



**SOCHE – Title IX Investigator Training**

Melissa Carleton & Jessica Galanos



**Bricker & Eckler**  
ATTORNEYS AT LAW  
[www.bricker.com/titleix](http://www.bricker.com/titleix)

## Disclaimers



*We can't help ourselves. We're lawyers.*

- We are not giving you legal advice today.
- Consult with your legal counsel regarding how best to address a specific situation.
- We will discuss best practices for investigators today. Much of what we discuss is not legally mandated, but it is all consistent with legal requirements. Consult your policy for specific requirements.

## Participation Is Encouraged



*We're so happy to see you here!*

- Life happens. Take breaks as needed.
- We will be discussing a sexual assault case today so as to prepare you difficult cases. The topic can be sensitive and difficult.
- We are happy to take questions whenever they arise.
- Feel free to use, "For the sake of argument..."

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## Posting is Permitted



*Yes, you may post these materials on your website.*

- The "recipient" is required by 34 CFR 106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.
- We know this and will make this packet available to you electronically to post, so feel free to take notes on your hard copies.
- This training assumes you have already met your annual Clery training requirements.

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## Aspirational Agenda



**We always hit lunch on time.**

- 9:00-9:20 – Exercise
- 9:20-9:40 – Fundamental Values in the Title IX Process
- 9:40-9:50 – Review of our Hypothetical
- 9:50-10:30 – Initial Steps in an Investigation
- 10:30-10:45 – Break
- 10:45-12:00 – Interviewing Skills
- 12:00-12:30 – Working Lunch (Prep for Interviews)
- 12:30-1:30 – Mock Complainant Interview
- 1:30-2:30 – Mock Respondent Interview
- 2:30-2:45 – Break
- 2:45-3:45 – Preparing the Case File and Report
- 3:45-4:00 – Extra Q&A Time

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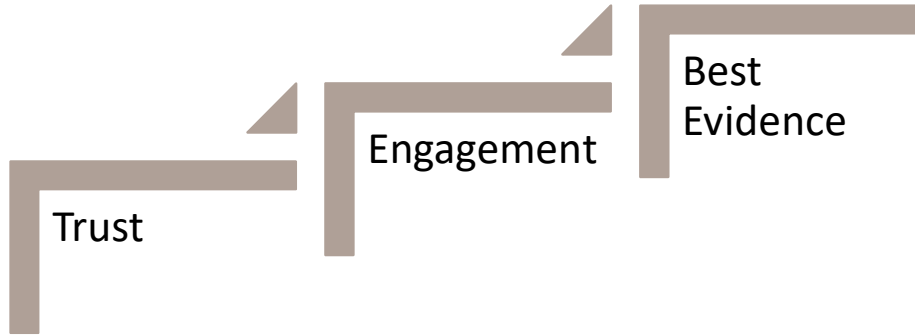
### Fundamental Values in the Title IX Process

Remember your Institutional Ethic of Care

# What is our goal?



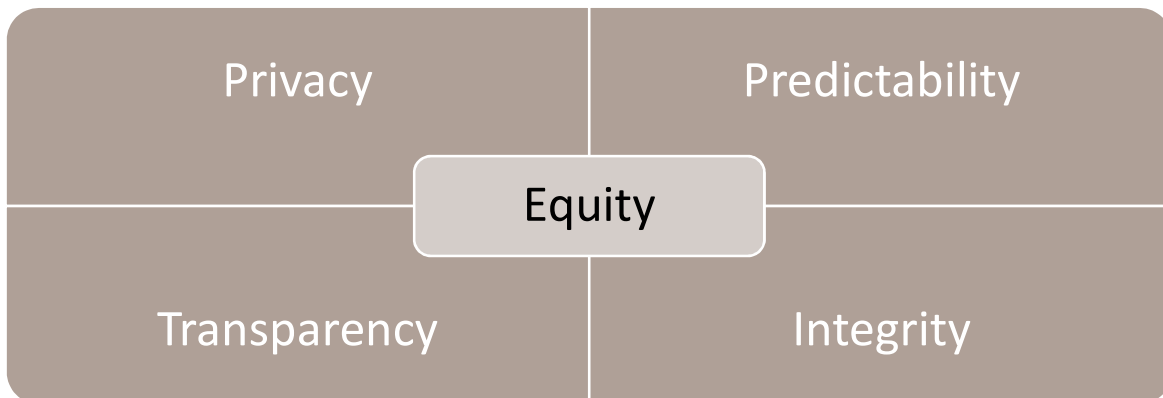
Compliance, yes, but also...



# How Do You Build Trust?



Through infusing your process with values



## Value: Equity



**“What we do for one, we do for the other” (as appropriate)**

- Until we have reached the end of the process, we don't know whether anyone did anything wrong.
- Treat both parties equitably with regard to access to supportive measures, evidence, opportunities to provide information, and in every other respect that is appropriate.

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## Value: Privacy



**No one will tell you anything if they don't trust you**

- Explain privacy versus confidentiality
- Explain how information is shared
  - Within the investigation
  - With other school officials
  - With advisors
- Connect individuals with confidential resources as necessary
- Remember to collect FERPA forms for advisors when necessary

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## Value: Predictability



Knowing what happens next builds trust in the process.

- Give a copy of the policy at the outset.
- Constantly refer back to policy language to explain:
  - Where we are in the process;
  - What happens next;
  - What the expectations will be for the person.
- Follow your policy and follow your process.
- When you must deviate, fill in the gaps with your institutional ethic of care.

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## Value: Transparency



If they hear nothing, they'll assume you're doing nothing or actively working against them.

- Give regular updates to the parties and their advisors.
- Answer questions truthfully, to the extent permitted considering privacy.
- Be cautious before deciding to withhold anything that may be relevant. What is the concern? Does it serve the parties and the process?

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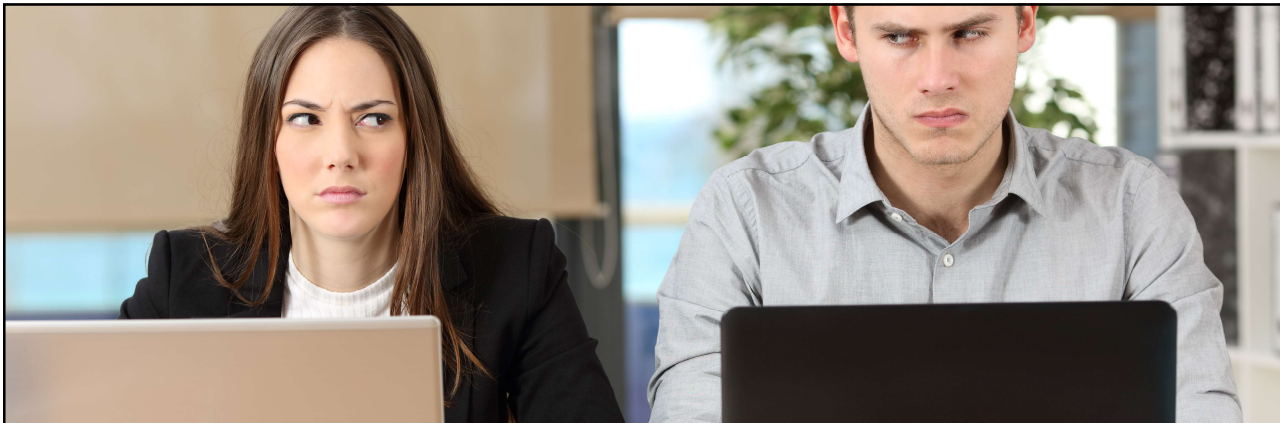
## Value: Integrity



### Personal integrity – and integrity within the process

- Watch for conflicts of interest and bias so as to be fair and maintain confidence in the process.
- Don't use or share information outside the process. All evidence should be “on the table” for all parties and advisors to see.

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### Reviewing our Hypothetical: Once Best Friends

Meet Danielle and Peter

## Formal Complaint



Filed by Danielle on February 17, 2022 – Incident was January 7-8, 2022

- “Peter came to visit me late at night on January 7th. My roommate Sadie left me with him, but I was very drunk. He kept giving me more and more alcohol. We were laying in bed and he touched my vagina over my underwear and my breasts under my t-shirt. We were watching Ted Lasso. He never asked for my consent, and I was too drunk to say yes anyway.”

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## Notice of Allegations



Charge #1

- ✓ Sexual Harassment (Title IX) – Fondling – “The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”

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## Notice of Allegations (cont)



### Charge #2

- ✓ Sexual Exploitation (Non-Title IX) – “Taking advantage of another person without Consent, which includes ... Causing or attempting to cause the Incapacitation of another person in order to gain sexual advantage over the other person or in order to allow another to gain sexual advantage over the other person.”

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## Consent



Check your policy for your own definition, but here's what we'll use.

Words or actions that show a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity.

Effective consent cannot be gained by taking advantage of the incapacitation of another, where the respondent knows or reasonably should have known of such incapacitation.

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# Incapacitation



Check your policy for your own definition, but here's what we'll use.

Occurs when the complainant lacks the ability to make informed, rational judgments regarding the participation in sexual activity. Defined is the inability to give consent because the complainant is mentally and/or physically helpless, asleep, unconscious, or unaware that sexual activity is occurring.

A person may be considered incapacitated if the person cannot appreciate the who, what, where, when, why, or how of a sexual interaction.

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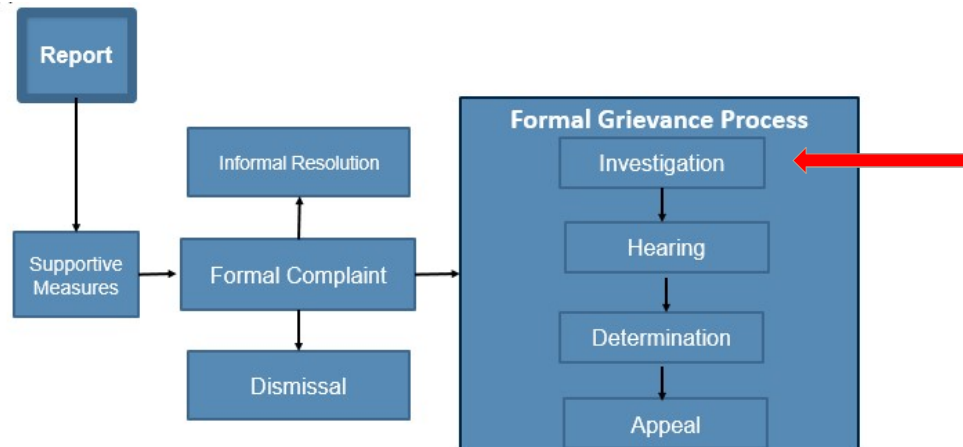
## Initial Steps in an Investigation

You can do it!

## Understand Your Role



Where do you fit in the process?



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## What does an investigator do?



Lays the foundation!

- Starts the process
- Builds rapport to encourage engagement
- Gathers evidence
- Conducts interviews and prepares written summaries
- Requests records and evidence from other sources (e.g. police reports, security footage)
- Prepares a written report to summarize what you did and what you collected

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## What **doesn't** an investigator do?



### Make decisions in the case

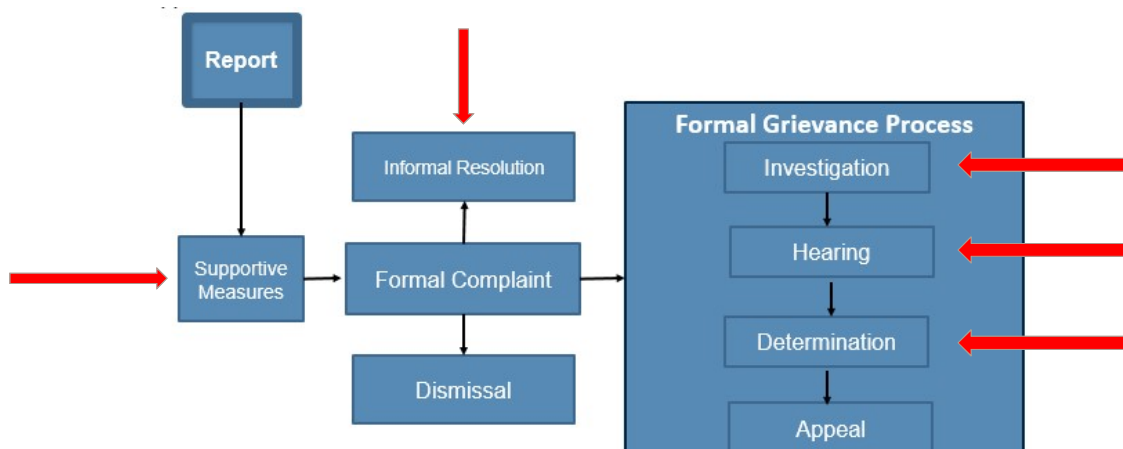
- You do not make findings of fact
- You do not make decisions as to whether the policy was violated
- You do not make credibility determinations
- You do not offer your opinion to the decision-maker about whether Peter “did it” or whether Danielle is not telling the truth (because your opinion is not evidence)
- You do not consult with the decision-maker as to what their finding should be

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## But what do you need to understand?



### Virtually all of it.



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## So what does this mean?



You are free! (Uh, not exactly.)

- Free to engage with the parties in a way that lets them know you are there to help them record their side of the story.
- Free to compile the information and walk away without having to make the final decision.
- Free to form your own opinions in your head without sharing them – after you have finished your investigation (to avoid confirmation bias).

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## Email to Danielle (1 of 4)



Contact the Complainant

Dear Danielle,

My name is Melissa Carleton and the Title IX Coordinator has assigned me to **investigate your case**. I would like to meet with you to discuss **what you remember** about your encounter. Do you have time to meet with me on **February 18<sup>th</sup> at 12:30 in the conference room**? You may bring an **advisor of choice** with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

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## Email to Danielle (2 of 4)



### Preparations for Interview?

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

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## Email to Danielle (3 of 4)



### Accommodations/Interpreters

If you are disabled and need **reasonable accommodations** to participate, or if you speak another language and would like an **interpreter** to be present, please let the Title IX Coordinator know and we can make those arrangements.

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## Email to Danielle (4 of 4)



### Questions?

When we meet, we can talk through any questions you may have for me about the **process**, and we will discuss the **prohibition against retaliation** against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any **supportive measures**, please contact the Title IX Coordinator.

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## What About Peter?



### "What we do for one, we do for the other"

- Don't leave Peter hanging. Make contact with him when you make contact with Danielle!

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## Email to Peter



### Echoing what we have told Danielle

Dear Peter,

My name is Melissa Carleton and the Title IX Coordinator has assigned me to investigate your case. My first step will be to meet with the other person to get more information about the formal complaint. I am in the process of setting that meeting up.

Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

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## Email to Peter (2 of 4)



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## The Investigator Spiel



### What do you say at the outset?

- Explain your role
- Explain how information will be shared in the process
- Explain the prohibition against retaliation
- Explain amnesty provision

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## Explain Your Role (1 of 2)



### How do you explain it?

“As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews.”

“Today, I’ll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it’s accurate, so I’ll send you a copy for your review. You’ll get the opportunity to suggest changes to make sure that it’s complete and truthful, and that I’ve properly captured your side of the story.”

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## Explain Info Sharing



How do you explain it?

“

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## Explain Your Role (2 of 2)



How do you explain it?

“I’ll also draft a report that summarizes what I’ve done to investigate, and the information I’ve collected. I do not make decisions about what happened or whether the policy was violated. A hearing officer has that job.”

“The goal is for me to collect information to help the hearing officer understand what happened so that they can make a good decision in this case, which is why I’m very thankful that we’re speaking today.”

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## Retaliation Prohibition



### How do you explain it?

“Our policy prohibits retaliation, and there’s a technical definition for that. But listen – if anyone makes you uncomfortable because you’ve spoken with me or participated in this process, please tell me right away. It may not rise to the level of retaliation under the policy, but there are still things we can do to address it. And if you’re feeling uncomfortable, chances are good that other folks are, too, so you’ll be doing them a favor by reporting it.”

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## Retaliation – More Oomph



### How do you explain it?

“Please don’t do one of these two things:

- 1) Re-read the policy and decide you don’t need to tell me because you don’t think it rises to the level of a policy violation; or
- 2) Decide that you are strong enough to handle it and don’t tell me.

You might be strong, but maybe other witnesses are experiencing the same thing and they might not be strong enough. I’d rather help address things before they get too complicated, so please let me know.”

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## Amnesty



How do you explain it? Check your policy, but here is a sample.

“Our policy gives you amnesty for personal drug and alcohol use, and it gives amnesty for other witnesses and the parties also. So, if any part of your story involves people using drugs or alcohol, please know that we’re not going to bring student conduct charges in this situation. We want you to feel comfortable telling us the whole truth about the evening, and this is more important than underage drinking or drug use.”

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## To Record Or Not?



Should you record interviews?

- Ohio is a “one party” state, which means as long as one party to the conversation is aware of the recording, you can record.
  - But failure to disclose this recording is likely not consistent with your institutional ethic of care.
- If you ask for consent and some witnesses refuse, what then?
- Your hearing officer will need either transcripts of the recordings, or they will need to review all of the videos. If you have a panel, they all will need to review this information.
- Recordings can be incredibly useful when a party or witness changes their story, and they can be helpful in lawsuits/OCR complaints.

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## Advisors



**An Advisor can be anyone – including an attorney, a parent, a witness...**

- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: “Your advisor asked \_\_\_\_\_, so I wanted to share my response directly with you.”
- If the advisor submits the party’s written statement, make sure the party adopts that statement as their own.

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## Interviewing Skills

Preparation, Attention to Detail, and Being Human

## Start with your Scope



### What are you investigating?

- This should be documented in the Notice of Investigation
- The NOA should also include information about which policies are at issue
  - Double-check – is the correct policy cited?
- Break down the provisions to elements.

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## Elementary, My Dear Watson



### What are you investigating?

- For example:
  - ✓ Unwelcome conduct
  - ✓ On the basis of sex
  - ✓ That a reasonable person would determine to be:
    - ✓ So severe, pervasive, and objectively offensive that
    - ✓ It effectively denies a person equal access to the recipient's education program or activity.

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## Elements as Questions: Brainstorm



What types of questions do you ask for each of these?

- For example:
  - ✓ Unwelcome conduct
  - ✓ On the basis of sex
  - ✓ That a reasonable person would determine to be:
    - ✓ So severe, pervasive, and objectively offensive that
    - ✓ It effectively denies a person equal access to the recipient's education program or activity.

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## Outline your thoughts



Get your plan on paper

- Prepare a bullet point list of things you want to explain at the outset
- Have your policy language at the ready
- Bring any evidence that you may want them to review and comment on
- Prepare an outline of questions
  - Don't forget to ask the complainant about impact if it's an element of your policy language!

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## Setting the Stage



### Where are you interviewing?

- Private location – be cautious of windows, traffic in the area
- Distraction-free – Ringer off, noise outside
- Comfortable seating that provides equal positioning for interviewee, interviewer, and advisor (if any)

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## Things we cover



### “My Spiel”

- What is my role?
- Who will read your information?
- No retaliation
- How to access supportive measures (always for parties – as needed for witnesses)
- “Do you know what I’ve called you to talk about today?”

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## Start with Relationships



### This helps to get context

- Student: What year are you? Where are you from originally? What is your major? Where do you live on campus?
- Employee: What is your title/position here? How long have you worked here?
- Who did you meet first, C or R? How? When?
- Relationships with other key people in the case (to help assess potential bias)

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## Get a Timeline



### This helps to get context

- “What do you remember regarding this situation?”
  - Give them a starting point or let them choose
  - “And then what happened? And what happened next?”
  - Let them deliver a monologue
- Think in terms of a timeline for your report
  - What section headings will help you tell the story chronologically?
  - Are you clear as to which parts of their monologue fit under which section?

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## Ask Follow-Up Questions



**Acknowledge that the individual may not remember every detail.**

- Go back to each incident on your timeline and flesh out the details.
- If the witness was alleged to have done or said something in particular, check to see if that's accurate
- Cover every element that the individual could have information about
  - Remember: is impact an element in my case?

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## Consent – Explicit?



**These may be worded slightly differently depending on the party.**

- “They gave consent” → “What did you say to them, and what did they say to you?”
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

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## Consent – Implicit?



These may be worded slightly differently depending on the party.

- Who took off your clothes? Who took off the other person's clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

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## Questions for Respondent



If they say there was consent, these can help get more details.

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

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# Incapacitation



First, explain why you need information on alcohol/drug use.

- Remember: amnesty.
- “I want to understand the role that drugs or alcohol may have played in this situation.”
- “I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol.”
- “I want to understand whether the other person was sober enough to understand and consent.”
- “I am trying to get a sense of how intoxicated the person may have been when you saw them.”

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# Incapacitation Questions (1 of 2)



You need a good physical description of relevant symptoms

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- “They were drunk” → What did “drunk” look like?
  - Slurring? Clumsy? Uncoordinated?
  - Able to walk on their own? Need assistance to navigate or complete tasks?
  - Vomiting?
  - Able to carry on a conversation?
  - Oriented to who/what/where/when/why?

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## Incapacitation Questions (2 of 2)



You need a good physical description of relevant symptoms

- Was it a cup or a CUP?
- How many “fingers” of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

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## Respondent's Awareness



Did Respondent know of incapacitation?

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

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## Incapacitation: Timeline



**This will be critical**

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

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## Sensory Questions



**These may help with memories that are hard to access.**

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person's hand, leg, body weight, etc.?

Focusing on sensations can help to recall memories that may not have been mentioned when asked to give an overview of what happened.

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## Paraphrase Questions



Make sure you understand

- “So, what I heard you saying is...”
- “Let me make sure I understand...”
- “It sounds like... do I have that right?”

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## Strategic Questions



Be thoughtful about when these are appropriate.

- “Would it surprise you to learn...”
- “Witness X said.... Do you agree?”
- “Here you said X, but today, you said Not X. Can you help me reconcile those things?”
- “Witness X said this and Witness Y said that. Can you help me understand why they might have different information?”
- “Let’s look at this [evidence] together so I can get a better understanding...”

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## Final Questions



### Catch-alls at the end

- Is there anything you thought I would ask you about that we haven't discussed?
- Is there anything else you'd like to tell me?
- Is there anything else you think I should know?

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## Drafting Interview Summaries



**This isn't literature, folks. The key is clarity, not eloquence.**

- Virtually every sentence should start with, "Witness stated..." or "Witness recalled..."
- Use direct quotes whenever possible and appropriate.
- Don't use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.

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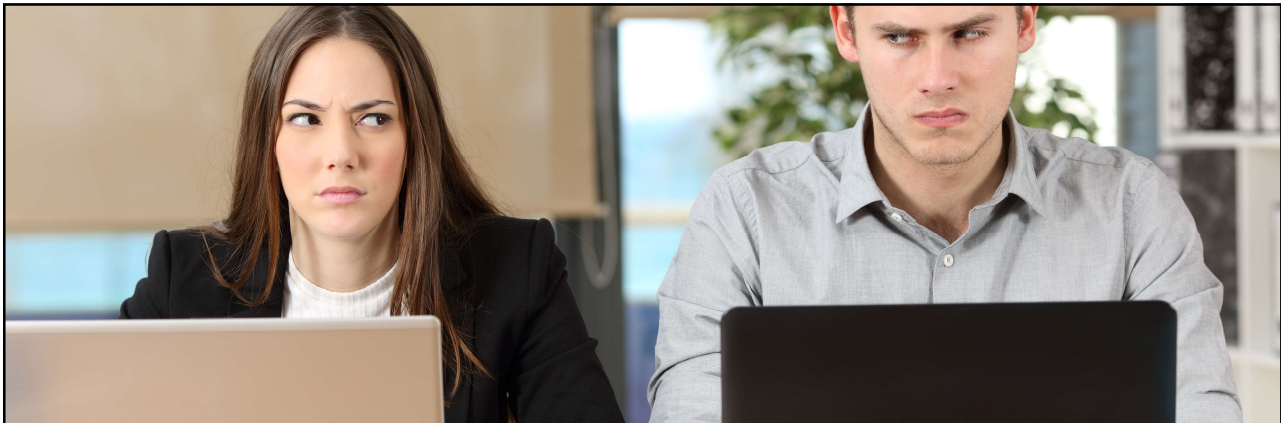
## Thoughts About Summaries



There is no perfect way to write a summary.

- Include procedural review at the outset (your “spiel”)?
- Complete sentences vs. bullet points?
- Anonymize witness names?
- Use “Complainant” or “Respondent,” or use the names as they are used by the witness?

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**Back to our Hypothetical**

Your task: plan interview questions for Danielle

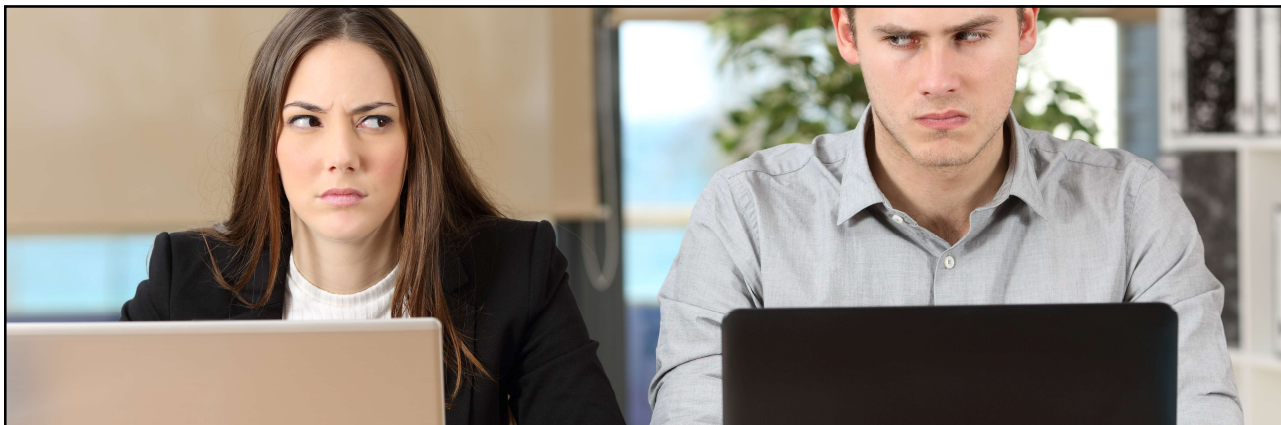
## Formal Complaint



Filed by Danielle on February 17, 2022 – Incident was January 7-8, 2022

- “Peter came to visit me late at night on January 7th. My roommate Sadie left me with him, but I was very drunk. He kept giving me more and more alcohol. We were laying in bed and he touched my vagina over my underwear and my breasts under my t-shirt. We were watching Ted Lasso. He never asked for my consent, and I was too drunk to say yes anyway.”

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### Peter's Turn

Time to ask questions of Peter!



## Preparing the Case File

Parties review and respond

## Redactions



### Is it relevant?

- Sexual predisposition or prior sexual behavior of complainant
- Privileged information where privilege has not been waived
- Medical records where no consent has been granted

## What do you include?



### Pretty much everything

- Interview summaries
- Evidence gathered
- Do you prepare a draft report to go with the evidence for review?

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## How do you share it?



### Technology or not?

- Privacy is important.
- Technology – can limit ability to print, share, download, screenshot?
- Use watermarks for Complainant/Respondent file?
- In-person review?
- Non-disclosure agreements for technological access?
- How can advisors access it?

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## Draft Report



Can't finalize it until you give the opportunity to review and respond (10 days)

- “Fairly summarizes relevant evidence”
  - What you summarize is likely narrower than what you include in the file for review

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## Report Includes?



Can't finalize it until you give the opportunity to review and respond (10 days)

- Procedural History
- Summary of Allegations
- Relevant Policy Language
- Investigation Overview
  - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested wasn't relevant (and why)
  - Evidence – What you gathered, what you tried to gather but couldn't, what you were asked to gather but didn't (and why)

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## Synthesis of Information



How can you make heads or tails of what is in the full file?

- Do you want to detail what each witness said?
- Do you want to synthesize and summarize undisputed facts?
- Do you want to do a combination, depending on whether a particular issue is disputed or undisputed?
- Do you want to intersperse evidence, or make it a separate section?

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## Report Attachment



All relevant evidence should be attached – and relevant is a broad term.

- Put it in a single PDF.
- Make a table of contents.
- Bonus: Make the table of contents clickable.
- Refer to relevant documents when you write your summary.
  - My ideal world: Every sentence has a citation to the attachments.

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## Party Responses



### What do you do with them?

- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.

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### Bonus: Read Your Notes Like A Decision-Maker

Investigators don't do this.



## Let's Look At Your Evidence



Based on your interviews, can you make a decision?

- Let's walk through the process.
- Do you have enough information to make a decision?
- What questions do you wish you had asked?
- What evidence do you wish you had?
- If you had to make a decision based only on the evidence in front of you (without the benefit of a hearing), what decision would you make and why?

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## Upcoming Events



*SOCHE – Registration Up Soon*

May 6<sup>th</sup>, 9:00-4:00

- Title IX Decision-Maker Training – In Person!
  - We will do a mock hearing in this workshop, so attendees will be asked to read an investigative report before they come.
  - Appropriate for all members of your Title IX team, so they can see how the process comes together.

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## Upcoming Free Webinars



*Register at [www.bricker.com/events](http://www.bricker.com/events)*

March 24, 12:00 EST – Clery Compliance and Enforcement

April, TBD – Review of Proposed Title IX Regulations

April 20, 12:00 EST – Name, Image, and Likeness Update

May 12, 12:00 EST – Title IX Litigation Update

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## Don't Miss Our Resource Page



[www.bricker.com/titleix](http://www.bricker.com/titleix)

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## Contact Information



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