. Mike stated that he then got up, locked the door, and turned off the lights before returning to the bed.

GRAY  
PLANT  
MOOTY 190

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Mike stated that after penetration had occurred for a short time, Emily said "this doesn't feel right." Mike stated that Emily was lying underneath him at this time, so he assumed she was uncomfortable with the position and flipped her on top of him. Mike stated that they then continued having sex. Mike stated that Emily then said "what are you doing?" and "did you take the condom off?" Mike stated that he was confused by her questions since he never had a condom on and they had not discussed using a condom during this sexual encounter. Mike stated that he assumed Emily was concerned about pregnancy, but he thought she was on the pill, so he said "you're on the pill, we don't need a condom."

GRAY  
PLANT  
MOOTY 191

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**CASE STUDY—SUMMARY OF THE FACTS** 

- Mike stated that penetration continued for maybe a minute until Emily said "I don't want to have sex without a condom." Mike stated that he then immediately stopped having sex with Emily, and pushed her off of him. Mike stated that prior to Emily saying this during sex, he did not have any idea she didn't want to have sex without a condom. Mike stated that as soon as he had any indication that she was not comfortable with the sex, he immediately stopped.

GRAY  
PLANT  
MOOTY 192

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**CASE STUDY—SUMMARY OF THE FACTS** 

The Parties End Their Dating Relationship

- Emily stated that a couple of days after this sexual encounter, Mike broke up with her because she refused to have unprotected sex with him. Mike stated that he broke up with Emily because “things were just too difficult” with her, and while he liked her, he just wanted to enjoy his senior year of college. Mike stated that he did not break up with her because she wouldn’t have unprotected sex with him.

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PLANT  
MOOTY 193

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**OTHER CONSIDERATIONS** 

- Multiple complainants/  
multiple respondents
- Preservation of  
investigator’s notes



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PLANT  
MOOTY 194

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**PROVIDING THE PARTIES  
ACCESS TO INFORMATION** 

- Must with sexual assault and VAWA cases
- “Must” if Title IX<sup>2017 Q&A (2)</sup>
- Need to comply with federal law without unnecessarily risking privacy
- Access to review information; not copies
- Use of watermarks
- Prohibit photographs, copying, downloading (check smart phones at the door)
- Supervise access
- Out of town access
  - secure site with ability to prohibit downloading AND
  - skype session during review
- Access by advisor – must be with party

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PLANT  
MOOTY 195

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**ROLE IN DECISION-MAKING PROCESS** 

- If role is investigator (and not adjudicator), role in adjudication should be limited
  - May be asked to review parties' responses to investigation report
  - Avoid communication with adjudicators if at all possible
  - If communication with adjudicators is necessary, work with Title IX Coordinator to provide the parties with access to additional information

GRAY PLANT MOOTY 196

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**RECORDS TO MAINTAIN** 

- Reports and complaints
- Notice to respondent of complaint
- **Communications with parties and other correspondence relating to investigation (including documentation of verbal in-person/phone conversations)**
- No-contact orders and other interim measures (offered and whether accepted or declined) for both parties
- **Investigator's notes**
- **Party and witness statements, if applicable**
- **Recordings of interviews or interview notes**
- **Other evidence received (text messages, pictures, emails, etc.)**
- **Investigation report or summary**
- Adjudicator or hearing panel notes
- Notice of determination
- Appeal records
- Names of all involved in process (parties, witnesses, investigators, adjudicators, appeal officers)
- **Training records – relating to investigators, adjudicators, appeal officers, and other involved officials, as well as training received by parties**
- Records relating to complaints of retaliation or violation of interim measures or sanctions
- **Start and stop dates of investigation suspension**
- Records relating to other complaints involving same parties

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**Q & A** 



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# 2018 Title IX/VAWA Investigator Training

## Handout 1

### Complaint

On March 10, 2017, Emily Edwards made a complaint of sexual misconduct against Mike Morris.

#### **Sexual Assault/Harassment Complaint Form**

**COMPLAINANT NAME:** Emily Edwards

**ADDRESS:** 999 University Circle

**DATE OF REPORT OF ALLEGED POLICY VIOLATION:** March 10, 2017

**RESPONDENT NAME:** Mike Morris

**ADDRESS:** 1234 College Lane

#### **TITLE IX COORDINATOR SUMMARY OF EMILY'S ORAL REPORT:**

On January 28, Mike Morris sexually assaulted Emily. On that evening, she went to a party and became very drunk. Emily and Mike had been messaging each other and agreed to meet later at Mike's apartment. The last thing Emily recalls is going into Mike's bedroom and the two of them kissing. Emily "blacked out" until the next morning when she woke up in Mike's bed without any clothes on. Emily later learned from Mike by text message that they had sex the night before. A few days later, she and Mike had intercourse again. On that occasion, Mike performed oral sex on her without her consent and Mike penetrated her without a condom without her consent.

The Title IX Coordinator notified Mike of the complaint. Mike stated that Emily is just angry with him for breaking up with her. Mike insisted that he never assaulted Emily.

# 2018 Title IX/VAWA Investigator Training

## Handout 2

### Investigation Report Excerpt

#### *Summary of Facts/Background*

The parties are both students at the College. Emily Edwards is a junior, and Mike Morris is a senior. They agree that they met through a mutual friend last fall, and began dating in January. The parties agree that during the few weeks that they dated, they engaged in consensual sexual interactions including kissing, touching, and digital penetration. Emily stated that, during this time, Mike consistently asked to take their sexual relationship further, including asking her to perform oral sex on him and asking to have intercourse. Emily stated that she was resistant to this and told him numerous times that she wanted to take things slow.

#### First Alleged Incident

The parties agree that the evening of January 28, they were together at an off campus apartment of a mutual friend, Shawn. Emily stated that after leaving Shawn's apartment, she went to a party with another friend, Lauren. Emily stated that Mike was not at the party, and that he had plans to go to the bar. Emily stated that she was at the party for approximately three hours. Emily stated that, while at the party, she drank two, maybe three, cups of beer from a keg. Emily stated that towards the end of the party, someone gave her a cup of "jungle juice." Emily stated she recalled finishing one cup and thinks she may have drank part of another cup also. Emily stated that it felt like her intoxication went from "0 to 100" after drinking the jungle juice.

Emily stated that she and Mike were messaging each other while they were out, and had agreed to meet at Mike's apartment later. Emily stated that she met Mike at his apartment around midnight, and that she still felt very drunk by the time he arrived. Emily stated that she realized how very "faded" she was while walking to his apartment and said she has "never been that drunk in [her] life." When asked how far she walked from the party to Mike's apartment, Emily stated that she believed it was about 5-6 blocks. Emily stated that the room was spinning and she thought that she was slurring her words. Emily stated that she decided she would spend the night at Mike's place because she was so drunk.

Mike stated that he saw Emily earlier in the night at Shawn's apartment. Mike stated that he left Shawn's at the same time as Emily. Mike stated that Emily told him she was going to a party, and he went out to a bar to celebrate a friend's birthday. Mike stated that they had not discussed seeing each other again that night. Mike stated that, after he had been at the bar for awhile, he received a message from Emily that stated "I've been thinking about you all night. Let's meet at your place later to pick up where we left off last night." Mike stated that he responded that he would be back at his apartment by midnight, and she could come over any time after that.

### *Emily's Account*

Emily stated that her memory is “very fuzzy” after she arrived at Mike’s apartment. Emily stated that Mike did not appear drunk “at all” when she arrived. Emily stated that she was not aware if Mike had been drinking that night, but she knew that he had gone to the bar.

Emily stated that the last thing she recalls is going into Mike’s bedroom and the two of them kissing. Emily stated that she then “blacked out” until the next morning when she woke up in Mike’s bed partially clothed. Emily stated that when she woke up, Mike was still sleeping. Emily stated that, because she wasn’t feeling well, she quickly dressed and left his apartment while he was still sleeping.

Emily stated that she received a message from Mike later that same day, and they exchanged the following messages:

Mike: How are u feeling? We okay?

Emily: Not well. IDK what happened

Mike: I was worried when you weren’t here. Not surprised to hear thou since u were sick and all

Emily: Sick? What?

Mike: Yeah. U threw up

Emily: When? I kind of remember this now. What else happened

Mike: Ha, ha

Emily: Why r u laughing??

Mike: Wait, what? you don’t remember?

Emily: Rebeber what?

Mike: the sex?

Emily stated that she was “shocked” to hear that she had sex with Mike that night. Emily stated that after Mike mentioned that she had been sick, she recalled throwing up at some point while she was in his bed. Emily stated that, other than that, she has no memory of any events that occurred in Mike’s bedroom and said she “blacked out.” Emily stated that she immediately called Mike and told him that she did not remember having sex with him. Emily stated that she told him that she “couldn’t believe he would have sex with [her] when [she] was so drunk.” Emily stated that Mike should have known she was drunk and that she “couldn’t and wouldn’t have agreed to have sex.” Emily stated that Mike responded by telling her that he had no idea

she was blacked out but she didn't understand how that could be true. Emily stated that Mike told her he would never take advantage of her, and kept saying "I need you to believe me."

### *Mike's Account*

Mike stated that Emily arrived at his apartment around midnight. Mike stated that they talked for the first 15 minutes after she arrived and that Emily was also on her phone during this time. Mike stated that Emily told her she was messaging Lauren to let her know she had made it to his apartment okay. Mike stated that he knew that Emily was going to a party and that she'd been drinking, but they did not discuss how much she had to drink and she did not seem "hammered." Mike stated that Emily appeared "fine." When asked how he knew Emily had been drinking, Mike stated that he assumed she would be drinking at the party and that she was talking a little loud and was "giggly" and "flirty." Mike stated that Emily's behavior was no different than the other times he's seen her drinking. Mike stated that they have been to a few parties together since they started dating, they have both drank alcohol when with one another at these parties, but he has never seen Emily wasted.

Mike stated that as soon as they entered his bedroom, Emily began kissing him. Mike stated that shortly after, Emily then removed both his and her clothing. Mike stated that Emily did seem "more aggressive" than she had been in previous intimate encounters. Mike stated that Emily then initiated performing oral sex on him. Mike stated that "one thing led to another," and they had sex. Mike stated "everything [we] did that night was consensual." When asked what words or overt actions led him to believe Emily consented to their sexual contact, Mike stated that Emily initiated coming to his place, initiated removing each of their clothing, and initiated performing oral sex on him. Mike stated that, during their sexual encounter, Emily also lay on her back, grabbed his hand and moved his hand between her legs, and pulled him closer to her. When asked who initiated intercourse, Mike stated that he believes he initiated intercourse but only because "all the signs were there that it was what she wanted." Mike stated that he asked Emily "You sure you're good with this?" immediately before they had sex and she said "yes."

When asked in a follow-up interview, Emily stated that she could "vaguely remember" performing oral sex on Mike, but her memory was "in and out."

Mike stated that, minutes after they finished having sex, Emily leaned over his bed and threw up in a nearby trash can. Mike stated that this surprised him because he didn't think Emily was drunk and had never seen Emily get sick. Mike stated that he then asked Emily if she was drunk, and she responded "no."

Mike stated that they both fell asleep in his bed. Mike stated that when he woke the next morning at 11:00 a.m., Emily was gone from his bed and had left his apartment. Mike stated that he was worried about her because she had become sick, and sent her a message later that



afternoon asking if she was okay. Mike stated that while he was messaging Emily, she told him that she didn't remember having sex with him. Mike stated that Emily then called him, and accused him of taking advantage of her. Mike stated that he also remembers Emily asked him whether he wore a condom. Mike stated that during their call he told her that he had no idea she was blacked out. Mike stated that he became very worried and wanted her to believe him.

#### *Witness Account*

Lauren stated that she was with Emily at a party that night and that they both consumed alcohol there. When asked about Emily's intoxication level, Lauren stated that she wasn't really paying attention to how much Emily drank, and that they spent quite a bit of time apart at the party. Lauren stated that she was drunk by the end of the party and that Emily was buzzed the last time she saw her, which was about an hour after they arrived. When asked, Lauren stated that she thought Emily was buzzed because she thinks she remembers Emily laughing and dancing in place with their friends. Lauren stated that at some point, she could not find Emily and that worried her so she texted Emily. Lauren provided the following text message exchange:<sup>1</sup>

Lauren:       Where r u?  
Emily:         I left, with Mike  
Lauren:       When? Why didn't you tell me?  
Emily:         Sorry. I think u r 2 wasteff  
Lauren:       ?  
Lauren:       You ok?  
Emily:         Yeah, will sleep here That last drink to to much

#### The Parties Communications and Interactions in the Days and Weeks Following

Emily stated that in the days following, Mike continued to contact Emily and continued to apologize. Emily stated that she interpreted Mike's apology as him acknowledging "his poor judgment in having sex with [her] while [she] was drunk." Emily stated that she decided to forgive Mike because she really liked him. Emily stated that she felt partly responsible because she drank too much and then went to Mike's house. Emily and Mike agreed that they continued to spend time together nearly every day.

Emily stated that, within days of his apologizing, Mike then began "heavily pressuring" her to have sex. Emily stated that Mike said things to "coerce" her, including "if you really like me"

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<sup>1</sup> When asked, Lauren stated that she frequently communicates with Emily by text messages. Lauren stated that these messages were a typical exchange between the two of them, and she would not have been able to gauge Emily's intoxication level based on this communication.

and “I have needs.” Emily stated that she also recalls a conversation in which Mike told her she was making “too big a deal” because they had already had sex.

Mike stated that during this time, he tried to continue to be intimate with Emily because he really liked her. Mike thought Emily was interested in the same thing because she consistently sent him “provocative” messages. Mike stated that when he would try to be intimate with Emily, he was reacting in part to what he thought she wanted because of her messages. Mike stated that he always made sure that she was okay with whatever they were doing. When asked about these messages, Emily stated that she sent Mike “flirty” messages during this time because, while she didn’t want to rush things with Mike, she did like him and didn’t want him to get bored of her. When asked for the text messages, Emily stated that she had deleted them at the time because they weren’t important.

The parties agreed that they had sex again, on February 4th. Mike stated that the sex was consensual, that neither of them had been drinking, and that he was careful to ask for verbal consent. Emily stated that she did consent but this was after Mike pressured her for the past week and continuously for nearly two hours on the night they had sex. Emily stated that during this time Mike threatened to break up with her if she didn’t say yes. Emily stated that Mike said things like “you must not be very serious about this relationship” and “people who love each other express those feelings through sex.” Emily stated that, at that time, she wanted to take things slow and would never have agreed to have sex with him if he hadn’t threatened to break up with her. When asked about these statements, Mike stated that he said these things to Emily because he was beginning to question how serious Emily was about dating him. Mike further stated that Emily was pretty experienced sexually and that made him even more insecure about how slowly their relationship was progressing.

### Second Alleged Incident

The parties agreed that on February 8, they again had intercourse in Mike’s apartment. The parties agreed that their sexual interaction began with kissing, touching, and digital penetration, and that they each consented to these acts.

### *Emily's Account*

Emily stated that shortly after the digital penetration began, it became painful for Emily. Emily stated that she put her hands on Mike's shoulders to push him away and repositioned her hips so that he was no longer penetrating her. Emily stated that Mike then ducked down and began performing oral sex on her. Emily stated that she did not want this and immediately froze. Emily stated that she "did not say anything or do anything" while Mike performed oral sex on her. Emily stated that Mike had never attempted to perform oral sex on her during previous sexual encounters, and they had never discussed the topic. Emily stated that in order to get Mike to stop performing oral sex, she pulled him up and said "let's have sex."

Emily stated that, right around this time, she heard someone or something outside his bedroom door and asked him if the door was locked. Emily stated that Mike left the bed, turned off the lights, and locked the door. Emily stated that Mike then took a minute to get back to bed, and she assumed he was putting a condom on because they had previously only had sex with a condom on.

Emily stated that she realized after Mike penetrated her that he was not wearing a condom and it surprised her. Emily stated that she believes she said "this doesn't feel right" initially, and Mike did not respond. Emily stated that shortly after, she again said to Mike "what are you doing?" and "did you take the condom off?" Emily stated that Mike responded by saying "we don't need a condom," and continued penetration while moving her hips with his hands. Emily stated that this discussion about the condom went on for a few minutes, all the while penetration continued. Emily stated that she was "annoyed" that Mike was not listening to her and said, "Stop, I don't want to have sex without a condom." Emily stated that after she told Mike to stop, he continued penetrating her for at least another couple minutes. Emily stated that she was then able to break free from his hands holding her hips and to stop the penetration.

### *Mike's Account*

Mike stated that at some point they were "making out," while he was digitally penetrating Emily. Then Emily "pushed down on his shoulders" and moved her hips towards him. Mike stated that this was a "clear sign" to him that Emily wanted him to perform oral sex on her. When asked to further describe how Emily pushed his shoulders, Mike stated that she "kind of pushed him a little down and to the side." Mike stated that Emily appeared to enjoy the oral sex, and she moved her hips and made noises indicating her pleasure throughout. Mike stated that Emily then initiated intercourse and said he recalls she verbally stated that she wanted to have sex. Mike stated that before they began to have sex, she asked him if he locked the door. Mike stated that he then got up, locked the door, and turned off the lights before returning to the bed.

Mike stated that after penetration had occurred for a short time, Emily said “this doesn’t feel right.” Mike stated that Emily was lying underneath him at this time, so he assumed she was uncomfortable with the position and flipped her on top of him. Mike stated that they then continued having sex. Mike stated that Emily then said “what are you doing?” and “did you take the condom off?” Mike stated that he was confused by her questions since he never had a condom on and they had not discussed using a condom during this sexual encounter. Mike stated that he assumed Emily was concerned about pregnancy, but he thought she was on the pill, so he said “you’re on the pill, we don’t need a condom.”

Mike stated that penetration continued for maybe a minute until Emily said “I don’t want to have sex without a condom.” Mike stated that he then immediately stopped having sex with Emily, and pushed her off of him. Mike stated that prior to Emily saying this during sex, he did not have any idea she didn’t want to have sex without a condom. Mike stated that as soon as he had any indication that she was not comfortable with the sex, he immediately stopped.

#### The Parties End Their Dating Relationship

Emily stated that a couple of days after this sexual encounter, Mike broke up with her because she refused to have unprotected sex with him. Mike stated that he broke up with Emily because “things were just too difficult” with her, and while he liked her, he just wanted to enjoy his senior year of college. Mike stated that he did not break up with her because she wouldn’t have unprotected sex with him.



# TITLE IX/VAWA ADJUDICATOR TRAINING CHECKLIST

## PRE-INVESTIGATION OBLIGATIONS \*Title IX Coordinator

- Assess immediate safety and well-being for individual and campus
- Notify complainant of right to contact law enforcement (or not to) and seek medical treatment
- Enter into daily crime log, if applicable
- Assess for whether campus alert should be issued
- Identify resources available to the complainant
- Offer accommodations
- Identify advocate/support person
- Notify importance of preserving evidence
- Provide written notice required under VAWA
- Discuss process options—e.g., mediation, full investigation—if applicable
- Get consent to proceed with the complaint process
- Assign complaint to *trained* investigator(s)
- Appoint *trained* decision-maker(s)—if different from investigator(s)

## STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION

- Prepare script of opening remarks
  - Provide general explanation of reason for interview—gathering facts
  - Explain possible uses of witness's statements
  - If applicable, inform witness of recording and its use
  - Explain complaint process to parties
  - Explain the need to ask difficult, detailed questions
  - Ask a complainant witness not to read into questions
  - Explain to complainant witness that different people respond differently
  - Explain that timelines and order of events may not be clear
  - Tell the witness to feel free to ask why a question is asked (Investigators: be prepared to answer)
  - Instruct witness regarding confidentiality
  - Warn witness regarding policy prohibiting retaliation
  - If applicable, advise witness on alcohol policy waiver
  - Obtain commitment to tell truth

- Advise party and advisor on advisor's limited role
- Gather and review available evidence
- Begin to create chronology of events
- Identify sources of evidence
  - Witnesses
  - Physical evidence (e.g., text messages, emails, surveillance video, evidentiary examination, student/personnel files, etc.)
- Identify and strategize order for witnesses
- Familiarize yourself with the setting(s) of the events
- Familiarize yourself with the witnesses as best you can
- Identify topics for interviews
- Coordinate witness interviews
- Notify parties of meetings/interviews with the other party
- Determine whether to record interviews
- Maintain confidentiality if requested

#### **STAGE TWO: GATHER EVIDENCE**

- Review student/personnel files
- Gather physical evidence
- Witness interview
  - Review script of opening remarks with each witness (see above)
  - Attempt to establish chronology of events
  - Identify potential witnesses and evidence to gather
  - Ask witness to forward evidence/information immediately
  - "Is there anything else"
  - Discuss non-retaliation and confidentiality
  - Request to contact if further information
  - Prepare a summary immediately following interview
- Continue to update chronology of events

#### **STAGE THREE: REVIEW/REVISE/RE-INTERVIEW**

- Note all factual discrepancies
- Assess additional investigation needs
- Determine whether additional witnesses should be interviewed
- Determine whether follow-up with any previous witnesses necessary

#### **STAGE FOUR: PACKAGE INVESTIGATION FOR DECISION-MAKERS**

- Summarize evidence
  - Recording and/or written summary of each interview (prepare immediately following interviews)
  - Written summary of other facts/evidence gathered

- If using written summary of interview, consider allowing each witness to review the summary of their interview and/or give option to attach a written narrative
- Prepare information to be provided to decision-maker(s)
- Ensure that parties are updated on the status of the investigation **\*Title IX Coordinator**
- Ensure that parties are provided an opportunity to view information that will be provided to the decision-maker **\*Title IX Coordinator**
- Institution should consider whether policy should allow parties to submit a written statement in response to information provided to the decision-maker **\*Title IX Coordinator**

#### **STAGE FIVE: ADJUDICATION/DECISION-MAKING**

- Use preponderance of the evidence standard
- Specify role of advisors/attorneys (if hearing)
- Consider whether to review recordings (if any) and summaries and ensure parties are provided access
- Weigh evidence and assess credibility
- Review institution's sexual misconduct policy, including definitions of consent
- Make a determination
- Consider limited consultation with Title IX coordinator
- Determine sanctions
- Determine remedies for complainant and campus community
- Provide written notice of determination to parties simultaneously
  - Result
  - Any appeal rights
  - Sanctions (if sexual violence, include all sanctions in notices to both parties; if not sexual violence, only include sanctions related to complainant in complainant's notice)
  - Remedies for complainant (only in notice to complainant)
  - Remedies for campus
  - If sexual violence, rationale for result and sanction

#### **STAGE SIX: APPEAL (if applicable)**

- Assign to trained official(s) **\*Title IX Coordinator**
- Review institution's policy for grounds for appeal
- Determine whether grounds for appeal under the policy are satisfied
- Provide written notice to parties simultaneously of updates and outcome of appeal



# TITLE IX/VAWA ADJUDICATOR TRAINING

## WEB RESOURCES

### September 22, 2017 Department of Education Guidance:

- Dear Colleague Letter: [https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf?utm\\_name](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf?utm_name)
- Q & A on Campus Sexual Misconduct: [https://www2.ed.gov/about/offices/list/ocr/docs/ga-title-ix-201709.pdf?utm\\_name](https://www2.ed.gov/about/offices/list/ocr/docs/ga-title-ix-201709.pdf?utm_name)

### January 2001, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties:

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

### January 25, 2006 Dear Colleague Letter on Sexual Harassment:

<https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>

### April 24, 2015 Department of Education Guidance on Title IX Coordinators:

- Dear Colleague Letter on Title IX Coordinators: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>
- Letter to Title IX Coordinators: <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf>
- Title IX Resource Guide: <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>

### April 28, 2015 Department of Education Response Letter to Senator Barbara Boxer:

<https://timedotcom.files.wordpress.com/2015/05/150428educationdepartmentreponsetoletter.pdf>

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**The Clery Act showing amendments made by § 304 of the Violence Against Women Act:**

<http://ifap.ed.gov/dpcletters/attachments/GEN1413VAWAAMendmentsCleryAct.doc>

**Final Regulations for the Violence Against Women Act amendments to the Clery Act (October 20, 2014):**

<http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>

**Handbook for Campus Safety and Security Reporting:**

<http://www2.ed.gov/admins/lead/safety/handbook.pdf>

**April 4, 2011 Dear Colleague Letter on Sexual Violence (withdrawn):**

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

**Questions and Answers on Title IX & Sexual Violence (2014) (withdrawn):**

<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

**Building Partnerships among Law Enforcement Agencies, Colleges and Universities:  
Developing a Memorandum of Understanding to Prevent and Respond Effectively to Sexual Assaults at Colleges and Universities:**

[https://obamawhitehouse.archives.gov/sites/default/files/docs/white\\_house\\_task\\_force\\_law\\_enforcement\\_mou.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/white_house_task_force_law_enforcement_mou.pdf)

**Not Alone:** <https://www.notalone.gov/>

- **Legal Guidance for Schools:** <https://www.notalone.gov/schools/#legal-guidance>
- **Understanding FERPA, the Clery Act, and Title IX:**  
<https://www.notalone.gov/assets/ferpa-clerychart.pdf>
- **Confidentiality FAQs:** <https://www.hhs.gov/hipaa/for-professionals/faq/ferpa-and-hipaa>
- **Guide to State Confidentiality Laws:**  
[http://www.americanbar.org/content/dam/aba/uncategorized/cdsv-related/Advocate\\_Confidentiality\\_Chart\\_2\\_2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/cdsv-related/Advocate_Confidentiality_Chart_2_2014.authcheckdam.pdf)
- **Guidance for Developing Partnerships with Local Rape Crisis Centers:**  
<https://www.notalone.gov/assets/mou-rape-crisis-centers.pdf>

- **Key Components of Victim Service Resources:**  
<https://www.notalone.gov/assets/intervention-resources.pdf>
- **Guide to Conducting Climate Surveys:** <https://www.notalone.gov/assets/ovw-climate-survey.pdf>
- **Student Resources:** <https://www.notalone.gov/students/>
- **Crisis Resources Search Tool:** <https://www.notalone.gov/resources/>

**It's On Us Campaign:**

<http://www.itsonus.org/>

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