

Advanced Title IX Investigator Training and Certification

Welcome & Faculty Introductions



Rabia Khan Harvey, M.Ed., MSHR

Senior Learning & Development Manager

Academic Impressions

rabia@academicimpressions.com

July 26 – 27, 2023



Overview of this Virtual Training

learning OUTCOME

After participating, you will be able to apply the advanced interviewing and evidence-gathering skills necessary to conduct a thorough and comprehensive investigation of even the most complex sexual harassment formal complaints.

Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice. Instead, all information, content, and materials available during this training are for training and general informational purposes only.



AGENDA

July 26, 2023

1. Title IX Investigations under the Current Regulations
2. Intro of the Five Stages of Investigation
3. Stage 1: Prepare
4. Stage 2: Gather
5. Autonomy, Neutrality, and Objectivity



AGENDA

July 27, 2023

7. Confronting Interviewing Challenges
8. Small Group Activity: Mock Interviews
9. Stages 3&4: Compile and Assess for Relevance
10. Stage 5: Drafting the Investigation Report
11. Testifying at the Hearing
12. Final Q&A and Conference Wrap up

Meet Your Expert Faculty



Cara Hardin, J.D.

Acting Title IX Coordinator

Marquette University

cara.hardin@marquette.edu




Christine H. Taylor, J.D., LL.M.

Institutional Equity Officer & Title IX Coordinator

The University of Oklahoma

christine.taylor@ou.edu



#1

Title IX Investigations Under the Current Regulations



10 Step Investigative Process §106.45(b)(5)



1. Complainant or Title IX Coordinator files a Formal Complaint alleging sexual harassment.
2. Notice of Allegations sent to Parties. §106.45(b)(2)
 - *Assignment of investigator*
3. Investigator begins the investigation.



Investigative Process – 4 and 5

4. The parties have an equal opportunity to present witnesses and evidence.
 - The investigator may independently identify and interview witnesses and obtain evidence other than offered by the parties.

5. Investigator requests and conducts interviews with the complainant, respondent, and witnesses.
 - The parties must receive a Notice of Interview. §106.45(b)(5)(v)

RESOURCE



Sample
Notice of Interview



Investigative Process – 6 and 8

6. Investigator requests and obtains non-testimonial (i.e., physical) evidence.
7. The investigator creates the “Investigative File,” which contains the information “directly related to” the allegations raised in the formal complaint. §106.45(b)(5)(vi)
8. “Investigative File” sent to parties and their advisor for review and response.
 - Party written responses are attached to the Investigative File and shared with other party and their advisor.



Investigative Process – 9 and 10

9. Investigator drafts an “Investigative Report” that fairly summarizes the relevant evidence and sends it to the parties and their advisors for review and response.
 - Parties may submit a written response to the Investigative Report, which will be shared with the other party and their advisor and attached to the Investigative Report. §106.45(b)(5)(vii)
10. Investigator returns the case to the Title IX Coordinator for next steps.

RESOURCE



**Rights of the Parties
within the Investigative
Process**

QUESTIONS?

#2

Introduction of the Five Stages of the Investigation and Scenario

CHAT



- 1. What does it mean to “investigate?”**
- 2. What are the key attributes of an investigator?**

in·ves·ti·gate

/inˈvestəˌɡɑːt/

verb

To carry out a systematic or formal inquiry to discover and examine facts of (an incident, allegation, etc.) so as to establish the truth.

Oxford**Languages**



Investigative Process: Evidence

To investigate a formal complaint alleging sexual harassment is to gather the information (evidence) pertaining to the allegations in the formal complaint, including:

- Inculpatory information that tends to show the allegations are true, and
- Exculpatory information that tends to show the allegations are not true.



Examples of Evidence

Example of inculpatory evidence:

After the alleged sexual misconduct occurred, the respondent sent a text message to the complainant stating, "I'm sorry, I should have listened when you said no."

Example of exculpatory evidence:

The respondent has mid-length blonde hair. The video from the scene of the alleged misconduct shows that the perpetrator has short dark hair.

QUESTIONS?



Investigative Process: Five Stages

1. Prepare
2. Gather
3. Compile
4. Assess for relevance
5. Summarize relevant evidence



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Review of Scenario

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Allegations

- On September 2, 2022, Respondent allegedly grabbed Complainant by both arms, which left bruising, as Respondent forced Complainant out of Respondent's dorm room.
- Complainant alleges that on October 31, 2022, Respondent placed Complainant in a jiu-jitsu chokehold, forced Complainant to the ground, and placed their knee on Complainant's diaphragm, interfering with Complainant's ability to breathe.
- Complainant alleges that on September 16 and October 10, 2022, Respondent posted sexually harassing tweets on their Twitter account to harass and humiliate Complainant.



#3

Stage 1: Prepare



Preparing for the Investigation (Step I)

FICTICIOUS STATE UNIVERSITY – TITLE IX OFFICE

INVESTIGATOR INVESTIGATION LOG

Complainant: Bailey Benson

Title IX Coordinator: Carmen Sandiego

Respondent: Quinn Quimby

Investigator: Cara Hardin, Title IX Deputy Coordinator

Date	Recorded By	Notes
3/15/21	CBH	Received and reviewed Notice of Allegations.
3/16/21	CBH	Emailed parties Notices of Interview and calendar appointments for Microsoft Teams video meeting.
3/17/21	CBH	Received email from Complainant with the selection of and contact information for their advisor. Sent advisor (copied Complainant) information about the advisor role within the Investigative Process.
3/20/21	CBH	Interview with Complainant. Advisor present. Reviewed investigative process. Conducted questioning and requested/obtained physical evidence.
3/21/21	CBH	Emailed interview transcript to Complainant and their advisor for review, edit, and approval.
3/25/21	CBH	Interview with Respondent. No advisor present. Reviewed investigative process, including right to an advisor. Conducted questioning and requested/obtained physical evidence.
3/26/21	CBH	Emailed interview transcript to Respondent for review, edit, and approval.
3/28/21	CBH	Respondent emailed redlined additions and clarifications within interview transcript.

I. Create Investigator Log



Prepare (Steps II-IV)

II. Review Notice of Allegations/Formal Complaint

III. Who is involved? (Students, faculty, staff?)

IV. What policy offense(s) are you investigating?

- Quid Pro Quo Sexual Harassment
- Hostile Environment Sexual Harassment
- Sexual Assault
 - Rape, sodomy, fondling, incest, statutory rape
- Dating violence
- Domestic violence
- Stalking



Prepare (Step V)

V. What are the “elements” of the offense(s) at issue?

Example: Rape

1. The penetration of any sort
2. Of the penis and the vagina (attempt to do the same)
3. Without complainant's consent ⇒ Review policy definition for consent
4. Including instances where the complainant is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Know the legal age of consent. See policy for definition of incapacitation

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Scenario

What are the applicable offense(s) within the scenario?



“Elements” for Hostile Environment Sexual Harassment

- ✓ *Unwelcome conduct (based on sex or of a sexual nature)*

THAT IS SO...

- ✓ *Severe*

AND

- ✓ *Pervasive*

AND

- ✓ *Objectively offensive*

THAT IT...

- ✓ *Effectively denies a person equal access to the university's education program or activity*



"Elements" for Dating Violence

✓ *Presence of violence*

- **Sexual abuse, OR**
- **Physical abuse, OR**
- **Threat of such abuse, OR**

AND

✓ *Occurring between people in, or who were in, a social relationship of a romantic or intimate relationship*

- *The existence of such a relationship is determined based on:*
 - *Length of the relationship.*
 - *Type of the relationship*
 - *Frequency of interaction between the person involved in the relationship*



Prepare (Step VI)

VI. Evidence available pre-interviews

- Email reporting misconduct (i.e., from Hall Director, RA, Campus Safety)
- Campus video footage
- Campus access-card records
- Police report
- Social Media

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Scenario

What evidence may be available pre-interviews?



Prepare (Steps VII-IX)

VII. Interview list

- Complainant
- Respondent
- Witnesses

VIII. What information are you seeking from each person?

IX. Order of interviews

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Homework: Scenario

- **Preliminary interview list**
- **What information are you seeking from each person?**
- **Order of the interviews?**




Prepare (Step X)

X. Outline party/witness interviews

Complainant's interview outline

- Build rapport
- How know the respondent?
- What happened?
 - Where?
 - When?
 - How? Penetration of genitalia?
 - Consent? (Actions/words? Incapacitation? Force?)
 - Response to conduct?
- Witnesses (Eyewitnesses? Who saw before and right after? Who talk to before and right after?)
- Physical evidence (Electronic communications? Pictures? SANE report? Police report?)

Example complainant outline for sexual assault case



CHAT



Based on what you've learned thus far, how will refine your preparation strategy?

QUESTIONS?



#4

Stage 2: Gather



Gathering the Evidence

There are two types of evidence within an investigation:

- Testimonial Evidence
- Non-testimonial evidence



Testimonial Evidence

Testimonial Evidence comes in a variety of forms:

- Investigator interviews with:
 - Parties
 - Witnesses
 - Expert Witnesses
- Statements (assertions of fact) made in other medium:
 - Electronic communication (texts, emails, chats)
 - Police reports
 - SANE reports
 - *106.45(b)(1)(x): Need signed waiver to obtain and include in Investigative File*



Non-Testimonial Evidence

Types of Non-Testimonial Evidence:

- Documents
- Photographs
- Video (without audio)
- Diagrams within SANE reports
- Boots on the ground!



QUESTIONS?



Interviewing Parties and Witnesses

1. Build rapport
2. Effective questioning
3. Identifying and obtaining physical evidence



Building Rapport

- Identify mutual interests or commonalities
- Conversational with active listening
- Transparency about the process and investigator's role
- Provide control
- Answer questions
- Acknowledge difficult situation
- Explain that personal questions may be asked
- No judgement and no wrong answers

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Rapport Building Demos

1. What went well?
2. What could be improved?



Effective Questioning



Initially seeking a narrative



Closed v. Open-Ended Questions



The Funnel Method



Questioning Pitfalls

Closed v. Open-Ended Questions

Closed Questions

You went to the party with the Complainant and your roommate

You said "no" when the Respondent kissed you.

After you said "no," you shoved the Respondent to the ground



Open-Ended Questions

Who went with you to the party?

How did you respond when the Respondent kissed you?

What happened next?



Open-ended Questions

Open-ended questions allows the interviewee to “fill the space”

- Begin by asking broad questions like...

Q: “Tell me about your evening the night of August 22...”

- Start narrowing the questioning based on what you learned

Q: “Who went with you to the party?”

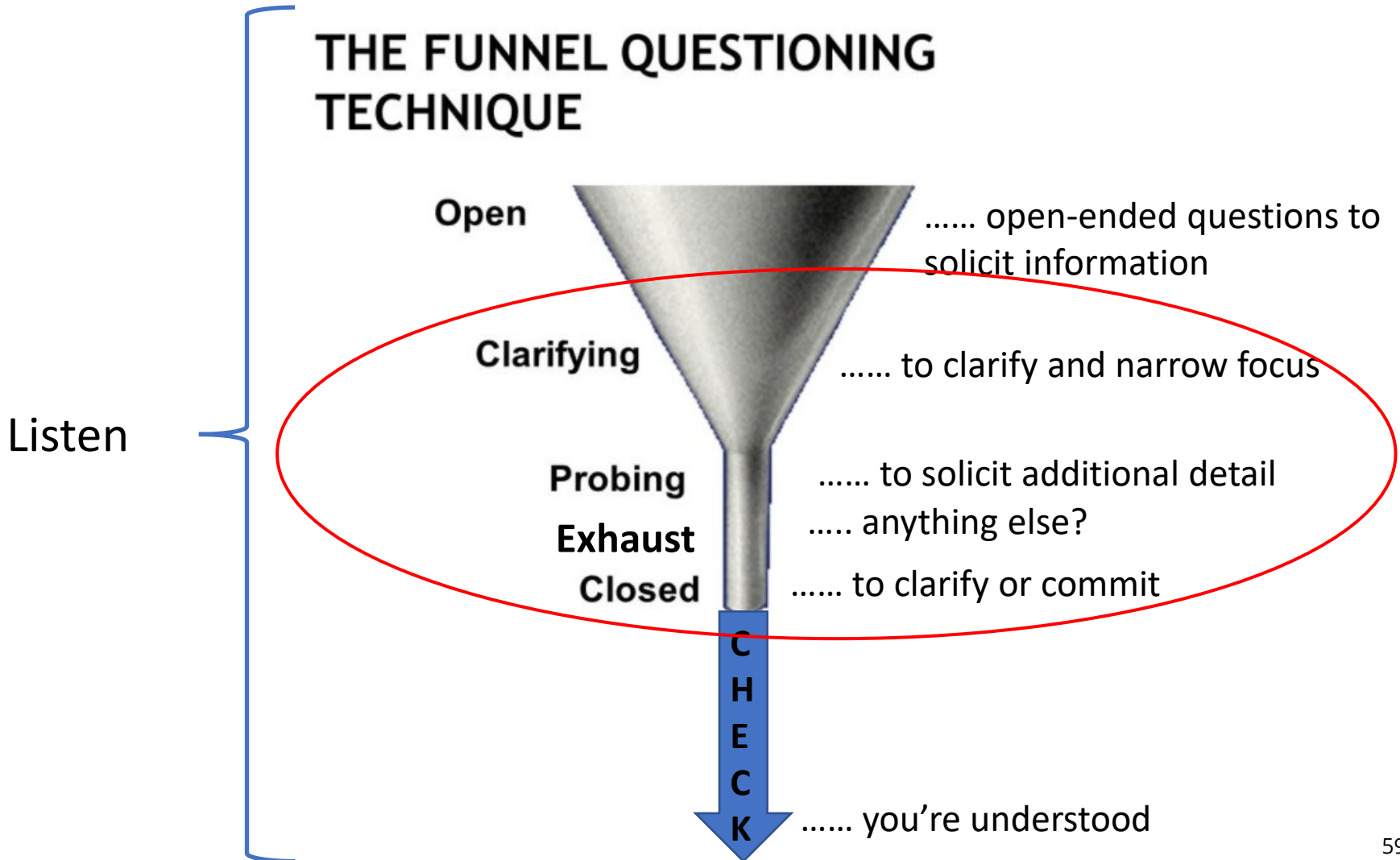
Q: “Where was the party?”

Q: “What did you do after you entered the party?”

Q: “Please explain further how....”



The Funnel Method





The Importance of Transitions

Using transitions to direct the conversation

Q: *"I want to take you back to the part where you talked about...."*

Q: *"Let's focus on your conversation with your roommate after you got home..."*

Q: *"I'd like to know more about..."*

Q: *"Now, I would like to talk with you about what happened after you left the party."*



Questioning Pitfalls

1. Asking open-ended questions in a leading/closed manner.

“Did you go to the police right after you left Respondent’s apartment?”

“Were you scared when your partner’s hands were around your neck?”

2. Asking compound questions

“Describe what you saw, what you heard, and what you did?”

One question at a time:

“What did you see?”

“What did you hear?”

“What did you do?”

3. Failing to clarify complex or confusing answers.

"Tell me if I understand you correctly, you said..."

"I am not sure that I understand, what does that mean?"

4. Assuming you know what the witness means.

"I talked to Jane last night."

5. Assumptions about what happened, generally.

6. Failing to use understandable (“normal”) language.

“Are you and Cam intimate with one another?”

“Did your fingers penetrate Cam’s labia majora?”

7. Interrupting the witness.

8. Judgmental spoken or body language in response to answers to questions.





Reacting to Interviewee Responses

Actual Thought

vs.

Professional Speak

***That makes
no sense.***

**What you just
explained is a bit
confusing to me.
Let's go over it
again...**





Example #2

Actual Thought

vs.

Professional Speak

***The
evidence
suggests
you are
lying***

***Help me
understand why
3 other people
recall things
differently***





Example #3

Actual Thought

vs.

Professional Speak

*Do you think
I'm an idiot?!*

*In my
experience, I
generally find
...*





Example #4

Actual Thought

vs.

Professional Speak

Are you kidding me?!

**Tell me about
your thought
process when . . .**



Co-investigators

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Questioning Demo

1. What went well?
2. What could be improved?



Refreshing Recollection

“I don’t know” v. “I don’t remember”

- “I don’t know” – Person never knew
- “I don’t remember” – Person did know at one time.
 - Helping the person remember:
 - Texts
 - Video
 - Photos
 - Going to the scene



Trauma-informed interviewing

- Trauma-informed interviewing techniques are helpful with any party or witness, not just complainants.
- Result is to obtain better information and to have the interviewee leave the interview feeling respected rather than victimized by the interview experience.



Trauma-informed Interviewing Techniques

- Build rapport
- Use a conversational approach instead of rapid-fire questioning
- Patience; allow for silence
- Warn before asking personal questions
 - Explain reasoning behind difficult questions
- Avoid victim-blaming and rape-myths during questioning
 - Both practices can function to re-victimize or cause trauma/blame/shame

QUESTIONS?



The Expert Witness

An expert witness is a person who has specialized or scientific knowledge, skill, experience, or proficiency in a particular field that is relevant to the case.

- Expert witnesses are *supposed* to provide independent, impartial, and an unbiased opinion about evidence in the case



Questioning an Expert Witness

I. INTRODUCTION

- Name and profession
- Qualifications - What makes this person an “expert?”
 - Education
 - Special Training
 - Experience
 - License/Certification
 - Publications
 - Teaching or speaking experience
 - Experience as an expert witness
 - Ever testified as an expert witness?
 - Ever been disqualified as an expert witness?



Expert Witness Assignment

II. EXPERT'S ASSIGNMENT

- What have you been asked to do/examine/compare in the case?
- Are you receiving compensation for your opinion and testimony? If so, how much and by whom?
- Did you reach an opinion?
- What information did you receive and rely on to make an opinion?
- What techniques, methodology, or process did you use on the information received?
- Is this the type of information relied on by experts in their field?



Expert's Opinion

III. EXPERT'S OPINION

- What is your opinion?
- How did you arrive at your opinion?
- Did you make any assumptions based on the information?
If you change your assumption, does your opinion change?
- Why are you sure of your opinion?
- Are there alternative techniques or methods that could result in a different opinion?

QUESTIONS?



Creating a Timeline

Creating a timeline surrounding the alleged incident:

- Exposes the gaps in the investigation
- Documents the movement of the parties and witnesses
- Helps identify inconsistencies or serves to corroborate
- Validates or refutes alleged alibis

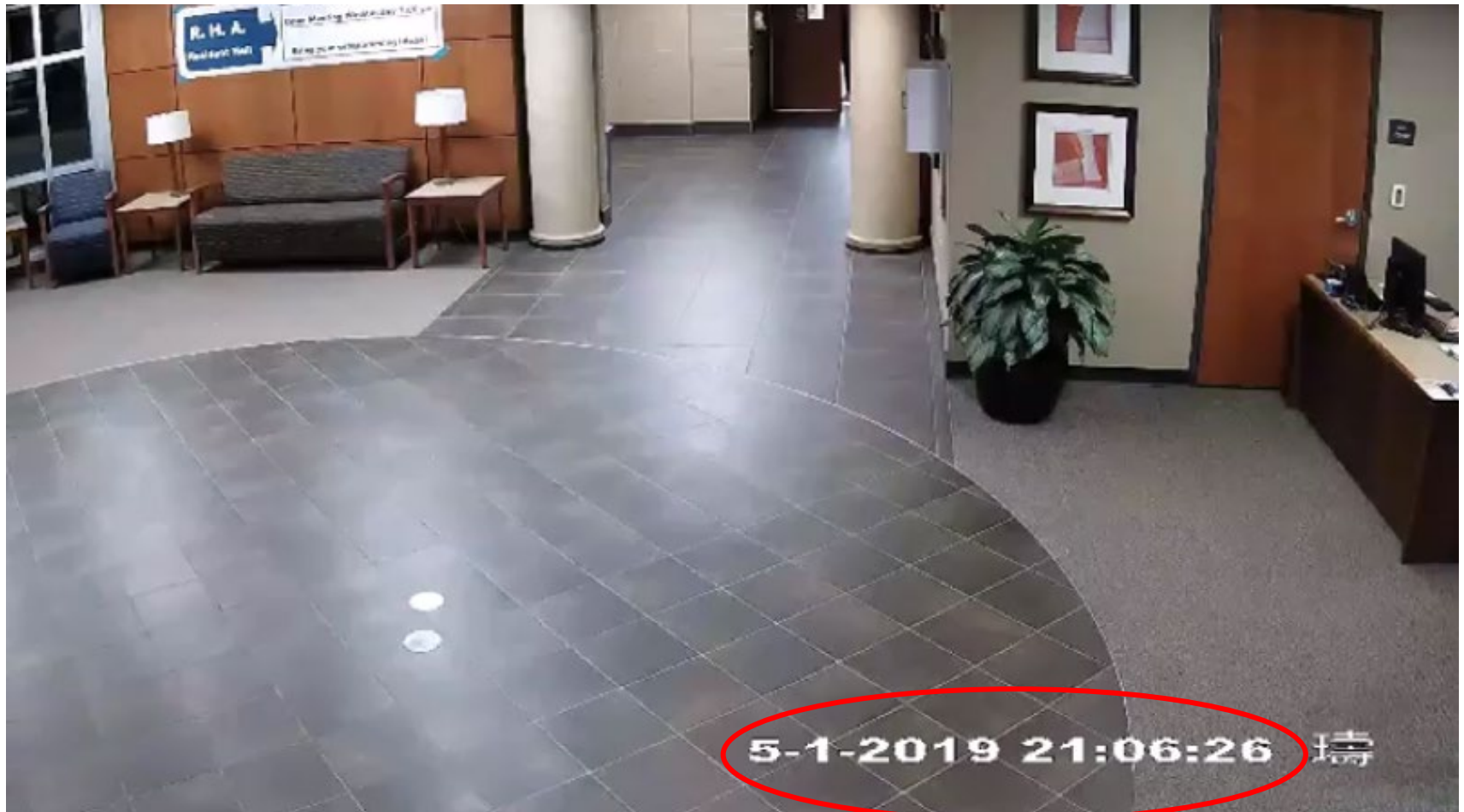


Timeline: How-To

Where to look to build your timeline:

- Timestamps within electronic communications

- Timestamps within video surveillance



- Hospital records
- Receipts
- 911 dispatch records/calls

- University access records



QUESTIONS?

ACTIVITY



How to create and utilize a timeline

TAKEAWAYS

- Building rapport and effective questioning during interviews increases the quality and quantity of the information the interviewee will provide.
- Identifying and obtaining physical evidence helps to fill gaps in testimony, provides a basis for assessing credibility, may corroborate or refute the allegations, and can provide additional insight over what may have occurred during and surrounding the alleged incident.
- Creating a timeline is an essential tool in evidence-gathering.



#5

Autonomy, Neutrality, and Objectivity



Autonomy, Neutrality, and Objectivity

§106.45(b)(1)(iii) requires investigators to serve impartially by avoiding:

- Prejudgment of the facts at issue
- Conflicts of interest
- Bias



Bias

BIAS

AUTONOMY

NEUTRALITY

OBJECTIVITY



Bias defined

Defined as: *An inclination toward (or away from) one way of thinking, many times, based on how you were raised.*

➤ Examples:

- Assuming that Complainants or Respondents are generally more likely to tell the truth
- Assuming the Complainant "had it coming" based on what they were wearing, how much they had to drink, or because they were at a fraternity party



Role of Investigator

- Not on anyone's side
- Employs the presumption of non-responsibility
- Role is to assist the decision-maker(s) in determining responsibility by gathering reliable and relevant evidence for consideration
- Investigators are advocates for the process – not either party
- Credibility is determined by specific factors, not a party's status as a complainant or respondent.



Autonomy

Defined as: *Independence or Freedom*

- Are you able to conduct the investigation without internal or external interference or influence?
 - High profile cases
 - Media influence



Neutrality

Neutrality is defined as: *Not aligned with or supporting a side or position.*

- Understand and uphold the rights of both parties
- Facts are presented as gathered – allow parties and witnesses to review and revise their statements
- Questioning conducted using non-judgmental language:
 - *“Do you remember how much you drank before you went to the house party?”*
 - Not: *“Were you thinking about how much you were drinking before you left your residence hall room?”*



Appearance of Neutrality

- Meeting with one party more than the other without explanation
 - Does your policy address this?
- Number of witnesses on either side does not determine outcome
- Perception of neutrality throughout the university



Objectivity

Objectivity is defined as: *Not being influenced by personal feelings, interpretations, or prejudice.*

- How do you act or respond to a party or witness you find obnoxious, conceited, or generally unlikable?
- How do you act or respond to a party or witness you find likable?



Conflicts of Interest

- Exist when the investigator has a personal or professional interest in the matter, and prevent the investigator from discharging their duties in a fair, neutral, and impartial manner
- Arise depending upon the investigator's personal interests, social factors, inside information, or a relationship to a party, or witness



Mitigation Strategies

- For conflicts of interest: Transparency
- For biases
 - Evaluate/recognize when you are having a biased or stereotypical thought
 - Identify the reasons behind the thought. Where does it come from? Will it impermissibly influence my actions?
 - If possible, overcome and replace the biased/stereotypical thought or action with a non-stereotypical response action



Mitigation Strategies (con't)

- Improve Decision Making
 - Slow down
 - Ask: What assumptions have I made about the gender identity, religious beliefs, athletic status?
 - Ask: What assumptions have I made about the facts?
 - What evidence supports the conclusions I draw and how have I challenged the "unsupported" assumptions
- Practice - and be present.

QUESTIONS?



AGENDA

July 27, 2023

6. Confronting Interviewing Challenges
7. Small Group Activity: Mock Interviews
8. Stages 3&4: Compile and Assess for Relevance
9. Stage 5: Drafting the Investigation Report
10. Testifying at the Hearing
11. Final Q&A and Conference Wrap up

ACTIVITY



Refresh & Reset

Please share one investigation strategy you learned yesterday that you can begin applying right away.



#6

Confronting Interviewing Challenges



Interviewing Challenges





Categories of Witnesses

Willing to
cooperate

Reluctant to
cooperate

Refusal to
cooperate



Reluctance, generally

- Fear of getting involved
 - Includes fear of getting in trouble
 - Guilty of something
- Mistrust of the University, the investigation process, the investigator
- Fear of retaliation
- Fear of not being believed
- Fear of re-traumatization (complainant)
- Fear/discomfort with subject matter



Reluctant Complainants

- May have important information connected to their own safety or campus safety
- Specific reasons:
 - Uncomfortable/trauma
 - Not wanting to get anyone (respondent) in trouble
 - Pressure not to report
 - Concern their report is “not serious enough” or their report will not meet the policy violation threshold
 - Concern about their own actions (underage drinking, etc.)
 - May not understand the investigation and grievance process



Reluctant Respondents

- Secured legal counsel
 - Advised not to give a statement
 - Statements given may be held against them in court
- Concern their testimony will not be believed
- May not understand the investigation and grievance process



Reluctant Witnesses

- Fear of getting involved
 - Includes fear of getting in trouble
 - Guilty of something
 - Taking sides
- Mistrust of the University, the investigation process, the investigator
- Fear of retaliation
- Fear of not being believed
- Fear of own misconduct (underage drinking, etc.)
- Fear/discomfort with subject matter



Reluctant Party/Witness Interview Preparation

- Importance of your initial contact
- Professional, respectful, and equitable for all parties involved
- Prepare for the interview- thought out- open ended questions
- Format of the interview: Zoom, Teams, or in-person – wherever they are most comfortable



Control the Room

Whoever is in the room, or not in the room can impact the interview – consider:

- How many investigators are present
- Advisor
- **Non-Advisor parent or other person**



Transparency

Explain	Explain your role as the investigator
Explain	Explain the process and its role
Do Not Make	Do not make promises you cannot keep and keep your promises
Set	Set realistic timelines and update
Explain	Explain you may need to follow up with them or re-interview them
Explain	Explain school policies about drug & alcohol use as well as any amnesty policy.



Getting Parties and Witnesses Talking

- Attempt to establish a personal connection
- If this is an in-person interview – candy
- Begin with the positive
- Appreciate their time and their assistance will help establish what happened or prevent another similar incident
- Flexibility
- Most people are comfortable in familiar settings and convenient times.
- If possible, give parties and witnesses the option of where/what format and when they will be interviewed.
- Record or not record – reluctant parties/witnesses do not like to be recorded. Ask permission and explain reason for recording!



Getting Parties and Witnesses Talking (con't)

- Remind a reluctant witness this isn't about them – it's about improving campus safety/workplace issues.
- Remind them the decision to participate is completely theirs – you are providing them with a degree of influence and control over the process.
- Draw diagram of the room, direction, distance, access, location
 - Leads to points of reference and allows for more detailed discussions



The Hard Questions

- Allow the party/witness to finish their narrative before you probe
- Say, "I want to back through this part slowly, so I understand."
- When asking the hard questions:
 - Say, "I would like to ask some hard questions, is that ok with you?"
 - Explain why you are asking the question.
 - Wait to confront the party/witness with adverse evidence – it may make them less willing to continue talking.
 - Let the party/witness know you are attempting to figure out what doesn't track and why.
 - Don't accuse
 - Be careful when asking "why?"



The Untruthful Witness

How do you know?

- What physical evidence do you have?
 - Video
 - Card swipe information
 - Text messages with date/time stamp

Treat testimony at face value unless the evidence suggests otherwise.



Inconsistent/contradictory statements

Three "C's" to confronting inconsistent or contradictory statements

1. Catch the inconsistent statement (statement that is different than the statement given before or different from the physical evidence)
2. Commit the interviewee to the statement being made
3. Confront with the inconsistency or contradiction using the prior statement or physical evidence



What Not to Do

- Use the “bad cop” approach. If the party or witness is reluctant, find out why.
- Get into a conflict with a party or witness about their reluctance to participate.
- Flattery when establishing rapport – it never goes well.
- Use the 20 questions approach.
- Cut off a statement so you can move on to your next pre-arranged question.



Work with what is available

- Take what you can get
 - Phone call conversations
 - Written statement
- An effective investigator can turn reluctance into cooperation with a non-combative and empathetic approach.

QUESTIONS?



#7

Group Activity: Mock Interviews

ACTIVITY

Fact Pattern

- Who will you interview?
- What information are you seeking from the interviewees?
- Order of Interviews
- Let the interviews begin!



#8

Stages 3 & 4: Compile and Assess the Evidence



Stage 3: Compile the Evidence

The investigator compiles all the information “directly related to” the allegations raised in the formal complaint into the “**Investigative File.**” §106.45(b)(5)(vi)

- The **Investigative File** is provided to the parties and their advisors for review and response (must provide at least 10 days for review and response).
- **Investigative File** must be made available at the hearing to allow the parties to refer to the evidence in the file, including for the purpose of cross-examination.



Stage 4: Assessing evidence "directly related to" allegations

Determining whether the evidence is "*directly related to*" the allegations:

- "*Directly related to*" undefined within the Final Regulations.
- Evidence directly related to the allegations isn't necessarily relevant evidence.
- Includes evidence that the school does not intend to rely on in reaching a determination.



Stage 4: Assessing the “relevant” evidence

- The investigator drafts an **Investigative Report** that fairly summarizes ONLY the relevant evidence within the **Investigative File**.
- At least 10 days before a hearing, the parties and their advisors must receive the **Investigative Report** for review and response.



Investigative File v. Investigative Report

Investigative File v. Investigative Report



INVESTIGATIVE REPORT
PERSONAL AND CONFIDENTIAL

I. Introduction

[University] is a recipient of federal funding and must comply with Title IX of the Higher Education Act of 1972. Title IX is a federal civil rights law that prohibits discrimination based on sex in any federally funded education program or activity. It applies to students, faculty, and staff members of the university.

[University] Sexual Harassment and Discrimination Policy (the "Policy") prohibits Sexual Harassment and Sex Discrimination in the university's Programs and Activities. The Policy complies with the mandates set forth under Title IX, including the May 2020 Final Regulations issued by the United States Department of Education's Office for Civil Rights. *Sexual Harassment* is a broad term encompassing behaviors based on sex, including (1) Quid Pro Quo Sexual Harassment, (2) Hostile Environment Sexual Harassment, (3) Sexual Assault, (4) Dating Violence, (5) Domestic Violence, and (6) Stalking.

According to Title IX and the Policy, when [University] has actual knowledge of Sexual Harassment, or allegations thereof, and upon the filing of a Formal Complaint alleging Sexual Harassment, it must respond by following the Grievance Procedure and Grievance Process outlined within the Policy.

II. The Formal Complaint

The Complainant filed a Formal Complaint against Respondent. The Formal Complaint alleges that the Respondent engaged in Sexual Harassment, specifically [name offense(s)], in violation of the [University] Sexual Harassment and Discrimination Policy.

III. Jurisdictional Statement

The [University's] jurisdiction over a Formal Complaint attaches when the alleged Sexual Harassment occurred within a University Education Program or Activity and against a person in the United States.¹

The Parties are both [university] students. The Complainant alleges that the Respondent sexually harassed them connected with and surrounding their participation within a university Program or Activity [name specific program or activity]. Accordingly, the Policy has jurisdiction over the Formal Complaint.

IV. Applicable Offense(s)

- List offenses and their definitions

V. Supportive Measures

- Explain supportive measures discussed and those put in place for each party.

¹ See 2020 Title IX Regulations, 34 C.F.R. § 106.30.



What is "*Relevant Evidence*?"

Evidence is *relevant* when...

...it may aid a decisionmaker in determining whether the alleged sexual harassment/discrimination occurred.

**See June 23, 2022, proposed regulations.*



Evidence Not *Relevant*

Evidence that is NOT *relevant* or is otherwise precluded from the grievance process:

- i. A Party's treatment records, unless have consent. §106.45(b)(5)(i)
- ii. Information protected by a legally recognized privilege, unless have consent. §106.45(b)(1)(x)

- iii. Questions or evidence about a Complainant's sexual predisposition, or about a Complainant's prior sexual behavior unless it meets one of two limited exceptions. §106.45(b)(6)(i)-(ii) ("Rape Shield" protections)
 1. That someone other than the Respondent committed the conduct alleged by the Complainant, or
 2. If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent.



Cannot exclude *relevant* evidence

"...A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence."

Final Regulations, Preamble, p. 834-835 (Federal Register Version)

Relevance v. Weight



ACTIVITY



Scenario

What evidence will you include in the Investigative File?

QUESTIONS?



#9

Stage 5: Drafting the Investigation Report



Report Outline

Outline of Investigative Report

- Explanation of alleged misconduct
- Applicable offenses
- Description of procedural steps taken during investigation*
- Evidence obtained
- Witnesses interviewed
- Supportive measures (whether they were/were not provided)
- Jurisdictional statement
- Summary of relevant evidence



- OR -

§106.45(b)(5)(vii).



Investigative report may include

- Identification of undisputed facts, corroborated facts and contested/disputed facts.
- Analysis of the relevant evidence, including a credibility analysis.
- Recommended findings or conclusions.



“The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative process.”

Final Regulations, Preamble p. 1059 (Federal Register Version).



Summarizing – Example #1

How to summarize the relevant evidence within the Investigative Report:

1. Provide the allegations as stated in Notice of Allegations.
2. Cut and paste the relevant testimony and evidence from the Investigative File into the Investigative Report.
3. Explain the undisputed facts.
4. Explain the contested facts, or facts in dispute.
5. Explain the evidence that appears to corroborate or refute the testimony and allegations.

- OR -



Summarizing – Example #2

“The Complainant alleges that the Respondent raped them in the Complainant’s dorm room when the Complainant was incapacitated due to alcohol consumption and unable to consent to sexual activity.

The Respondent insists that the Complainant was “fine” and an active participant during sexual activity. The Respondent claims that the Complainant was playful and joking around as they walked to the Complainant’s dorm room. Respondent also claims that the Complainant initiated sexual activity with the Respondent as soon as they entered the room.

The Respondent’s claim about the parties’ interactions while walking to the Complainant’s dorm room is inconsistent with the dorm’s video footage. The video shows the Complainant stumbling and staggering as they walked. The Complainant then falls to the ground. The Respondent picks up the Complainant, who appears unconscious, and carries the Complainant to the dorm room.”

RESOURCES

See Sample Outline for Investigative Report in your Resources

INVESTIGATIVE REPORT

PERSONAL AND CONFIDENTIAL

I. Introduction

[University] is a recipient of federal funding and must comply with Title IX of the Higher Education Act of 1972. Title IX is a federal civil rights law that prohibits discrimination based on sex in any federally funded education program or activity. It applies to students, faculty, and staff members of the university.

[University] Sexual Harassment and Discrimination Policy (the "Policy") prohibits Sexual Harassment and Sex Discrimination in the university's Programs and Activities. The Policy complies with the mandates set forth under Title IX, including the May 2020 Final Regulations issued by the United States Department of Education's Office for Civil Rights. *Sexual Harassment* is a broad term encompassing behaviors based on sex, including (1) Quid Pro Quo Sexual Harassment, (2) Hostile Environment Sexual Harassment, (3) Sexual Assault, (4) Dating Violence, (5) Domestic Violence, and (6) Stalking.

According to Title IX and the Policy, when [University] has actual knowledge of Sexual Harassment, or allegations thereof, and upon the filing of a Formal Complaint alleging Sexual Harassment, it must respond by following the Grievance Procedure and Grievance Process outlined within the Policy.

II. The Formal Complaint

The Complainant filed a Formal Complaint against Respondent. The Formal Complaint alleges that the Respondent engaged in Sexual Harassment, specifically [name offense(s)], in violation of the [University] Sexual Harassment and Discrimination Policy.

III. Jurisdictional Statement

The [University's] jurisdiction over a Formal Complaint attaches when the alleged Sexual Harassment occurred within a University Education Program or Activity and against a person in the United States.¹

The Parties are both [university] students. The Complainant alleges that the Respondent sexually harassed them connected with and surrounding their participation within a university Program or Activity [name specific program or activity]. Accordingly, the Policy has jurisdiction over the Formal Complaint.

IV. Applicable Offense(s)



Title IX Coordinator's Review

- After the parties have reviewed and responded to the investigative report, the Title IX Coordinator determines next steps.
- Following the investigative process, formal complaints of sexual harassment may:
 - Be dismissed entirely or just certain allegations (§106.45(b)(3)(i,ii)),
 - Be resolved through the informal resolution process, or
 - Proceed to the hearing process.

QUESTIONS?

TAKEAWAYS

- Remember to always rely on your institution's policy and procedures as it relates to your investigative process protocol.
- Be as thorough as possible.
- Remain neutral, objective, and autonomous.
- Ensure an equitable investigative process
- Uphold party rights within the investigative process

TAKEAWAYS



For more training on how to draft the Investigative Report:

**AI On-Demand Recording:
[The 5 Stages of Preparing Your Title IX Investigative Report](#)**



#10

Testifying at the Hearing



Live-Hearing

- For postsecondary institutions, the institution's grievance process must provide for a live hearing.
- At the live hearing, each party's advisor must be allowed to ask the other party and any witnesses all:
 - Relevant questions
 - Follow-up questions
 - Questions challenging credibility (i.e., cross-examination).
- Questioning must be conducted directly, orally, and in real time by the party's advisor of choice.

§106.45(b)(6)

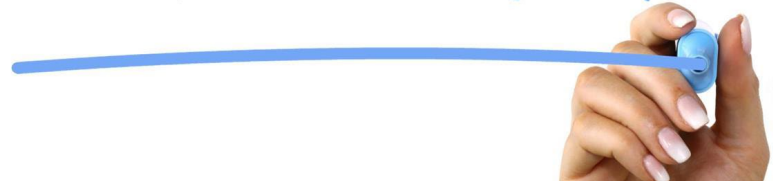


Testifying at the Hearing

Investigators will likely testify at the hearing.

- Investigators may “present” the case.
- Investigators may be questioned by the decision-maker(s).
- Investigators may be questioned and cross-examined by party advisors.

TESTIFY





Cross-Examination

What is cross-examination? Questioning designed to:

- Allow the parties to probe/challenge the credibility, plausibility, and reliability of statements asserted by parties/witnesses.
- Give the decisionmaker(s) the opportunity to observe parties and witnesses answer questions, including those challenging credibility, to serve a truth-seeking purpose.
- Permit parties to pose questions intended to promote the asking party's perspective with respect to the allegations at issue and bring out additional facts and details about the alleged incident.



Leading Questions

- Attorney advisors may conduct cross-examination by using leading questions.
 - Leading (or closed) questions generally solicit a “yes” or “no” answer and essentially suggests the answer to the question.



Investigator as Witness

The investigator as a witness:

- May testify about the procedural steps taken during the investigation.
- May be asked why the investigator did or did not interview a specific witness, pursue a specific topic during the questioning of a party or witness, or obtain certain evidence.
- May be asked about observations made during the evidence collection phase of the investigation.
- Should not be asked for opinion on outcome.



5 Tips for Testifying and Surviving Cross-Examination

1. Prepare
2. Answer the Question Asked
3. Be Positive and Confident
4. Responding to Leading Questions
5. Control Yourself





#1 – Prepare

- Review all the evidence you collected during the investigation.
- Review the procedural steps taken during the investigation.
- No need to memorize! Bring information with you to the hearing and ask to refer to it if necessary.



#2: Answer the Question Asked

- Listen carefully to the questions you are asked and answer that question. Explain yourself, if necessary.
- If you don't understand the question, have it repeated or clarified before you answer.
- *Remember:* Wait to answer questions from advisors until decision-maker tells you to do so.



#3: Be Positive and Confident

- Avoid speculation.
- If you don't know, say you don't know.
- If you don't recall, say you don't recall. (If there is information available to refresh your recollection, ask to review that information before answering the question.)



#4: Responding to Leading Questions

- If questions can't be fully answered with a "yes" or "no," it's okay to explain your answer.
 - If advisor tries to cut you off before you finish your answer, ask the decision-maker to allow you to finish answering the question.



#5: Control Yourself

- Stay calm, cool, and collected
- Avoid arguing with the decision-maker(s) or advisors
- Take nothing personally
- Remain courteous but firm if your professional competency or your work product is challenged

QUESTIONS?

Thank you!

Please remember to complete the *event evaluation*.
Your comments will help us continually improve the
quality of our programs.