SPECIAL TRAINING FOR THE BOSTON CONSORTIUM

MAY 31, 2023

SETTING INVESTIGATIONS UP FOR SUCCESS

What is the scope, what are the roles?

THE SCOPE OF THE INVESTIGATION

- Too large: time, resources, loss of trust
- Too small: not thorough, loss of trust
- Allegations as the frame
- Elements of each allegation
- What if you need it only for credibility/reliability?

EVIDENCE: GATHERING, WEIGHING, ANALYZING

Avoiding Common Errors

GATHERING EVIDENCE

BARRIERS TO EVIDENCE COLLECTION

- Non-participating parties, witnesses
- Party who does not understand
- Advice of advisor or family
- Identity of witness unknown
- Refusal to share materials
- Materials lost or no longer accessible
- Difficult topics

EVIDENCE THAT IS "NOT RELEVANT"

- questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege
- supportive measures
- emergency removal

INVESTIGATION FLAWS

Didn't ask

Didn't gather

Inconsistency?

Who else saw that?

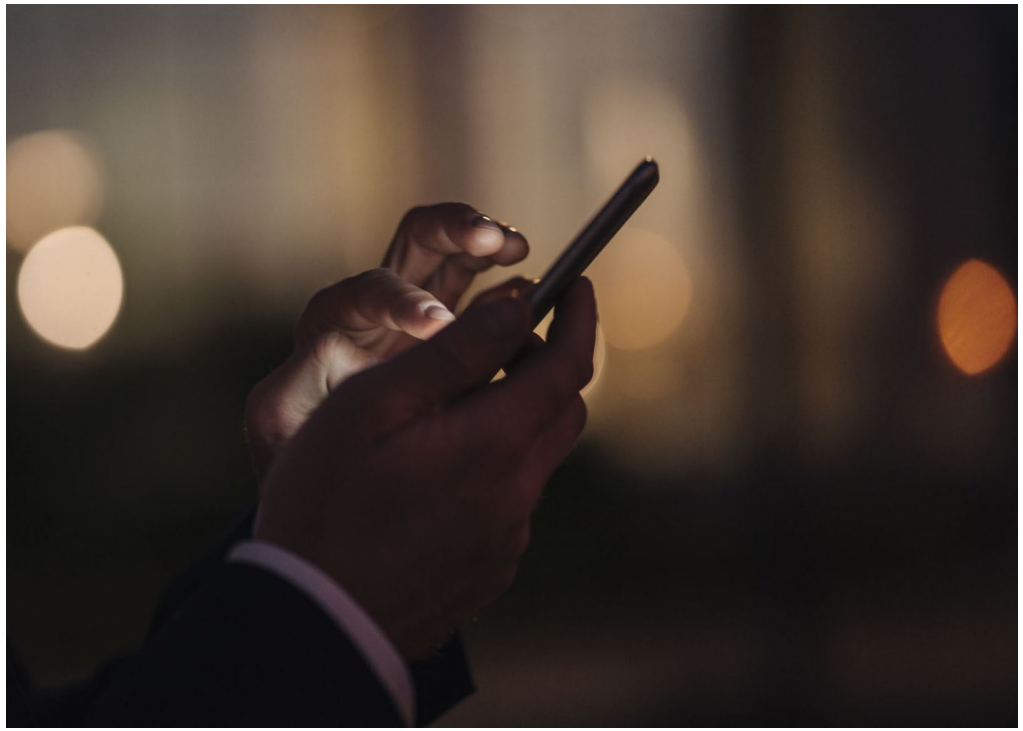
Failed to explain

What do you mean?

Weighing what you don't have

IF YOU DIDN'T GATHER IT, YOU CANNOT WEIGH IT

"Then, when I learned they had seen it on the video, I got really upset"



- What video?
- Who saw it?
- What was on it?
- Who took it?
- Do you have a copy?
- Who has a copy?

SHE TEXTED ME “ALL THE TIME”

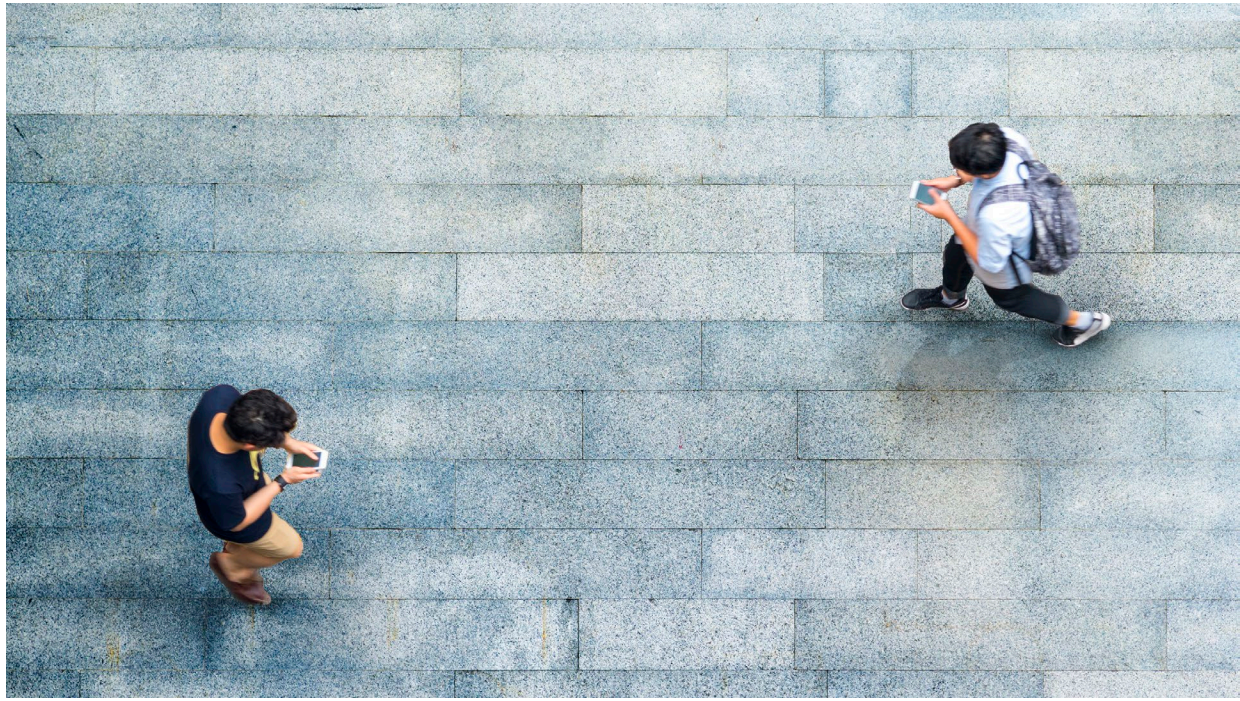
Do you have those texts?

May I have those texts?

Oh, they weren’t ‘texts,’ they were DMs?

Who else might have seen them?

Was anyone else copied?



THEY NEVER EXPLAINED

- First Complainant said there were three friends of theirs in the bar. In the second interview, Complainant said there were "a few people, maybe 5 or 6 friends" in the bar. Based on this inconsistency, I find that Complainant lacks credibility.

- Respondent never mentioned that they had been in a relationship with Witness 2, a key witness. Because they did not offer this information, Respondent lacks credibility.

- The witness did not explain where she was standing, and how she could have seen into the room, and therefore is not a reliable witness.

“I DIDN’T WANT TO, BUT I FELT COERCED”

What does that mean to you?

Can you describe what that felt like to you?

At the time, what did you think might happen if you said “no”?

How many times did they ask you? Over what period of time?

How many people were around? In what type of space?

In addition to asking repeatedly, was anything else going on?

Was there a threat? Of what? How was it expressed?

WHAT LANE IS YOUR LANE?

- Investigator
- Title IX Coordinator
- Supervisor of Coordinator
- College/University President
- Counsel's office
- Outside counsel

DEAR COUNSEL . . . WHAT LANE ARE YOU IN?

HEARINGS

But that's not what I heard . . .

HEARINGS

- Live, but can be remote
- No compelled participation
- Cross-examination/questioning
- Relevancy: Hearing Officer/Panel
- Written decision with road-map
- No new evidence
- Once more: No new evidence

BEING TRAUMA-INFORMED

Training your panel/adjudicators

- Asking questions
- Asking "why"
- Filtering questions of the parties

Preparing parties

- Reviewing the investigation report
- Sharing their story again
- Answering questions again

The attraction of prurient interests

GRAND RIVER SOLUTIONS

CULTURAL COMPETENCY AT A HEARING

- Credibility based on . . .
- The myth of "I know how I would have reacted . . ."
- Impact statements

QUESTIONS ABOUT CREDIBILITY/RELIABILITY

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?

Does an appeal officer ever determine credibility?

EVIDENCE: GATHERING, WEIGHING, ANALYZING

Avoiding Common Errors

EVALUATING THE EVIDENCE

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible/reliable?

Is the evidence worthy of belief?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

AUTHENTICATING EVIDENCE

1. At 1:18 am, Pat captured a video of Elliott and Sam. In the video, Sam had one arm around Elliott's shoulders, and Elliott's head was resting on Sam's shoulder. In the video, both Sam and Elliott, and at least 2 others, were loudly singing Happy Birthday, although the video cut out before the singers said the name of the person to whom they were singing.

2. Elliott alleged that Sam later sent him a threatening message, and the next day showed up at his dorm, uninvited, twice. Elliott stated he did not have the message, because it was on SnapChat, but had kept a screenshot of the message, although the screenshot cut off part of the message. Sam denied sending any threatening message, and also stated that he never used SnapChat.

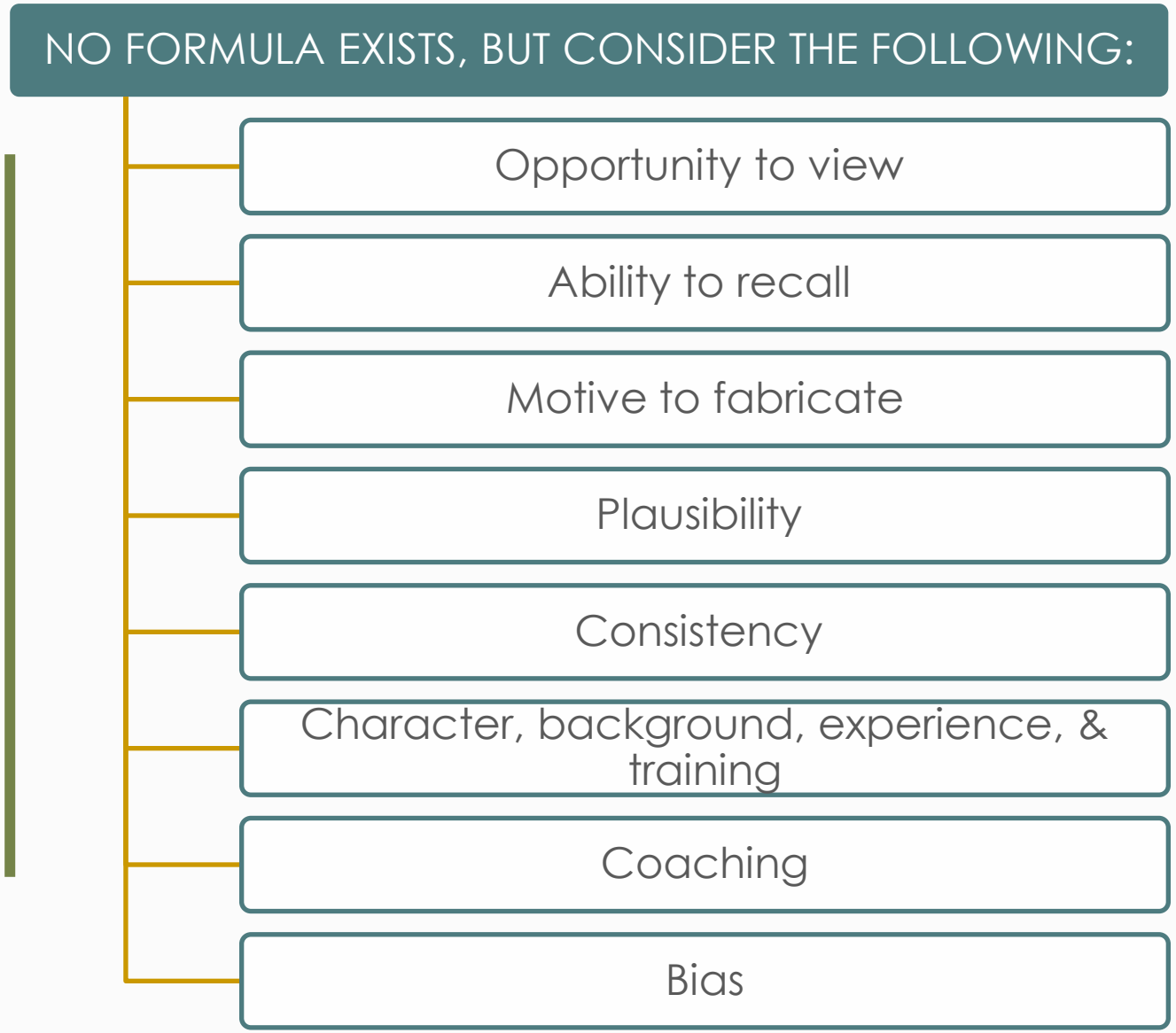
PRACTICE ON WEIGHING EVIDENCE

- Expert testimony
- Polygraph examiner's report
- News article that the college has a history of covering up sex assaults
- Case involves DV and allegation of strangulation. Witness discusses respondent's repeated angry outbursts in social situations and class settings.

CREDIBILITY AND RELIABILITY

- Why they are different
- How to write about it
- When a party attacks credibility of the other, but on a non-issue (delay in reporting, did not go to law enforcement, minimized the report in comments to a friend or family)
- How to ask questions to get to the bottom of it without being offensive

ASSESSING CREDIBILITY AND RELIABILITY



CREDIBILITY/RELIABILITY ANALYSIS
STEP BY STEP

1. Determine the material facts – focus only on material facts.
2. Determine which material facts are:
    - Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g., Marcy and Jack attended a fraternity party on April 5, 2019]
    - Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g., Marcy alleged that Jack kissed her without her consent around 1am at the party, and Jack asserted he never kissed Marcy and went home early]
    - State clearly which facts are accepted, and which are rejected, and state the reasons why.

- "While Jack maintained that he never kissed Marcy and went home early, several witnesses corroborated that he was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Jack kissing Marcy. Therefore, I find that Jack's version of events cannot be credited as being more likely than not to be true."

INTERNAL CONSISTENCY
CONSISTENCY OVER TIME

- Did the person share the same version of events in all settings, including interviews, in written and/or verbal statements and between documentary evidence?

- Are there any discrepancies or contradictions?

- Is there a sufficient explanation for any discrepancies?

CONSISTENCY WITH OTHER EVIDENCE OR TESTIMONY

- Is the testimony or evidence consistent with the other evidence?
- Is the testimony or evidence inconsistent with the other evidence?
- Is there a sufficient explanation for any inconsistencies?

CORROBORATION

- Is there witness testimony (either by witnesses or people who saw the person soon after the alleged incident, or people who discussed the incidents with the person around the time they occurred) or documentary or physical evidence that corroborates the person's testimony?

- Is there witness testimony or documentary and/or physical evidence that are inconsistent with statements made during the interview or does not provide corroboration to the person's version of events?

INHERENT PLAUSIBILITY / LOGIC

- Is the testimony believable on its face?
- Does it make sense?
- Could it have occurred?
- Does it make sense that this person knows this information?
- What was their opportunity to view/hear/know?

MATERIAL OMISSION

- Did the person omit material information?

- If so, what?
  - e.g., submitted partial text messages, or omitted text messages that could be perceived as unfavorable

- Is there a reasonable reason for the material omission?

PAST RECORD

- Is there a history of similar behavior in the past?
  - e.g., a supervisor had previous complaints of sexual misconduct

- If so, this might impact whether a statement should be believed.
  - For example, a respondent who states they never knew that a certain behavior was wrong, yet was written up for that same behavior; the history of similar past behavior makes the respondent's statement less believable and less reliable.

ABILITY TO RECOLLECT EVENTS

- What is the extent the person was able to perceive, recollect or communicate the version of events?
  - e.g., the person reported they were intoxicated, or the person reported they were sleeping

TRANSPARENCY IS YOUR FRIEND

- Investigator should show their work
- Decision-maker should show their work, rationale, and road-map
- Sanctioning officer should provide some rationale, particularly for mitigating or aggravating circumstances
- Notice letters should clearly show how to file an appeal – to whom, what email, and the specific date
  - No: Within 5 days of receipt
  - Yes: Any appeal is due, with any relevant attachments, no later than 5 pm Eastern on Wednesday, March 15, 2027.

WHY GIVE THEM A ROAD MAP?

- Trust
- Education
- Trust

APPEALS AND SANCTIONS

ALL APPEALS

Trauma-Informed

Each in their lane: The limits of an appeal officer's task

Fundamental Fairness

Due Process

Follow Your Process

DUE PROCESS DURING THE APPEAL PROCESS

Equal Rights and Fair Process for Each Party

- Using regular, published procedures
- Grounds for appeal
- Who is reviewing or hearing the appeal

DIFFERENCES IN RESPONSIBILITY

INVESTIGATION /HEARING

- Investigate, Hearing
- Determine What Happened
  - Findings of Fact
  - Findings of Policy

SANCTION

APPEAL

- Review the Appeal
- Determine Whether Grounds for Appeal Have Been Met
- Make Decision Regarding Merits of Appeal

DIFFERENCES IN BURDEN

COLLEGE/ UNIVERSITY	Error correction
COMPLAINANT RESPONDENT	Persuade and point out error with supporting evidence or facts

WAS AN APPEAL FILED?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds.

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.

IN THEIR APPEAL, RESPONDENT WRITES:

- I have new evidence not previously available to me. Having read the hearing officer's report, I now know the hearing officer was biased (new evidence) because the hearing officer found against me, and there is no way that any unbiased hearing officer would have properly weighed the evidence and come to any conclusion other than the fact that complainant was lying.
- The hearing officer failed to call 1 key witness. The Title IX coordinator should have been questioned, and she could have explained that Complainant was given a free pass and allowed to drop out of organic chem after it was obvious Complainant was going to fail. This would have proven that Complainant made up the complaint and filed only to avoid failing a difficult class.

WHAT DOES THIS MEAN?

- You are reviewing the appeal for what it says, not how it is said.

- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.

IS THIS GROUNDS FOR AN APPEAL?

Non-Participating Parties

Uncooperative Witnesses

Uncooperative Advisors

DEAR APPEALS OFFICER…

- I am the victim of a false accusation…
- The police were not contacted and I was not charged by law enforcement with a crime
- After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party
- No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.

NEW EVIDENCE: WHAT WOULD YOU DO?

Appeal states there is new evidence…

Evidence not provided with the appeal

How do you know it is new?

It is new but is it relevant and reliable?

PROCEDURAL ERROR

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent

DENIAL OF A PROCESS YOU DON'T OFFER

- Cross examination
- Representation
- Discovery
- Subpoena / compel witnesses

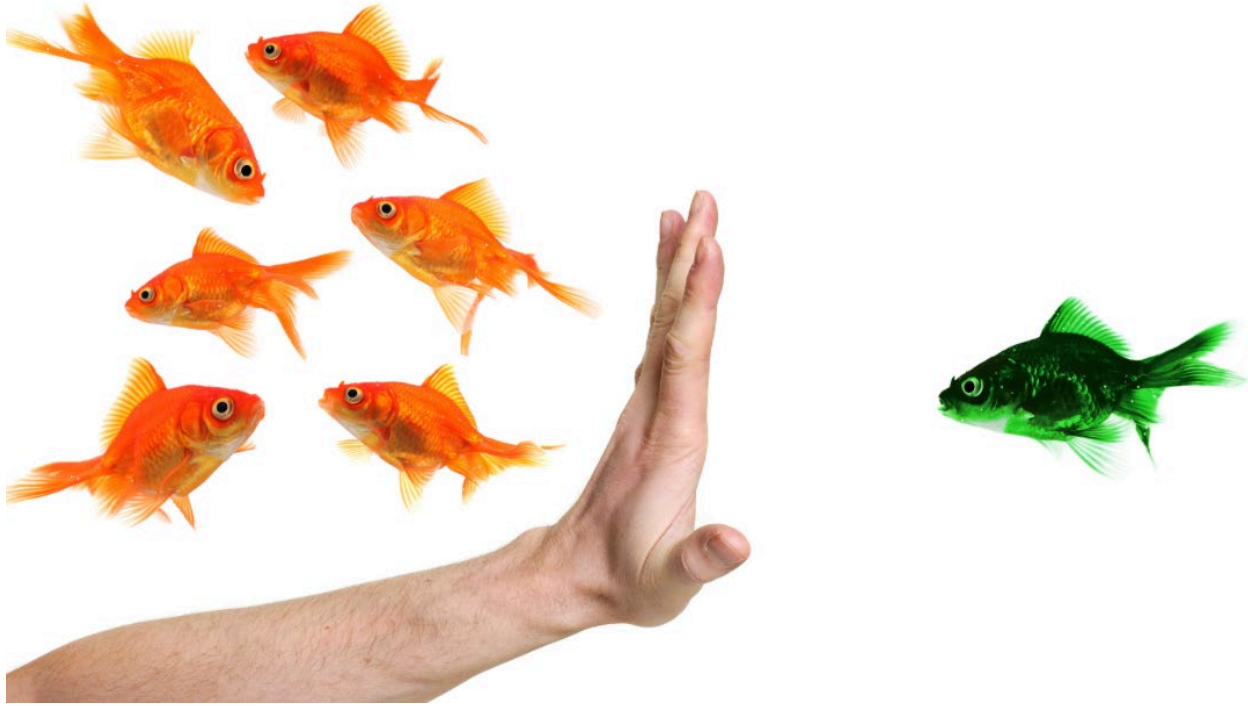
WHEN A RESPONDENT REFUSES TO PARTICIPATE IN THE PROCESS BUT CLAIMS DUE PROCESS IS VIOLATED

"The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him."

- Herrell v. Benson

BIAS

- What constitutes bias?
- The investigator was biased against me because…
- The investigator was biased against (complainants/respondents generally) because . . .



ALLEGATIONS FOR BIAS

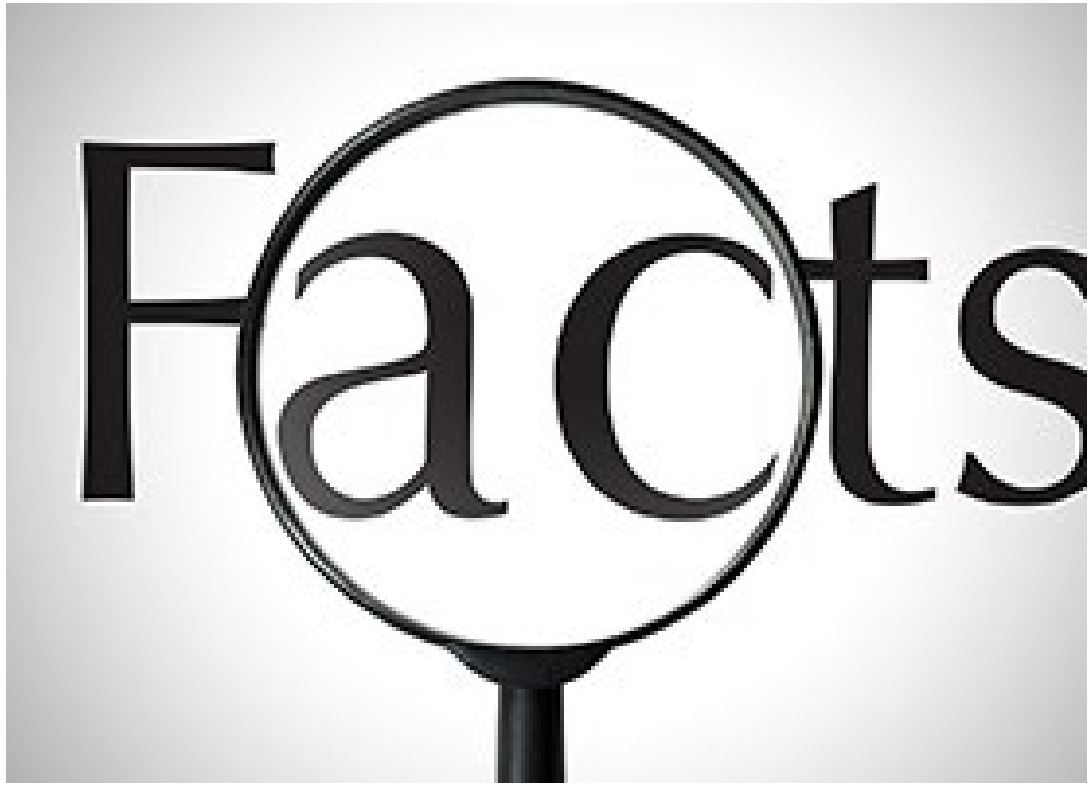
"Pro-victim bias does not equate to anti-male bias."
-Doe v. University of Colorado

Anti-violence bias does not equate to anti-male bias.

ALLEGATIONS OF BIAS AS THE BASIS FOR APPEAL

An allegation of bias without factual support "no longer passes muster".

-Doe v. University of Colorado



NEW INFORMATION

- Who decides if it is new?
- If it is new, would it change the findings/outcome
- Who investigates new information?
- Timeline

COMMON ERRORS ON APPEAL

Know the language of your policy

Drunk vs. Intoxicated vs. Incapacitated

- Language matters
- Clarity and consistency of application

Who has to prove consent?

LESSER-INCLUDED CHARGES

There are no lesser-included charges

Reflects lack of notice and opportunity to respond.

- Powell v. St. Joseph's University
- Doe v. U.S.C.

SOMETIMES INSTITUTIONS DO THE WRONG THING

- Missing deadlines for providing materials
- Misunderstanding of consent or incapacitation
- Errors at a hearing

QUESTIONS ABOUT CREDIBILITY ON APPEAL

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?

Does an appeal officer ever determine credibility?

DE NOVO APPEALS?

We Are Never, EVER, going back to this

APPEALS PANELS THAT EXCEED THEIR AUTHORITY

- Stay In Your Lane
- How Do You Know
- How To Correct

TRANSPARENCY IS YOUR FRIEND

- Investigator should show their work
- Decision-maker should show their work
- Sanctioning officer should provide some rationale, particularly for mitigating or aggravating circumstances
- Appeal officer should provide a road map, but also education for a student, potential lawyer, potential judge

HOW MUCH INFORMATION TO PROVIDE ON APPEAL?

The appellate officer's failure to plainly articulate why he granted the appeal, which resulted in a new hearing that found the respondent in violation, was "perplexing" to the reviewing court, along with the appellate officer's ad hoc decision to request an independent Title IX opinion prepared in the course of determining the appeal.

WHY SHOW YOUR WORK:
WHEN A JUDGE HAS A DIFFERENT DEFINITION OF CONSENT

"Because she removed her own shirt when Respondent suggested having sex, there was insufficient proof of a lack of affirmative consent." Haug v. SUNY Potsdam, 2018

As the Complainant did not report the rape, and did not initially think she had been raped . . . more likely there was an erroneous outcome due to gender. Doe v. Dordt University, 2022

GOALS OF SANCTIONS/DISCIPLINE

END	PREVENT	REMEDY
End The Harassment	Prevent The Recurrence	Remedy The Harm, Restore Equal Access

WHAT DOES THE SANCTION "SAY"?

Who is valued, who is not?

Community values?

THE SANCTION DOES NOT UNDO THE FINDING

No lesser sanction if you disagree with findings

Sanctioning officer must assume findings are correct

SANCTIONS ARE NOW WRONG BECAUSE FINDING WAS WRONG

Does appeals officer determine new sanction, or send case back for appropriate determinations?

SANCTIONING CONSIDERATIONS

Expulsion/Termination not required

Must be able to articulate why the action taken is reasonably calculated to end the harassment

Must be able to articulate why the action is reasonably calculated to prevent the recurrence

Remedy: To restore or preserve equal access; implemented by Title IX Coordinator.

FACTORS TO CONSIDER

- Impact
- Past Conduct
- Multiple violations
- Abuse of power/position
- Enhancements: filming the act, predation, weapon

AGGRAVATING CIRCUMSTANCES

- Premeditation
- Predation
- Physical Violence
- Multiple policy violations in one incident
- Harm to others, impact on complainant and/or community
- Did the behavior continue after intervention?
- Effort to conceal or hide the incident?
- Refusal to attend past trainings
- Past failures to comply with directives

COMPLAINANT'S WISHES TAKEN INTO ACCOUNT?

An institution's remedial measures do not amount to deliberate indifference simply because a reporting individual disagrees with their severity.

Butters v. James Madison Univ., 208 F. Supp. 3d 745, 762 (W.D. Va. 2016). Kelly v. Yale Univ., No. 3:01-cv-1591, 2003 WL 1563424, *4 (D. Conn. Mar. 26, 2003). Shank v. Carleton Coll., No. 16-CV-01154 (ECT/HB), 2019 WL 3974091, at *14 (D. Minn. Aug. 22, 2019), aff'd, 2021 WL 1228068 (8th Cir. Apr. 2, 2021).

Complainants do not have right to choose the particular sanction (or remedial measure)

I NEVER WANT TO SEE THEM AGAIN

Following a finding of sexual misconduct, the respondent was sanctioned with a no-contact order and deferred suspension. The complainant sued, alleging deliberate indifference, arguing that respondent should have been removed from campus to prevent any possible future encounters, which was more likely given that both were students in the same program and therefore more likely to access the same campus building.

What did the court say?

THE ROLE OF IMPACT STATEMENTS

- Is it evidence?
- Can a party be found not credible due to comment in an impact statement?
- Bias to decision-maker?
- Bias to appeal officer?

DETERMINING THE PROPER SANCTION

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?

CAN A SANCTION INCREASE ON APPEAL?

A. In response to Complainant's appeal

B. Sua sponte (meaning, just on their own determining it was not sufficient)

APPELLATE OFFICER/PANEL MAY NOT…

Substitute their own findings for the findings of the decision maker

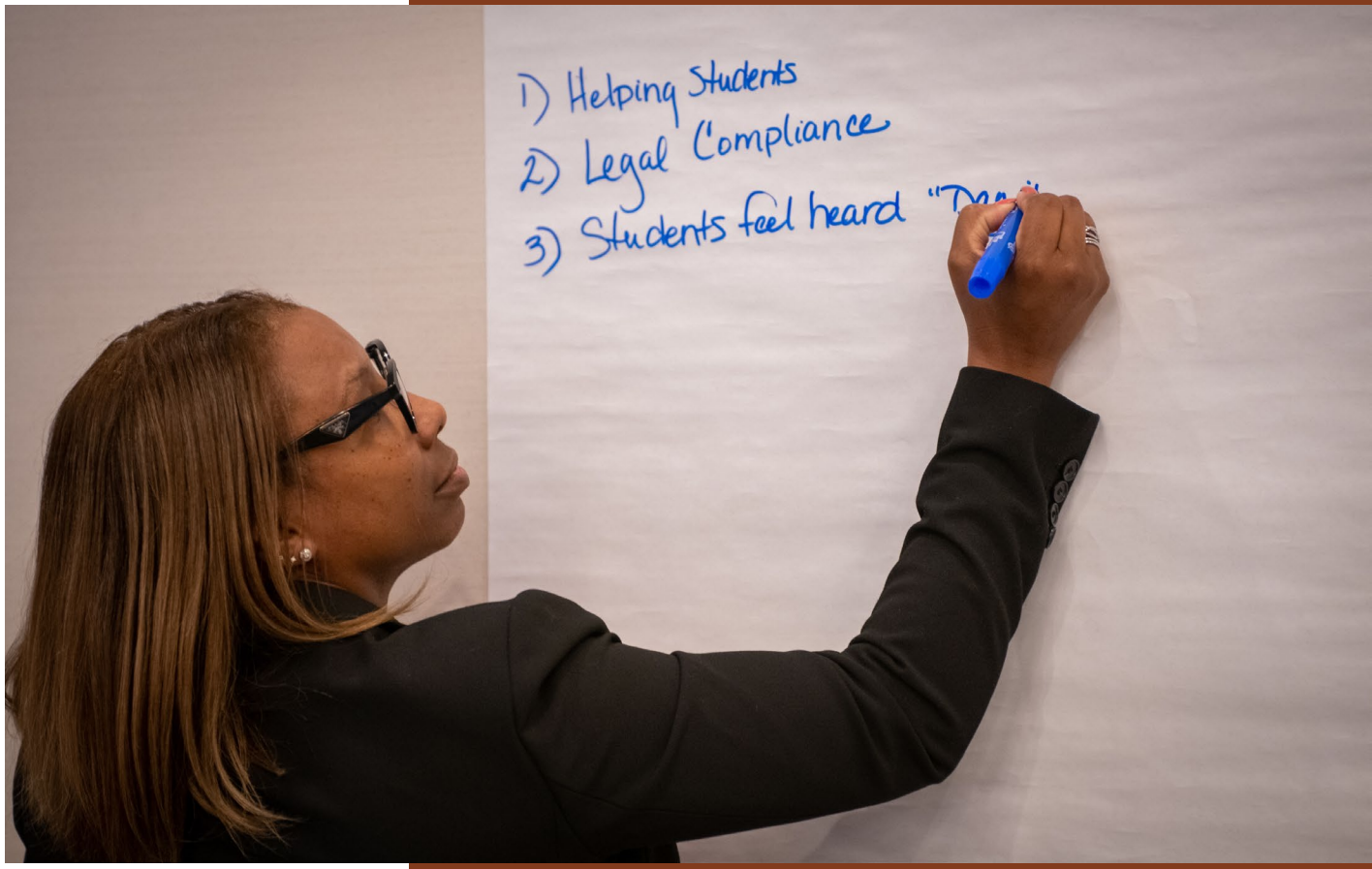
Consider new evidence

Correct procedural errors on their own


A LITTLE HELP HERE, PLEASE

EMPLOYEE COMPLAINTS

- Presumptions of skill, understanding
- Presumptions of maturity
- Sex Assault, DV in employee cases
- Differences in supportive /remedial measures
- Sanctioning



EMPLOYEE (STAFF, FACULTY) COMPLAINTS

- Presumptions of skill, understanding
- Presumptions of maturity
- Sex Assault, DV in employee cases
- Differences in supportive /remedial measures
- Sanctioning

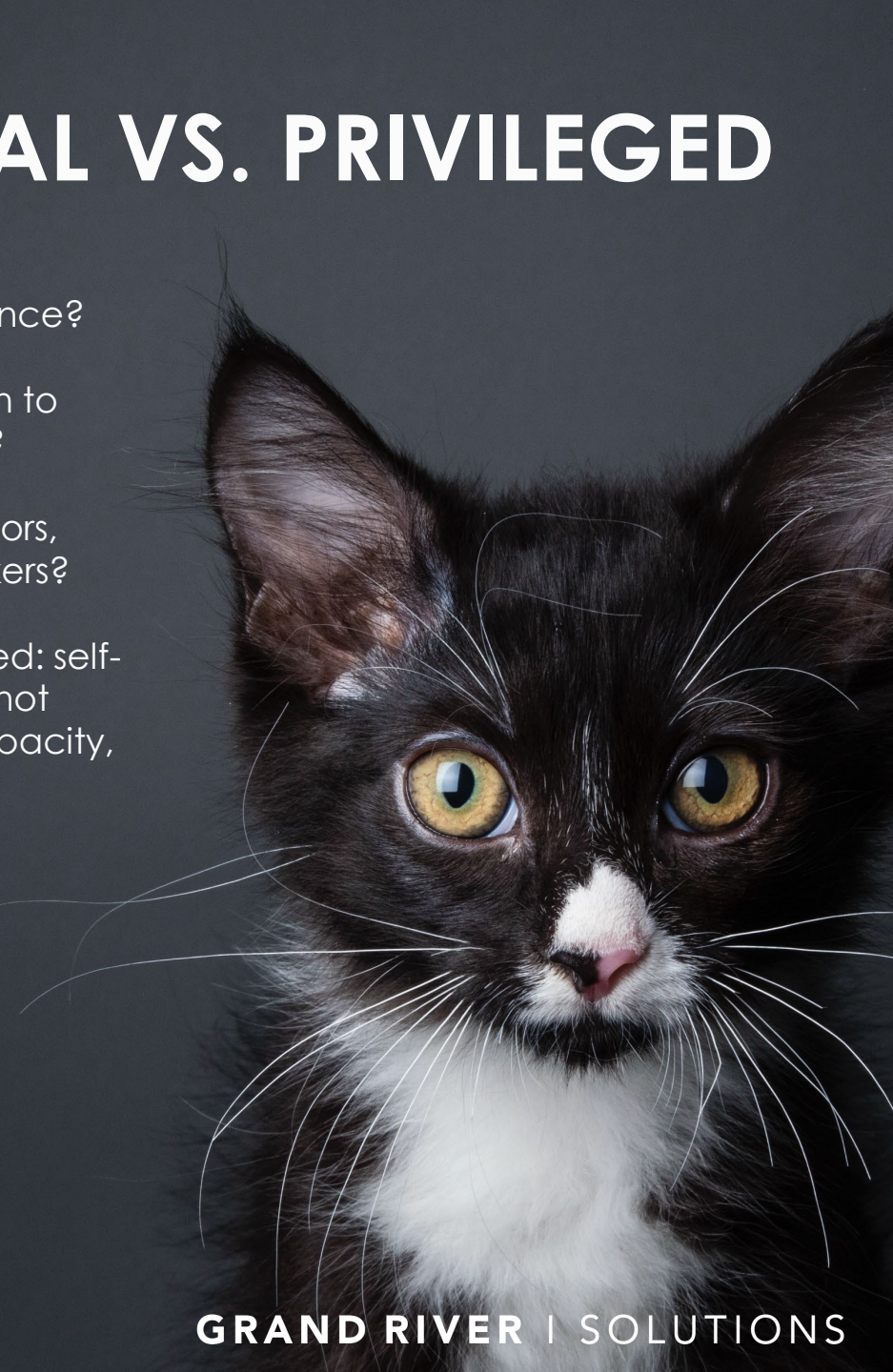
CONFIDENTIAL VS. PRIVILEGED

What is the difference?

What does it mean to hold the privilege?

Examples: counselors, clergy, social workers?

Who is NOT covered: self-appointed, those not working in that capacity, not hired into that capacity



THE FUTURE OF THE TITLE IX OFFICE

- How will you cover breadth of **ALL** Title IX – related cases?
- Elevated leadership of the office?
- Are we treating some harassment/discrimination as more or less important?
- Where do we want differences in procedure, where do we want it all to be the same?

TITLE IX PROTECTS PREGNANT & PARENTING STUDENTS

On October 4, 2022, the Department of Education released an updated resource related to pregnant and parenting students.

In the FAQ, the Department clarified that students cannot be discriminated against based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

34 C.F.R. § 106.40(b)(1)

ADVISOR ISSUES

- The advisor can be anyone, including an attorney or a witness.
- Institutions cannot place restrictions on who can serve.
- Institutions can create rules and guidelines for participation in the investigation and hearing.
- No specific training required.
- No “ineffective assistance of Advisor” claims
- And what is a “good” advisor?

QUESTIONS?

THE RIVER CONNECT is a virtual community of experts and colleagues gathered together to help each other process the complexities of the work.

THANKS FOR JOINING US!

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