



Association of
Title IX Administrators

Investigation Foundations for Higher Education

Training and Certification Course

WELCOME!

- Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by the QR code or visiting www.atixa.org/atixa-event-lobby in your internet browser.
- Links for any applicable course evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
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Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

Education Civil Rights Overview

Education Civil Rights Laws

Title VI of the Civil Rights Act

Title VII of the Civil Rights Act

Title IX of the Education Amendments of 1972

Americans with Disabilities Act

Section 504 of the Rehabilitation Act

Section 304 of the Violence Against Women Act



Civil Rights Equity

- Civil rights laws are equity laws
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
 - Equity focuses on providing support and resources to reduce disparities in access to the education program
 - Civil rights laws seek to remedy the inequities discrimination and harassment create

Essential Compliance Elements

The requirement to **Stop, Prevent,** and **Remedy** guides University response in its equity and compliance

1

STOP discriminatory conduct

2

PREVENT
recurrence, on both individual and University levels

3

REMEDY the effects of discrimination, for both individual and community



Discrimination

- Inequitable treatment on the basis of a protected characteristic.
- Discrimination often takes the form of decisions made regarding an individual or individuals.
 - Admissions/employment
 - Benefits/services
 - Participation

Harassment

- Unwelcome conduct on the basis of a protected characteristic.
- Harassment often takes the form of interpersonal conduct.
 - Hostile environment
 - Violent
 - Humiliating
 - Abusive

Retaliation

- Retaliation means intimidation, threats, coercion, or discrimination against any person by a(n):
 - Student, employee, University, or person authorized by the University to provide some sort of aid, benefit, or service,
 - For the purpose of interfering with any civil right or
 - Because the person has:
 - Made a report or complaint,
 - Testified, assisted, or participated or refused to participate in any civil rights process.

Title IX Overview

Title IX Compliance Oversight

Who is the Title IX Coordinator (TIXC)?

- Role mandated by Title IX regulations
- Oversees institutional Title IX compliance
- Responsibilities fall into two categories:
 - Responding to reports or complaints of sexual harassment and sex discrimination
 - Leading efforts to ensure gender equity across the entire institution



Title IX Scope

Sex Discrimination

- Sex/Gender Discrimination
- Program Inequity

Retaliation

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

Title IX Scope

- Education program or activity
- Control over the Respondent
- Control over the context of the behavior
- Applies to both student and employee complaints



Sexual Harassment Definitions

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



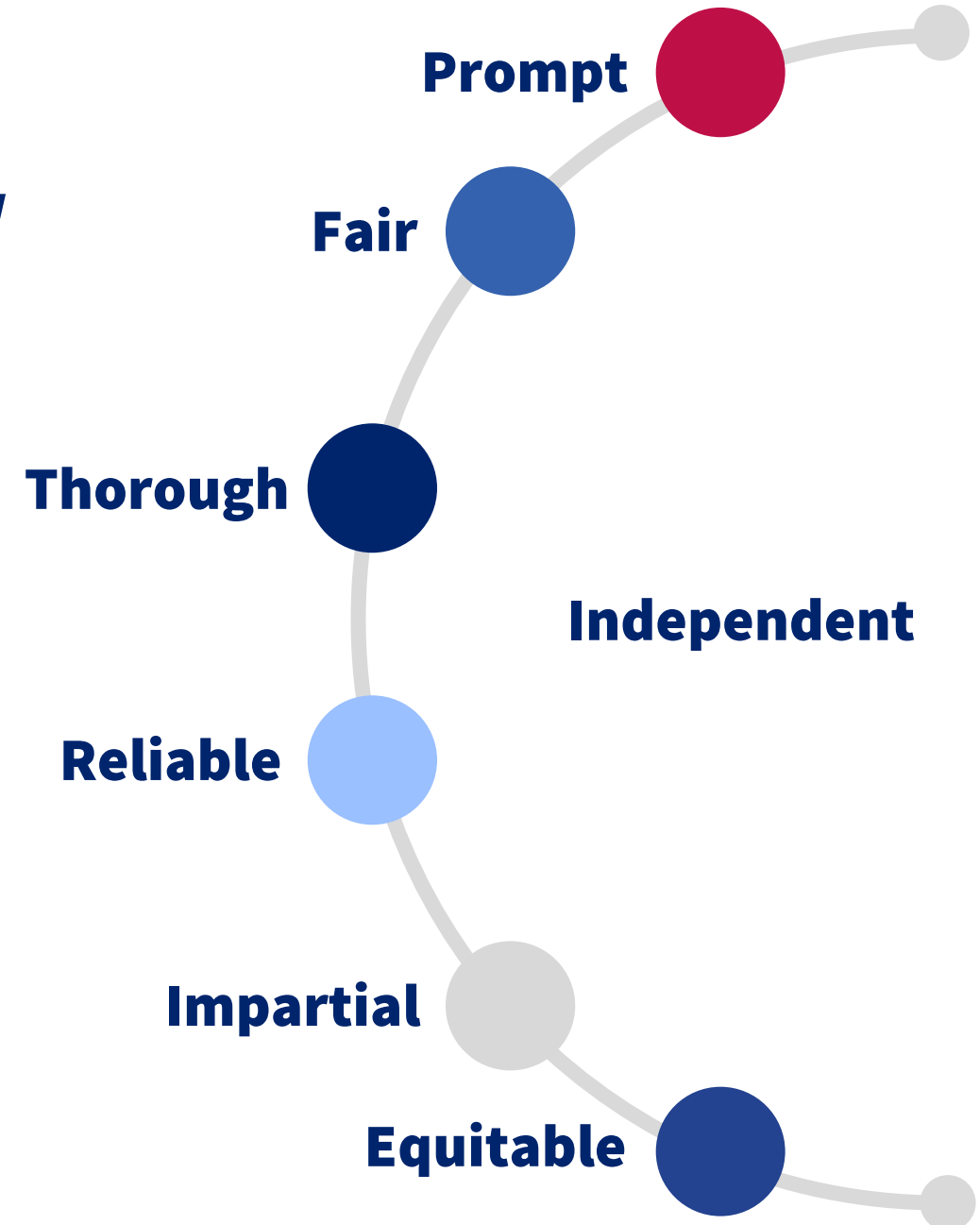
Definitions: Consent

- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- ATIXA's Definition:
 - Informed, knowing, and voluntary (freely given)
 - Active (not passive)
 - Creates mutually understandable permission regarding the conditions of sexual activity
 - No means no, but nothing also means no; Silence and passivity do not equal consent
 - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
 - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
 - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

Civil Rights Investigations Overview

Civil Rights Investigations Overview

- Investigations focus on gathering all available and relevant information
- The institution is responsible for gathering evidence—not the parties

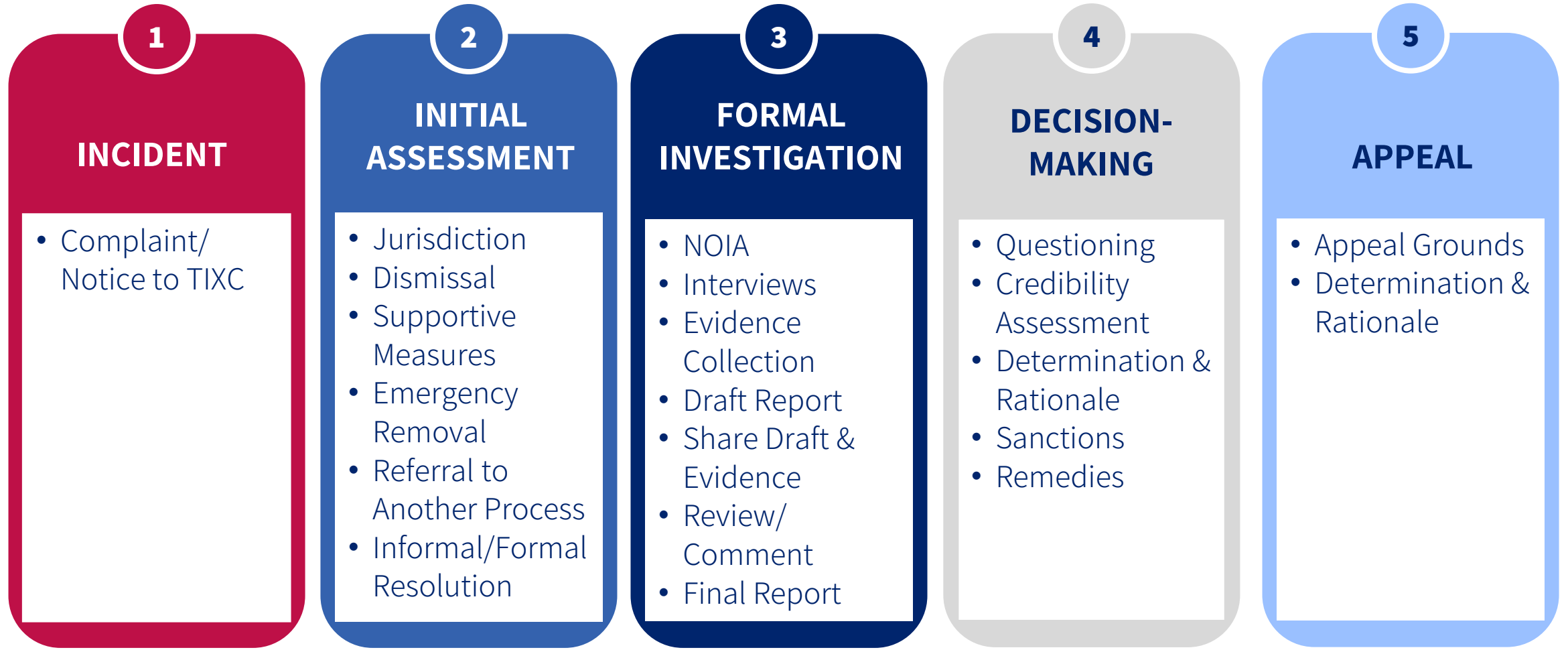


Bias and Conflicts of Interest

- Investigators must not have a conflict of interest or bias for or against the following:
 - Complainants
 - Respondents
 - Specific individuals involved with a complaint
 - Subject matter or details of the complaint itself
- Remember, Investigators have no “side” — their investment is in the integrity of the process

ATIXA'S Recommended Formal Grievance Process

Formal Grievance Process Overview



Title IX Grievance Process Overview

- Title IX investigations may examine allegations of sexual harassment, sex discrimination, or program inequity
- ATIXA's recommended investigation process is comprised of 10 steps over three phases:
 - Pre-investigation
 - Investigation
 - Post-investigation
- Not all phases involve the Investigator
- TIXC is responsible for Title IX Investigator oversight and supervision



Investigation Oversight and Supervision

TIXC responsibilities include:

- Appointing Investigators and ensuring training
- Helping Investigators to strategize
- Ensuring timeline compliance
- Overseeing recordkeeping
- Serving as primary point of contact for parties



Title IX Grievance Process Overview

Prompt Resolution

- Complete without undue delay
- Title IX regulations do not define “prompt”
 - 60 business days is a good guide
 - Investigations vary widely in complexity and pacing
- Grievance process may take longer than expected
 - Anticipate, mitigate, and document delays
 - Communicate with parties regarding delays

Equitable Resolution

- Treat all parties equitably
- Ensure that all parties have opportunity to fully participate

Title IX Grievance Process Overview

Rights of the parties during the grievance process:

- Present witnesses
- Present inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Be accompanied by Advisor of their choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review directly related evidence and investigation report

Investigation Overview

10 Steps of Investigations:

1. Receive Notice/Complaint
2. Initial Assessment & Jurisdiction Determination
3. Determine Basis for Investigation
4. Notice of Investigation and Allegations (NOIA)
5. Establish Investigation Strategy
6. Formal Comprehensive Investigation
7. Draft Investigation Report
8. TIXC Reviews Draft Report & Evidence
9. Parties Review Draft Report & Evidence
10. Final Investigation Report

INCIDENT INVESTIGATION
SUMMARY

Incident Date:

Review Date:

by:

Summary:

Root Causes:

Pre-Investigation

Pre-Investigation Steps

1

Notice/Complaint

2

**Initial Assessment
& Jurisdiction
Determination**

3

**Determine Basis
For Investigation**

Step 1: Notice/Complaint

- Institution receives a report, knowledge, or complaint of alleged harassment or discrimination
- TIXC is point person to receive reports and complaints, including referrals from mandated reporters
- **Report:** Any information that indicates a potential policy violation
- **Formal Complaint:** A written request for the institution to initiate its Formal Grievance Process
 - Signed by the Complainant
 - Could be signed by the TIXC

Step 2: Initial Assessment & Jurisdiction Determination

TIXC or designee will perform several steps including:

- Outreach and Intake to potential Complainant
- Jurisdictional Assessment
- Signing a Formal Complaint (if applicable)
 - Pattern, Predation, Threat, Violence, Weapons, Minors, Employee Respondent, Complainant not P/ATP
- Supportive Measures
- Emergency Removal or Administrative Leave (if applicable)
- Dismissal (if applicable)
- Pursuing Informal Resolution (if applicable)

Title IX Jurisdictional Assessment

- TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:
 - Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment or sex/gender discrimination?
 - Who is the Complainant?
 - Who is the Respondent?
 - Does the institution have control over the context of the alleged behavior?
- If an allegation falls outside Title IX jurisdiction, the institution may proceed under another policy (i.e., student conduct)



Informal Resolution

- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for employee-on-student sexual harassment
- IR is not defined by regulations
- Available at TIXC's discretion, at any time prior to a final determination
- Investigators should consult with TIXC to determine whether an investigation will proceed while IR is pursued
- IR facilitators must receive training, be free of bias or conflicts of interest
 - ATIXA recommends IR Facilitators not serve in any other roles for the same complaint

Step 3: Determine a Basis for Investigation

There are three bases for civil rights investigations:

- **Incident:** a specific incident or period
 - May involve one or multiple alleged violations
 - Sexual Harassment or Retaliation
 - Disparate Treatment or Disparate Impact
- **Pattern:** repetitive or similar behaviors or targets by the same Respondent over a period
 - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
 - 1975 regulatory framework
 - May have no identifiable Respondent

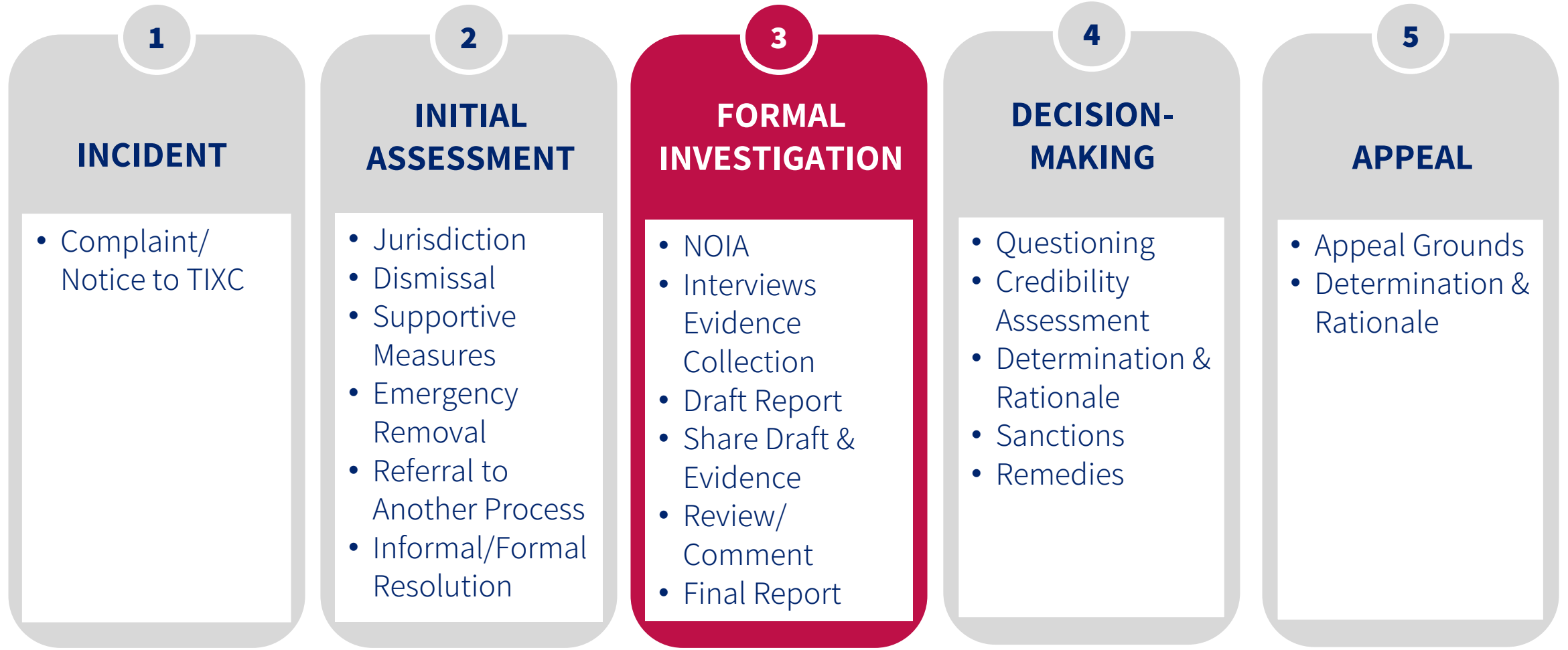
Investigation Scope

- TIXC determines the scope of the investigation
- **Scope** refers to the allegations, timeframes, and parties subject to the investigation
- Considerations:
 - Allegations outside of jurisdiction
 - Individual vs. Group
 - Multiple Complainants or Respondents
 - Counter-complaints
- May need to adjust scope during process



Investigation

Investigation



Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment & Jurisdiction Determination
3. Determine Basis for Investigation
- 4. Notice of Investigation and Allegations (NOIA)**
- 5. Establish Investigation Strategy**
- 6. Formal Comprehensive Investigation**
- 7. Draft Investigation Report**
- 8. TIXC Draft Report & Evidence Review**
- 9. Parties Draft Report & Evidence Review**
- 10. Final Investigation Report**

INCIDENT INVESTIGATION SUMMARY

Incident Date:
Review Date:
by:
Summary:
Root Causes:

Step 4: Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) letter is sent to all parties simultaneously
- The NOIA includes:
 - Notice of the allegations and known details, such as identities or the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options

Step 4: Notice of Investigation and Allegations

The NOIA must outline the parties' rights in the Formal Grievance Process:

- To present witnesses
- To present inculpatory and exculpatory evidence
- To freely discuss the allegations
- To be accompanied by an Advisor of their choice
- To receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- To review all relevant and directly related evidence before the investigation report is finalized

Step 4: Notice of Investigation and Allegations

The NOIA must also include:

- Presumption that Respondent is not responsible
- Include or reference current policy and procedures
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise or change during the investigation

Recordkeeping

Recordkeeping

- Investigator is responsible for developing and maintaining an **Investigation File** through the duration of the investigation
- Investigation File includes:
 - Copies of the policies and procedures in place at the time of the incident(s) and at the time of the investigation
 - Original NOIA and any subsequent NOIA updates
 - File for each party and witness
 - Approved interview transcripts
 - Associated evidence (e.g., screenshots, written statements)
 - Correspondence with the Investigator(s)

Recordkeeping

- Investigation File includes:
 - Collected evidence and evidence log
 - Background information (education, employment, etc.)
 - Witness flowcharts
 - Contact log
 - Investigator notes
 - Timelines for incident and investigation
 - Investigation Report
- Investigation File becomes part of the **Comprehensive Complaint File**
- Title IX-related records must be maintained for a minimum of **seven years**

Contact Log

- All forms of contact with any party, witness, or third party regarding the complaint or associated needs
- Date, time, method of contact, topics discussed, determinations, and any agreed upon action steps for each interaction related to the Complaint

Contact Log Example

CONTACT LOG

Staff Member: Alicia Harrison

Date(s) for Communication Log: January 2023 to March 2023

Communications Log

DATE	TIME	NAME OF CONTACT	TYPE OF COMMUNICATION (EMAIL, PHONE, IN PERSON)	COMMUNICATION NOTES	RESOLUTION PROVIDED AND FOLLOW-UP NEEDED
01/25/2023	1:00pm	Sam Smith	Phone	Discussed getting emails from IT	Received emails from IT on 01/26/2023
01/27/2023	2:00pm	Sally Harris	Email	Sent an email to Complainant to schedule <u>interview</u> .	Scheduled interview with Complainant for 01/29/2023.
01/29/2023	3:00pm	Sally Harris	In Person	Investigation Interview	Interviewed Complainant – send transcript to Complainant for verification.

Evidence Log

- All evidence gathered with:
 - Description
 - Date of receipt
 - Source,
 - Method of receipt
- Any evidence verification/authentication information

Evidence Log Example

EVIDENCE LOG

Staff Member: Alicia Harrison

Date(s) for Communication Log: January 2023 to March 2023

DATE OF RECEIPT	SOURCE	METHOD OF RECEIPT	TYPE	DESCRIPTION	AUTHENTICATION
01/25/2023	Sam Smith	Email	Security video footage; Thumb drive	Elevator video footage from 12/10/22 9:10 pm to 10:10 pm	Closed circuit from Public Safety
01/27/2023	Sally Harris	Social Media Screenshot	Social media screenshot	Post made from 12/10/22 by Respondent at 9:22 pm	
01/29/2023	Sally Harris	In Person	Call record	Phone call log from Complainant's phone carrier	Copy of the phone record from the Complainant's record

Investigation Timeline

- Investigators begin documenting an investigation timeline upon assignment of the formal complaint
- The comprehensive timeline should include:
 - Dates of all significant investigation steps
 - Dates of all meetings and interviews
 - Evidence collection and review periods
 - Report writing and review periods

Investigation Strategy and Interviews

Step 5: Establish Investigation Strategy

Investigator(s) consult with TIXC to strategize and plan the investigation:

- Elements of the specific policy provision(s) alleged to have been violated
- Challenges with the type of complaint and the parties involved
- Preliminary undisputed and disputed facts and their significance
- Initial witnesses and interview order
- Other types of possible evidence and the plan to acquire such evidence
- Anticipated obstacles and obstructions
- A working timeline for the investigation

Step 5: Establish Investigation Strategy

- Planning considerations:
 - Process delays
 - Coordination with law enforcement
 - Interview sequencing
 - Evidence collection
 - Anticipate obstacles/obstructions
 - Counter-complaints
 - Sharing information with parties and witnesses during the investigation

Process Delays

- Investigations must be completed within a reasonably prompt timeframe; avoiding undue delays
 - Investigations must proceed during academic breaks
 - Investigators should consult with TIXC if circumstances cause more than a short process delay
- Provide parties with written notice and rationale for any delays
- Parties may request reasonable extensions on a case-by-case basis
 - Grant or deny extensions equitably
 - Extensions must be documented

Coordinating with Law Enforcement

- Law enforcement may also be investigating one or more of the allegations in the Title IX investigation
- Law enforcement may request that the institution pause or stop its investigation; however, the Title IX investigation cannot be unreasonably delayed
- Pausing for a reasonable time to permit law enforcement to gather evidence is permissible
- Criminal investigation cannot substitute for the Title IX investigation



Interview Sequencing

- Conduct interviews as promptly as possible to capture fresh recollections (but not before NOIA)
- Identify an initial witness list and solicit additional witness suggestions from parties and other witnesses
- Investigator retains discretion to determine whether a suggested witness has relevant information
 - When unsure, err on the side of conducting the interview

Evidence Collection

- Active process to gather evidence
- Identify potential sources of information
- Document efforts to gather, even when not successful



Counter-Complaints

- Respondents may file a **counter-complaint** of sexual harassment or sex discrimination against the Complainant if there is Complainant conduct that they wish to report
- Reporting other alleged misconduct (e.g., drug dealing, academic misconduct) is not considered a counter complaint
- May occur prior to, during, or after the investigation of the original complaint

Information Sharing

- Information sharing practices must balance transparency, privacy, and strategy, as well as the parties' rights
- Witnesses may have limited or no knowledge about the complaint itself
- Witnesses may or may not know the parties or other witnesses
- Some information sharing will be necessary
- The parties will have access to all relevant and directly related information at the conclusion of the investigation

Formal Investigation

Step 6: Formal Comprehensive Investigation



THOROUGH



RELIABLE



IMPARTIAL



PROMPT



FAIR



EQUITABLE

Party and Witness Investigation Concerns

Confidentiality vs. Privilege vs. Privacy

1

CONFIDENTIALITY

Those who receive reports from students (and sometimes employees) and need not report to the TIXC

2

PRIVILEGE

A legal obligation, such as an attorney giving advice in an attorney/client relationship or clergy providing pastoral advice

3

PRIVACY

Only disclosing the allegations to those who need to know, but cannot guarantee confidentiality

Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
- “Of choice” truly means anyone
- Investigators may establish participation ground rules, if applied equitably
- Parties may request that the institution provide an Advisor for hearing
 - Institutions may choose to appoint earlier in process
- Advisors may ask questions of the other party and any witnesses on behalf of the party they advise during live hearings



Pre-Interview Planning

- Before scheduling interviews, consider:
 - Interview location
 - Interview scheduling constraints
 - Interview participants
 - Interview preparation
- Must provide written notification to parties with sufficient time to prepare
 - Date, time, location, participants, and purpose
- Cannot mandate participation in interviews
- It can be beneficial to conduct interviews in person, when possible, but videoconferences are common
- Investigator should always prepare initial questions in advance, but remain flexible

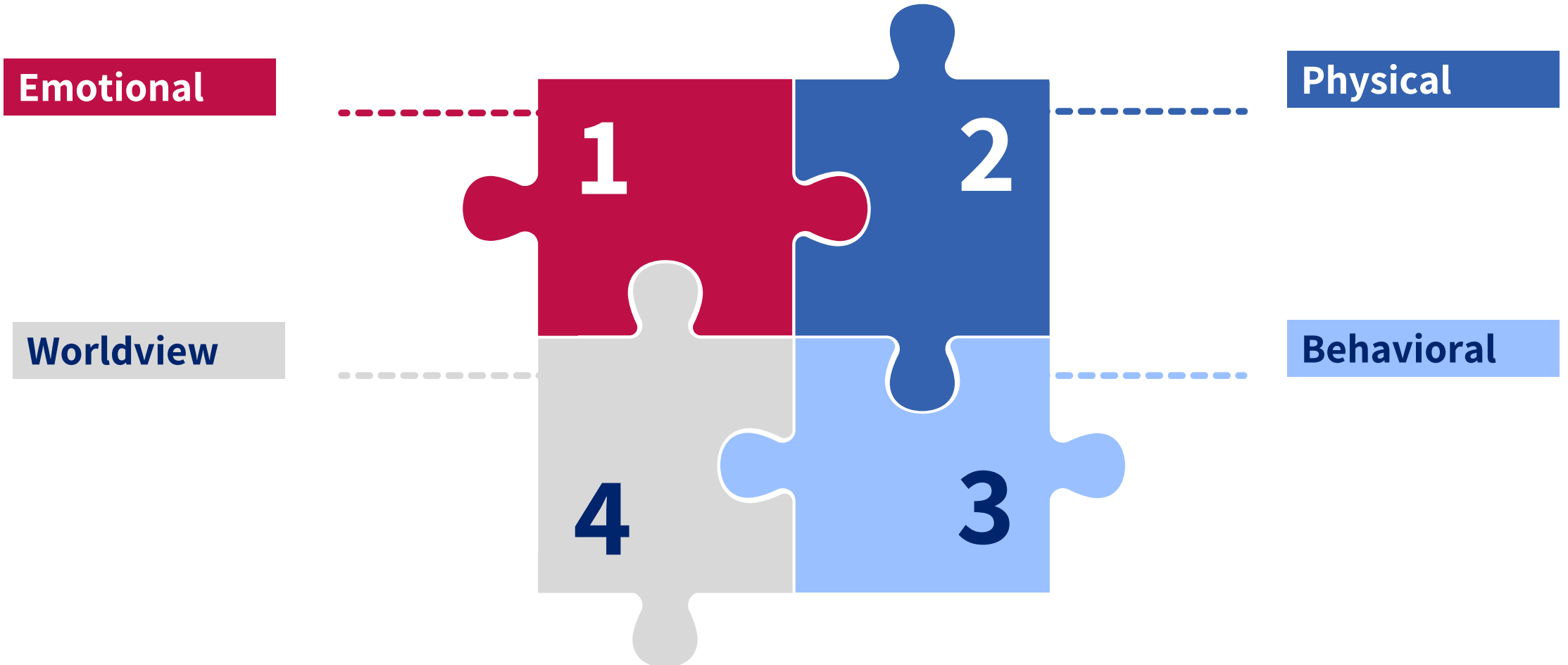
Building Rapport

- GOAL: Interviewee trusts that you are neutral and impartial
- Investigators can help set the tone for a productive interview
- Maintain professionalism
- Provide transparency about expectations and the process
- Balance neutrality with compassionate approach
- Ask questions in a straightforward, non-judgmental manner
- Follow up in a timely manner, if necessary
- Use a trauma-informed approach to working with all parties and witnesses

Trauma-Informed Practices

- **Trauma** is exposure to an event or events that create a real or perceived threat to life, safety, sense of well-being and bodily integrity
 - Acute, chronic, or complex
 - Neurological, biological, psychological, social, and emotional impacts
 - Developmental, intergenerational, historical, secondary, vicarious, or collective
 - Responses to trauma can vary, depending on a variety of factors
- Provide all persons with support that makes TIX services and processes accessible, including those who may have experienced trauma

Impacts of Trauma



Trauma-Informed Practices

- Key principles of trauma-informed practice:
 - Safety
 - Trustworthiness and transparency
 - Collaboration and mutuality
 - Empowerment, voice, and choice
 - Cultural, historical, and gender issues
- **ATIXA Position Statement:** Application of trauma-informed practices in our field has gotten way ahead of the actual science
 - **ATIXA Recommendation:** Incorporate trauma-informed investigation and interviewing methods without compromising gathering credible, relevant evidence
 - Trauma-informed practices should not significantly influence evidence evaluation

“The Spiel”

- Establishing rapport creates a conducive interview environment
- “The Spiel” helps an interviewee to understand the Investigator’s role and the process

- Investigator introduction and role
- Purpose of investigation
- Role of the Advisor
- Interview questions
- Notetaking practices
- Commitment to privacy
- Witness-specific information
- Post-interview steps
- Interview expectations
- Relevant policies
- Acknowledge difficulty
- Retaliation reminder

Interviewing Skills

- Investigators build and improve skills over time and with practice:
 - Appropriate questioning
 - Body language and non-verbal communication
 - Active listening
 - Seeking clarification
 - Identifying gaps



Questioning Considerations

- An interview is a conversation designed to elicit information in a non-accusatory manner
- Start with broad questions, but focus on timelines and details as well
- Explore all gaps in information; answer all questions
- Ask purposeful questions:
 - What do I need to know?
 - Why do I need to know it?
- Use policy definitions to inform questions
- Avoid unnecessary repetition or traumatic re-triggering
- Choose or blend effective questioning strategies/methodologies

Questioning Tips

- Listen carefully
- Seek to clarify terms that have multiple meanings
 - “We hooked up” or “She was acting weird”
- Avoid:
 - Accusatory or argumentative questions or tone
 - Confusing questions
 - Blaming questions
 - “Double-barreled” questions
 - Evaluative responses
 - Sanitizing language (use the terms used by the interviewee)

Consent Construct: Three Questions

1. Was **force** used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant **incapacitated**?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated
3. What **clear words or actions** by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Interview Challenges: Resistance, Reluctance, and Lying

- Offer a reminder of Investigator's role as a neutral fact-gatherer
- Maintain rapport and avoid accusation
 - “Help me understand...”
 - “I think I’m missing something...”
 - “Can you tell me more about that?”
- Use language mirroring
- Allow opportunity for interviewee to restate
- Review retaliation, amnesty policies, expectation of truthfulness

Final Questions for Interviews

- “Is there anyone else that you think we should talk to?”
- “Are there any questions you expected that we didn’t ask?”
- “Is there anything else you think we need to know?”
- FOR THE PARTIES: “Are there any questions that you would like us to ask any other witness or the other party(ies)?”
- Document questions and answers provided
- Keep a running list of the questions suggested/requested by each party
 - Whether and when the question was asked
 - Rationale for not asking any question(s) based on irrelevance or impermissible evidence

Interview Documentation and Review

- Maintain interview transcripts or written summaries
 - **Transcript:** word-for-word documentation of a recorded interview
 - **Summary:** Investigator's summation all information gathered during entire interview (may be several paragraphs or pages, depending on interview length)
- Recording is an increasingly common practice
- Parties and witnesses should be invited to review their interview transcript/summary
 - Verify accuracy, clarify where needed, and provide additional information

Understanding Evidence

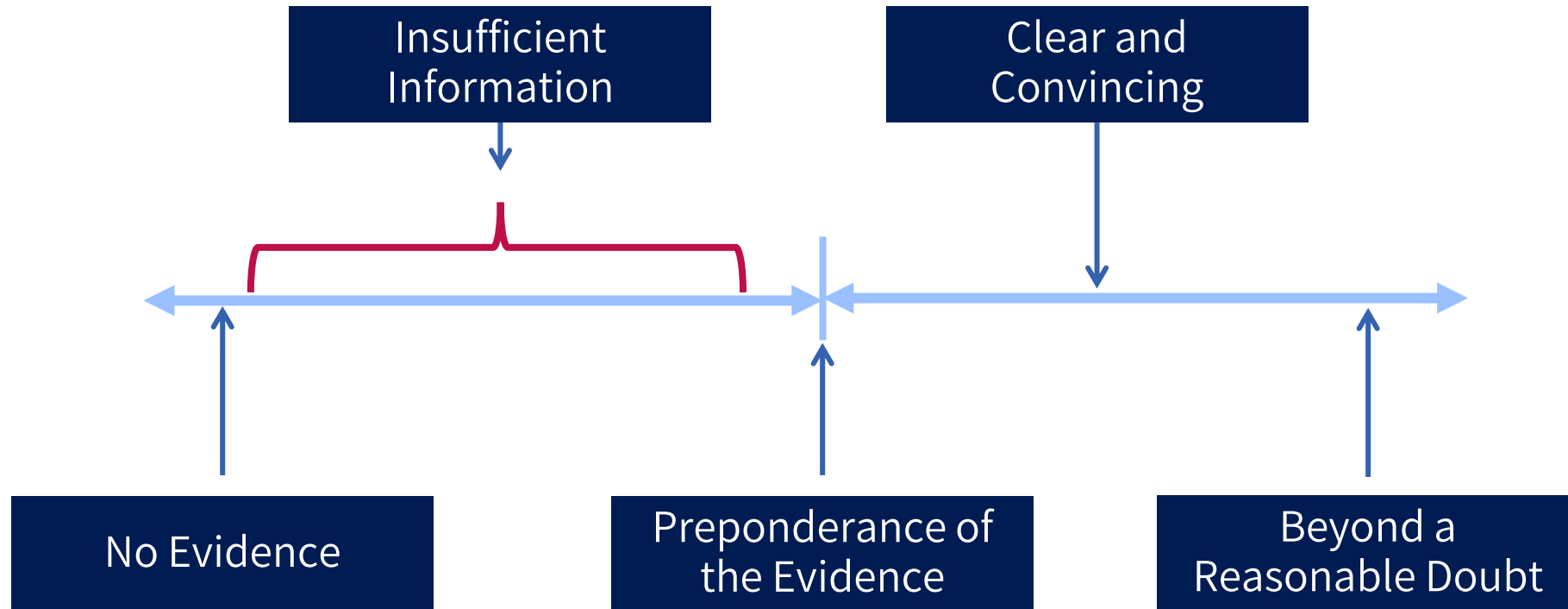
- Duty to collect and objectively evaluate all evidence that is relevant to the complaint
- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant evidence** is evidence that tends to prove or disprove the underlying allegations
 - Inculpatory and exculpatory evidence
- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory



Standard of Evidence

- Two options:
 - Preponderance of the evidence
 - Clear and convincing evidence
- Standard of evidence must be consistent for all formal complaints of sexual harassment in all policies
- Must apply the same standard for complaints against students and employees, including faculty
- Investigator must be familiar with the standard in institutional policy
- ATIXA recommends the preponderance of the evidence standard

Standard of Evidence



Preponderance of the Evidence is the current industry standard.

Types of Evidence

Documentary Evidence

Supportive writings or documents

Electronic Evidence

Photos, text messages, and videos

Real Evidence

Physical objects

Direct or Testimonial Evidence

Personal observation or experience

Circumstantial Evidence

Not eyewitness, but compelling

Hearsay Evidence

Statement from outside the interview presented as truthful

Character Evidence

Evidence of a person's character or character traits

Specific Evidence Issues: Privileged and Medical Information

The party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist

Specific Evidence Issues: Rape Shield Provision

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - If offered to prove consent with respect to prior consent with the Respondent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

Credibility

- **Credibility** is largely a function of corroboration and consistency
- **Credibility Assessment** involves evaluating the extent to which evidence is believable and reliable (accurate or truthful)
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Credibility Assessment

Consider the following elements to establish credibility:

- **Corroborating Evidence:** evidence that can be verified by an independent and objective individual
- **Inherent Plausibility:** information that is believable on its face
- **Motive to Falsify**
- Additional elements that investigators should consider, but are commonly less probative are:
 - **Past Record**
 - **Demeanor**

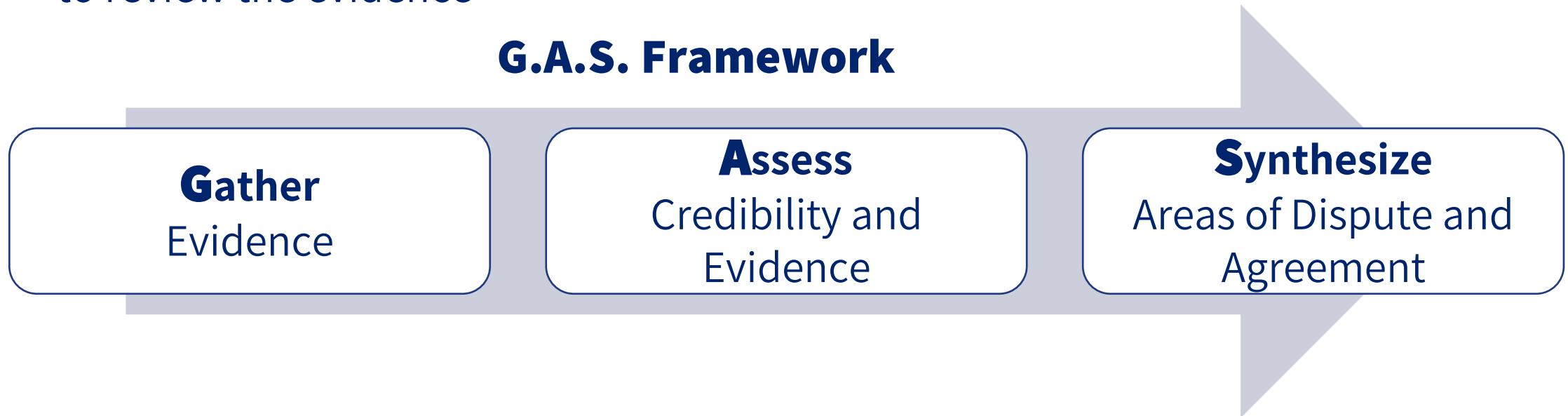
Evidence Authentication

- Not all evidence has the same degree of credibility
 - Less credible evidence may be less reliable evidence
- Investigator should seek the highest quality evidence available
- Investigators should try to authenticate all evidence provided
 - Check for possible fabrication of evidence
 - Corroborate information between witnesses
 - Try to obtain complete, rather than partial, records when possible

Step 7: Draft Investigation Report

- Title IX requires a written investigation report that fairly summarizes all relevant evidence and the investigation
- ATIXA recommends sharing draft report in Step 8 when the parties are entitled to review the evidence

G.A.S. Framework

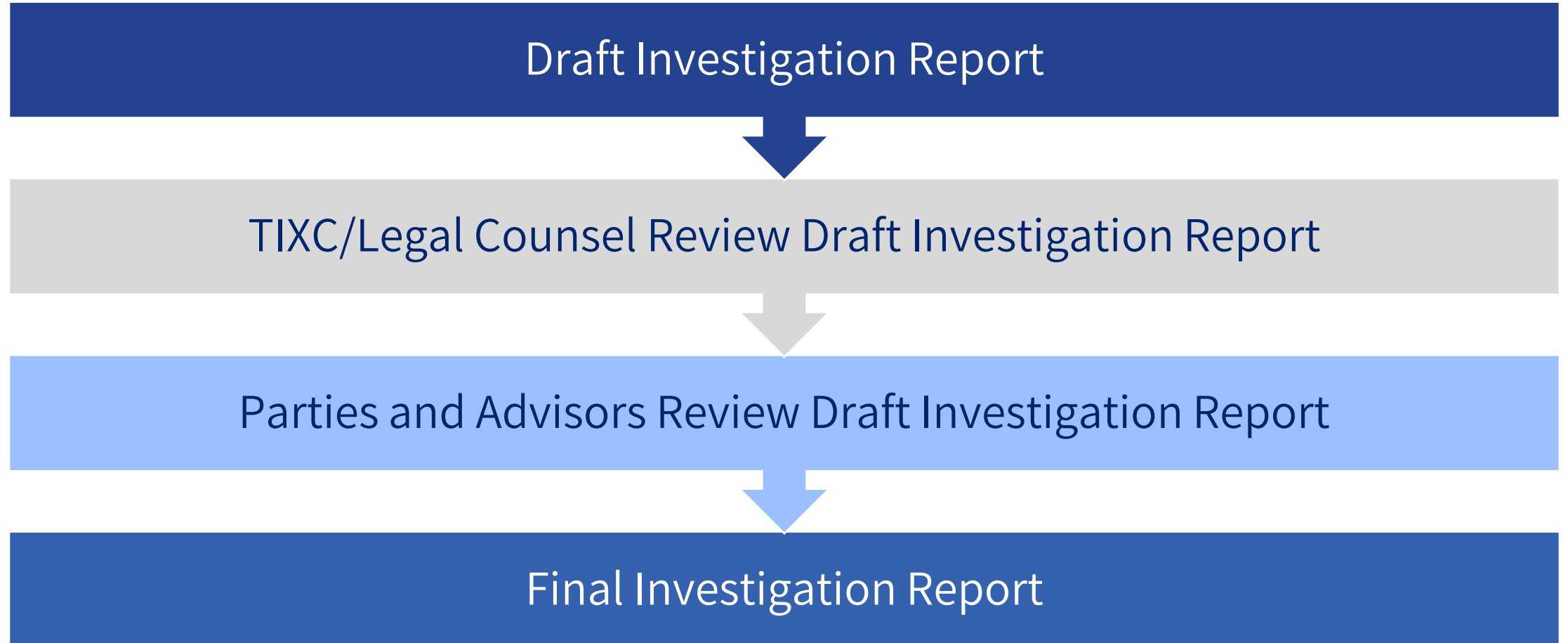


Investigation Report Elements

Comprehensive investigation report typically includes:

- Complaint and party information
- Jurisdiction
- Scope
- Applicable policies
- Investigation timeline
- Summary of evidence
- Analysis
 - Credibility Assessment
 - Disputed and non-disputed facts
- Conclusion
- Appendices

Investigation Report Steps



Step 8: Report Review

- TIXC and/or legal counsel reviews draft investigation report prior to providing it to the parties
- Reviewer(s) identifies gaps, logic leaps, typographical errors, and substantive issues
- Reviewer(s) should not rewrite any section of the report but can ask questions and provide suggestions
- Investigator should review and incorporate helpful edits and suggestions
- Institutions may elect to complete this review after the parties' review or have two separate TIXC/legal counsel reviews



Step 9: Parties and Advisors Review Draft Investigation Report

- Draft report and directly related evidence must:
 - Be sent to each party and Advisor in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
- Investigator must:
 - Allow 10 days for written response
 - Consider parties' feedback and incorporate where appropriate
 - Document rationale for not making recommended changes as appropriate

Step 10: Final Investigation Report

- Institutions determine the final investigation report review process
 - Once finalized, the investigation report is distributed simultaneously to the parties and their Advisors
 - The Title IX office provides the report to the Decision-maker(s)
- Parties and Advisors will be sent the final investigation report for review at least 10 days prior to the hearing

Decision-Maker Mission and Role

Decision-Making Oversight and Supervision

The Title IX Coordinator (TIXC) responsibilities include:

- Appointing Decision-makers (DMs)
- Properly training DMs or ensuring they are trained
- Serving as a resource to DMs on process and procedures
- Ensuring timeline compliance
- Reviewing DM work to ensure thoroughness
- Overseeing recordkeeping
- Serving as primary point of contact for parties



Decision-Maker Role and Responsibilities

Finding the
truth

Providing a
just result

Providing an
educational process

Making a safe
community

Upholding the
institution's policy

Ensuring a fair
process

Protecting the
institution from
liability

Punishing
wrongdoing

Decision-Maker Role and Responsibilities



Decision-Maker Training Requirements

Many Title IX training requirements are covered in this course:

- Definition of sexual harassment
- Scope of the institution's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of relevance for investigations and hearings

Required training that is not covered in this course:

- Use of any technology to be used at a hearing

Decision-Maker Role and Responsibilities

- Decision-makers have **no side**, other than the **integrity of the process**
- DM must have a thorough understanding of:
 - Institutional policy and procedures, including the investigation process
 - Whether you are addressing an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
 - Best practices for asking good questions
 - Decision-making procedures and management
 - Evidence and how to weigh it and apply it to institutional policy by the standard of evidence
 - How to analyze credibility
 - How to make determinations, decide sanctions/remedies, and write a rationale

Decision-Maker Skill Sets

Decision-makers need to be an organized manager and multi-tasker with:

- Effective questioning skills
- Strong writing skills
- Subject matter expertise
- Analytical skills

Analyzing Consent

Definitions: Consent

- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- ATIXA's Definition:
 - Informed, knowing, and voluntary (freely given)
 - Active (not passive)
 - Creates mutually understandable permission regarding the conditions of sexual activity
 - No means no, but nothing also means no; Silence and passivity do not equal consent
 - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
 - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
 - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

The Consent Construct

1. **FORCE:** Was force used by the Respondent to obtain sexual or intimate access?
2. **INCAPACITY:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity

3. **CONSENT:** What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Force

Was force used by the Respondent to obtain sexual or intimate access?

Physical Violence:

- Hitting, restraint, pushing, kicking, etc.

Threats:

- Objective and subjective analysis of the viability of the threat (true threat if public)

Intimidation:

- Implied threat that menaces and/or causes reasonable fear

Coercion:

- Unreasonable amount of pressure for sexual access (isolation, frequency, intensity, and duration)

Incapacity

Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
 - Unable to understand who, what, when, where, why, or how
 - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
 - Insufficient situational awareness
 - Lack of consequential awareness

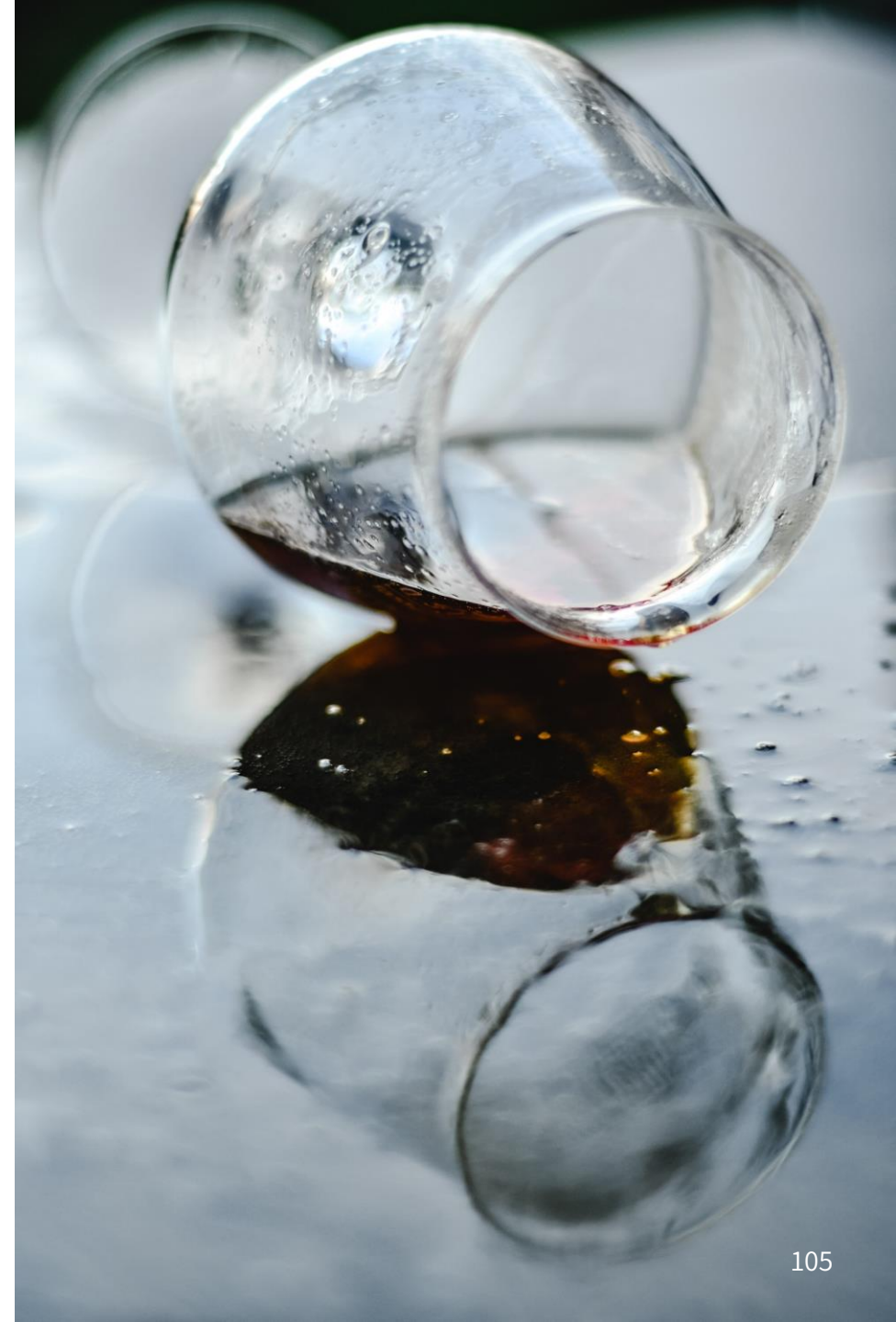
Incapacity

- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Partial blackout must be assessed as well
 - Memory absent, but verbal and motor skills may still function

Evidence of Incapacity: Potential Context Clues

- Slurred speech
- Scent of alcohol on the breath
- Shaky equilibrium; disorientation
- Passing out/unconsciousness
- Throwing up
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)

Incapacitation determination is made contextually **in light of all the available relevant evidence**



Incapacity Analysis

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know, **AND**
 - The Respondent would not have reasonably known of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
 - The Respondent **should have known it (reasonable person)** = policy violation
 - The Respondent's own intoxication cannot be used as a defense

Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
 - If so, was the Complainant acting differently than previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming
 - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant

Consent Analysis

What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

- Evaluate relevant sexual or intimate pattern or history between the parties
- Consider whether verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual
 - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors
- Analysis has objective and subjective elements

Conflicts of Interest and Bias

Conflicts of Interest and Bias

- Decision-makers must **not have a conflict of interest or bias** for or against the following:
 - Complainants, generally
 - Respondents, generally
 - The parties involved with a complaint
 - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none exists in fact
 - Not required, but TIXC may choose to substitute a DM based on perception alone

What's the Difference?

Conflict of Interest

- Conflicts of interest refer to situations in which:
 - An **actual** (or perceived) clash,
 - Between the DM's role and
 - A current or previous relationship/situation with one of the parties
 - That prevents neutrality or objectivity
 - Ex: A residence life professional staff member deciding a complaint filed by a current Resident Assistant on their building staff

Bias

- Bias refers to prejudice for or against a **person or group**, or an unwillingness/inability to be influenced by factual evidence
- A preference or tendency to like or dislike
- Implicit or explicit
- Can be intentional, but generally unintentional or at least unconscious
- Ex: A faculty member DM who believes respondents cannot be trusted to tell the truth

Conflicts of Interest

- Evaluated on a case-by-case basis
- Simply knowing a student or employee is **not** enough to generate a conflict of interest, as long as objectivity is not compromised
 - Previously disciplining a student is likewise **not** enough
- DM must bring potential conflicts to the TIXC's attention
 - Parties may also do so
 - TIXC will make a recusal determination
 - Policy may have a recusal provision

Bias

- Bias can be a significant problem for DMs
 - Explicit or implicit
 - The often implicit and unconscious nature can lead to unexpected outcomes
- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you
- Can affect our perceptions of Complainants **and** Respondents
- Common pre-conceptions about Complainants and Respondents
- Can affect our perceptions of others within the process or associated with the process
- DM role requires us to recognize it and mitigate its effects

Manifestations of Bias

Pre-
determined
outcome

Political bias

Intervention
from senior-
level admin

Group think

Improper
application of
policies

Confirmation
bias

Implicit bias

Animus

Attribution Bias

Appearance
Bias

Affinity Bias

Halo/Horn
Effect

Identifying and Correcting Bias

- Strategies to mitigate bias:
 - Hearing panels vs. individual DM
 - Panel members review each other's questions
 - Compliance with institutional policy and procedure
 - Evidence mapping to prevent evidentiary gap filling
 - All panel members review the rationale
 - Be conscious of your bias
 - Counteract them and ensure they do not influence your decision

Due Process

Due Process



Title IX regulatory requirements



Fundamental fairness concepts (private institutions)
Constitutional Due Process concepts (public institutions)



Institutional policies and procedures

Due Process in Procedure

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence and be heard by the Decision-maker

Due Process in Decision-Making

- A decision must:
 - Be appropriately impartial and fair (both finding and sanction)
 - Be neither arbitrary nor capricious
 - Be based on a fundamentally fair rule or policy
 - Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process:

- Present witnesses, including expert witnesses
- Present all inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction, including expert sources
- Be accompanied by and confer with Advisor of choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process, continued:

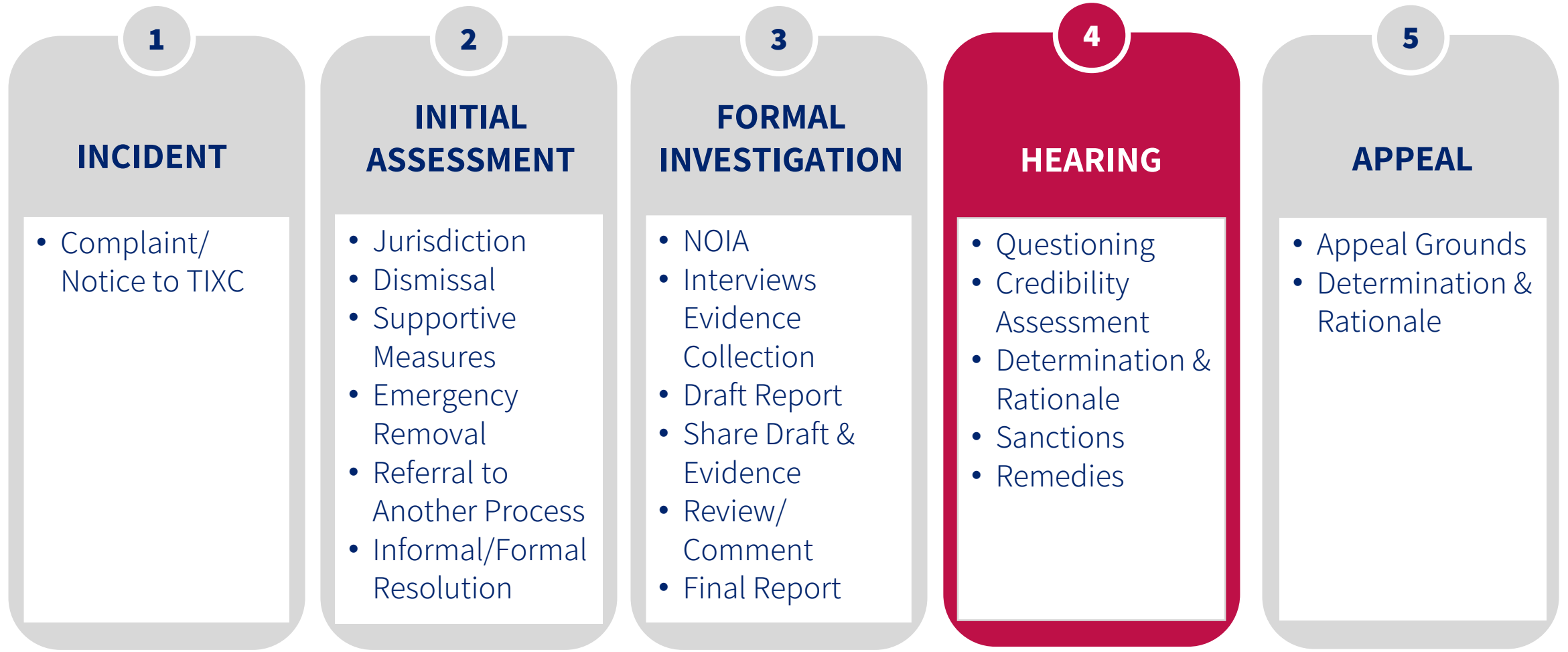
- Inspect and review directly related evidence and investigation report
- Conduct cross-examination, if desired, through the Advisor
- Right to explanation of any ruling that a question is not relevant
- See/hear all evidence the DM may rely upon in their decision
 - Right to review and comment on that evidence to the DM
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the DM's decision
- Appeal

Notice of Investigation and Allegations

- The Notice of Investigation and Allegations is critical to fundamental fairness and due process
- The NOIA lists the rights of the parties in the grievance process, in addition to:
 - Known details of allegations, such as identities of the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options
 - Presumption of non-responsibility
 - Prohibition on retaliation and false statements
- May need to update NOIA during process

Decision-Making Phase: Skills and Practical Application

Decision-Making



Materials Review

- Review the complaint file, including:
 - Complaint
 - Written Notice of Investigation and Allegations (NOIA)
 - Applicable policies
 - Investigation report and appendix
- Review carefully and thoroughly
- May require multiple reads



Policy Elements and Procedures

- Policy
 - What policies are alleged to have been violated?
 - What are the elements of those policies?
 - DMs will weigh and apply relevant evidence to determine whether a policy violation occurred
- Procedures
 - Review decision-making procedures to refresh your training
 - Note any procedural questions to ask the TIXC/legal counsel

Parsing the Policy

Parsing the Policy

Identify the elements of each policy provision:

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

Parsing the Policy: Answers

Identify the elements of each policy provision:

- **Unwelcome conduct**
- determined by a **reasonable person** to be so
- **severe**, and
- **pervasive**, and
- **objectively offensive**
- that it **effectively denies a person equal access** to the recipient's education program or activity

Parsing the Policy

Identify the elements of each policy provision:

- Stalking, defined as: engaging in a course of conduct on the basis of sex directed at the Complainant that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress

Parsing the Policy: Answers

Identify the elements of each policy provision:

- Stalking, defined as:
- engaging in a **course of conduct**
- **on the basis of sex**
- **directed at the Complainant**
- that would cause a **reasonable person to**
- **fear for the person's safety** or
- the **safety of others** or
- **suffer substantial emotional distress**

Other Hearing Preparation

- Confirm the file is complete
- Discuss any hearing logistics or questions with Chair or TIXC
- Prepare questions in advance
 - Areas of inconsistency or disputed information
- If part of a panel, consider meeting to:
 - Prepare questions and discuss question asking
 - Conduct a final review of policies and procedures
 - Strategize for hearing
- Other elements of hearing preparation are covered in Live Hearings course

Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
 - Could be an attorney, but need not be
- Parties may request that the institution provide an Advisor for hearing
 - Institution may choose to appoint earlier in process
- DM may establish participation equitable ground rules, as long as they do not interfere with any party rights
- Set and communicate reasonable expectations for Advisor participation



Skills: Understanding Evidence

Understanding Evidence

The DM must evaluate all relevant evidence

- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant evidence** is evidence that tends to prove or disprove the underlying allegations
- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory



Types of Evidence

Documentary Evidence

Supportive writings or documents

Electronic Evidence

Photos, text messages, and videos

Real Evidence

Physical objects

Direct or Testimonial Evidence

Personal observation or experience

Circumstantial Evidence

Not eyewitness, but compelling

Hearsay Evidence

Statement from outside the interview presented as truthful

Character Evidence

Evidence of a person's character or character traits

Primary Questions for Decision-Makers

1

Is this information
relevant?

2

Is this information
reliable?

3

Will we rely upon it
as evidence
supporting a
rationale?

Relevance

Is this information relevant?

Relevance

- Evidence is generally considered **relevant** when it helps determine:
 - Whether the allegations occurred as described in the complaint
 - Whether the policy was violated based on findings of fact
- The Investigator initially evaluates relevance, but the DM ultimately decides
- All relevant evidence must be objectively evaluated and considered
 - **Inculpatory**: tending to suggest a finding of responsible
 - **Exculpatory**: tending to suggest a finding of not responsible
- In the decision-making phase parties may dispute the investigator's initial relevance determinations

Specific Evidence Issues: Privilege and Medical Information

A party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist

Specific Evidence Issues: Rape Shield Provision

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - Specific incidents of the Complainant's prior sexual behavior with respect to the Respondent offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition, which are admissible if relevant

Other Evidence Considerations

- No restriction on parties discussing case or gathering evidence, but we can restrict parties from sharing materials
- Expert witnesses
- Parties seeking to introduce new evidence in the DM phase or at the hearing
 - Consult with the TIXC

Credibility Assessment

Is this information reliable?

Credibility Considerations

- Assessing and determining credibility is an important role for DM
- Credibility does not necessarily equate to honesty or truthfulness
 - Believability does not equal truthfulness
 - Not judging character
 - Not calling people liars
- Credibility is typically useful in determining findings of fact, which in turn help determine policy violations

Evidence Authentication

- Authenticating evidence seeks to prove that the evidence is genuine and credible
 - Investigator should authenticate evidence, but sometimes DM will
- Examples of authentication:
 - Verifying text messages by collecting texts from all involved parties
 - Collecting photographic evidence after it is referenced in an interview
 - Establishing chain of custody for a piece of physical evidence

Party and Witness Credibility

- **Credibility** impacts likeliness
 - Would a reasonable person do the same?
 - Are there more likely alternatives?
- **Credibility Assessment** involves evaluating whether evidence is believable and reliable
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Note: Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Credibility Assessment

Inherent
Plausibility

Corroboration
and
Consistency

Motive to
Falsify

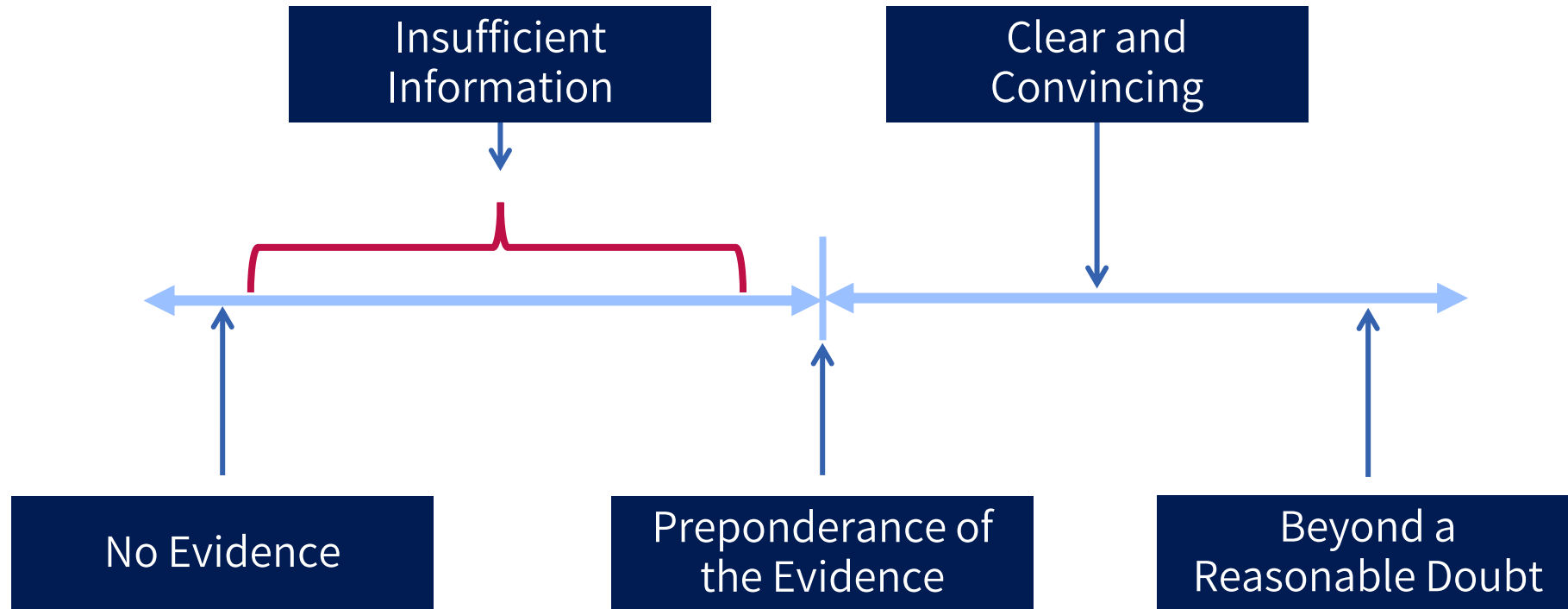
Past Record

Demeanor

Weighing and Analyzing Evidence

What evidence is relied upon in making a determination?

Standard of Evidence



- **Preponderance of the Evidence** is the most common industry standard
- Standard of Evidence must be consistent for all formal complaints of sexual harassment

Applying Facts to Policy

- DM must presume the Respondent is not in violation unless and until the standard of evidence is met
- The DM analyzes facts against each policy element to determine whether the Respondent violated policy
 - Written rationale will have to cite to specific evidence supporting conclusion
- Assess credibility of evidence and evidentiary weight
 - Assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated
- Based only upon evidence in the investigation report or presented at the hearing

Example: Applying Facts to Policy

Stalking:

- Engaging in a course of conduct
- on the basis of sex
- directed at the Complainant
- that would cause a reasonable person to fear for the person's safety or the safety of others or
 - suffer substantial emotional distress

Example: Applying Facts to Policy

Policy Element:

- Engaging in a course of conduct

Facts:

- Complainant asserts Respondent followed Complainant to an off-campus party on October 1
- Respondent came to Complainant's residence hall room three times between October 5 and October 12
- Respondent denies following Complainant on October 1
- Witness corroborates Respondent knocked on Complainant's door several times in one week

Example: Applying Facts to Policy

Policy Element:

- Would cause a reasonable person to fear for the person's safety

Facts:

- Complainant alleged Respondent pounded on her door and yelled until an RA told him to leave
- Complainant alleged Respondent sent texts suggesting he was following her, and she should fear him
- Respondent produced texts that do not support Complainant's characterization
- RA witness asserts "pounded on her door and yelled" is an exaggeration

Additional Considerations

- Separate the “Finding” from the “Sanction”
 - Do not use impact-based rationales for findings
 - Use impact-based rationales/evidence for sanctions only
 - Same with prior misconduct, unless a pattern is charged/proven
- Do not “heighten” the evidentiary standard when anticipating a severe sanction



Determining Sanctions

Determining Sanctions and Remedies

After making a determination of responsibility, decide sanctions and remedies

- Nexus between sanctions and misconduct
- Sanctions must be proportionate to the severity of the violation, taking progressive sanctions/history into account

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, for both the individual and the community

Sanctions and Remedies

Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC does not issue sanctions but oversees the process
- TIXC assures sanction compliance
 - Failure to comply could lead to discipline

Remedies

- May be implemented before or after a determination
- TIXC determines remedies that are equitable and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented for both Complainant and community

Determining Sanctions

- DM may consider:
 - Impact statements from the parties
 - Precedent, prior misconduct, proven pattern (if charged), attitude, collateral violations, or multiple violations
 - Aggravating or mitigating circumstances
- Primary purpose should not be developmental or educational, but equitable and remedial
- Each sanction must have a rationale

Common Student Sanctions

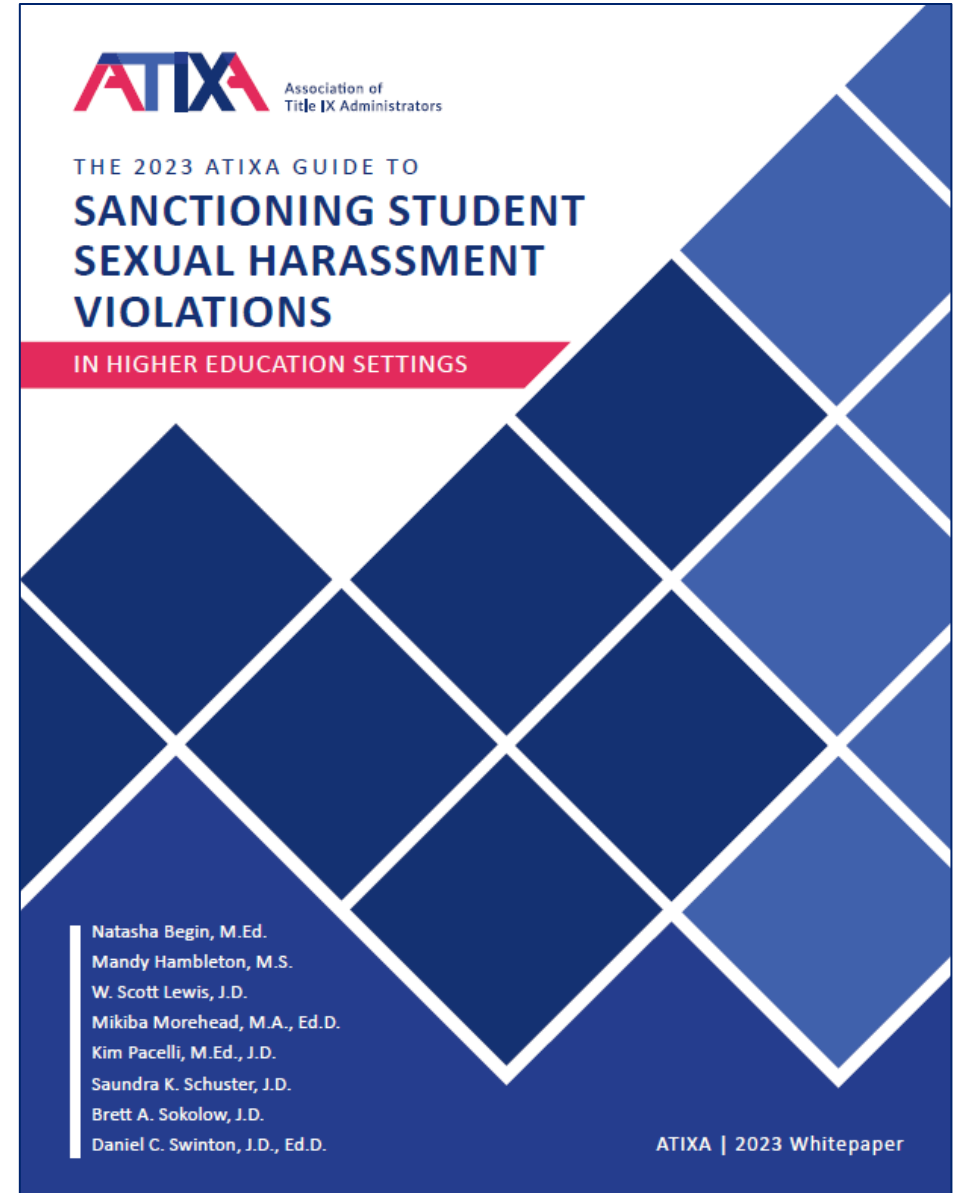
- Warning (preferably written)
- Probation
- Loss of privileges
- Counseling
- No contact order
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Alcohol and drug assessment and counseling
- Discretionary sanctions
- Parental notification
- College suspension
- College expulsion

Common Employee Sanctions

- Warning (preferably written)
- Probation
- Performance improvement/management process
- Training
- Counseling
- Loss of privileges
- Reduction in pay
- Loss of annual raise
- Discretionary sanctions
- Loss of supervisory or oversight responsibilities
- Paid or unpaid leave
- Suspension
- Termination

Sanctioning Pitfalls

- Failure to stop, prevent, and remedy
- Conflating the finding, the determination, and the sanctioning
- Unwillingness to expel, suspend, or terminate
- Inconsistent or disparate sanctions for similar behavior
- Failure to consider aggravating or mitigating circumstances
- Lockstep or prescribed sanctioning; failing to address incident-specific circumstances



Written Determination

Written Determinations

Written Determination

- Authored by Decision-maker(s)
- TIXC/Legal counsel reviews
- TIXC communicates to the parties simultaneously in writing
 - No FERPA concerns

Finality

- On the date the Recipient provides a written appeal determination
 - OR the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Finding and Final Determination
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

Written Determinations

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

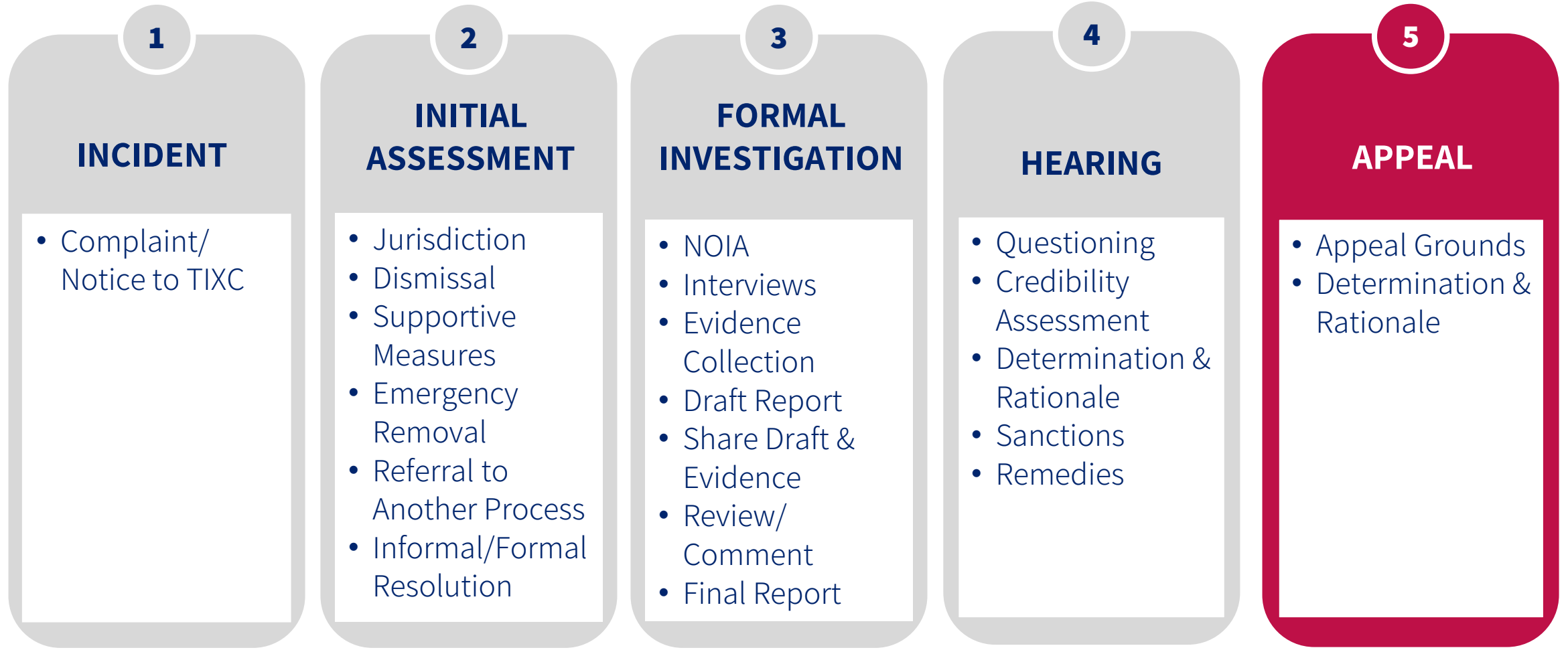
Whether the conduct that is proven to have occurred violates policy

Written Determination Standards

- Cogent explanation of facts
- Evidence relied upon/not relied upon and why
- Evidence that was unavailable and why
- Whether presumption of innocence overcome
- Credibility assessment and explanation
- Rationale explains how you got from the allegation to the final determination, and offers rationale for any sanctions implemented, as well

Appeals

Appeals



Appeals

Institutions must offer appeals on the following grounds:

1

Procedural irregularity that affected the outcome of the matter

2

New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter

3

Conflict of interest or bias by the TIXC, Investigator, Decision-Maker that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Appeals

Appeal Decision-maker

- Must complete a written determination with rationale
- Determinations may include:
 - **Upholding** the original determination and sanctions (if any)
 - **Remanding** the complaint back to the Decision-maker for reconsideration or to the Investigator for further investigation
 - **Modifying** the original determination and/or sanctions (if any)
 - **Overturing** the determination (not recommended)

Appeals

Appeal Decision-maker may be an individual or a panel

- Cannot be the Title IX Coordinator
- Cannot be the Investigator or Decision-maker in the original grievance process
- Recipient may have a pool of Decision-makers who sometimes serve as hearing or appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers



Questions?



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Title IX Administrators

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