



Office of Equity and Inclusion

# Title IX & Sexual Violence Investigations

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Minnesota State

# TITLE IX

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
  - *20 U.S.C. §1681 (1972)*



# WHAT IS TITLE IX?

- Title IX does not apply to sports only
- Title IX is a federal civil rights law enacted to eradicate sex discrimination, in general, in all facets of the educational setting
- By accepting federal funds, institutions agree not to discriminate on the basis of sex or allow the separation of the sexes in curriculum and extracurricular activities, unless permitted by the statute
- Failure to comply may result in liability on the part of the institution

# TITLE IX

## "any education program or activity"

- Covers all academic, educational, extra-curricular, athletic, and programming on and off campus
- School admission, testing and scholarship, treatment of pregnant and parenting students, athletics, and sexual harassment
- Bus trips, away athletic events, university-sponsored educational trips, study abroad programs, credit-based internships



# TITLE IX

## "on the basis of sex"

- No person can be discriminated against on the basis of his/her sex
- Retaliation: subjecting an individual to negative treatment as a result of bringing a complaint/participating in an investigation
- Various forms of discrimination
- Sexual misconduct
- Sexual harassment



# Prompt and Equitable Requirements

- Notice of where complaints may be filed
- Application of the Procedures
- Adequate, reliable, and impartial investigation
- Designated and reasonably prompt time frames
- Notice to parties of the outcome
- Assurance that the school will take steps to prevent recurrence and correct any discriminatory effects

# Relation to Law Enforcement: Parallel Proceedings

- School's Title IX obligation is independent from any law enforcement investigation and the existence of a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct



# Adequate, Reliable, and Impartial Investigations

- Notify complainant of the right to file criminal complaint
- May delay fact-finding at the request of law enforcement but still notify complainant of procedure, take appropriate interim steps
- Any MOU with local police department must allow the school to meet its Title IX obligation



# Designated and Reasonably Prompt Time Frames

- Grievance procedures should specify the time frame for:
  - The investigation
  - Both parties receiving the outcome
  - Appeal
  - System Procedure (1B.1.1 and 1B.3.1) generally calls for a 60-day timeline – calendar days, not business days
  - Process for extending time frame

# Hearing Procedures: “The Equality Principle”

- Equal opportunity access to information (but consistent with FERPA), ability to present witnesses, question witnesses, have an advocate, appeal

# Important Title IX Considerations

- Use the policy provisions in place at the time of the alleged incident
- Ensure decision-makers and investigators are well trained in how to evaluate and weigh evidence
- Be cautious with broad language in your procedures, e.g. "every opportunity" to present evidence
- Ensure impartiality and equity
- Keep parties informed
- Ensure both parties feel that they are being treated with dignity and respect
- Ensure that the campus community is trained about retaliation
- Ensure that retaliation is appropriately addressed



# REQUIRED REPORTER TRAINING

## Required Reporters should know:

- How to identify and report sexual harassment and violence
- How to respond to a report by addressing immediate safety, health and well-being concerns
  - Discuss importance of preserving evidence
  - Discuss right to file criminal complaint and complaint with school
  - Know the school's position on drugs and alcohol
- How to access support and emergency assistance
  - On-and off-campus medical/counseling services and academic services
- How to elevate the report to a centralized process (Title IX Coordinator)

# Investigators Must Know

- **Campus SaVE Act:** "For those involved in receiving, investigating, and adjudicating complaints: annual training on the issues relating to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an effective investigation and hearing process that protects the safety of victims and promotes accountability."
- **Title IX:** Title IX responsibilities to address allegations of sexual harassment, how to conduct Title IX investigations, information on the link between alcohol and drug abuse and sexual harassment and violence and best practices to address that link

## **Minn. Stat. 135A.15**

- Requires colleges and universities to have an online reporting system (must accommodate anonymous complaints)
- Requires annual training for individuals at the campus level who are responsible for responding to reports of sexual assault—including investigators and decisionmakers

# Training to Provide

- Information on working with and interviewing persons subjected to sexual violence
- Information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence
- The proper standard of review for sexual violence complaints
- Information on consent and the role drugs and alcohol can play in the ability to consent
- The importance of accountability for individuals found to have committed sexual violence
- The need for remedial actions for the respondent, complainant, and school community

# Training to Provide

- How to determine credibility
- How to evaluate evidence and weigh it in an impartial manner
- How to conduct investigations
- Confidentiality
- The effects of trauma, including neurobiological change
- Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds

Source: 2017, Debra Weiss Ford, Managing Principal, Jackson Lewis P.C.





# THE CLERY ACT

## DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME STATISTICS ACT

- Adopted by Congress in 1990 at the urging of Connie and Howard Clery, after the rape and murder of their daughter Jeanne at Lehigh University a year earlier
- Under this statute, university policy "must encourage individuals to report all crimes to campus police and police agencies...in a timely manner"

# THE CLERY ACT

## BASIC REQUIREMENTS

- Campus crime reporting
- Timely warning notices
- Emergency notifications and emergency response testing
- Fire safety reporting and missing student procedures
- Notices to prospective students and employees
- Policy statements



# THE CLERY ACT

## CAMPUS CRIME REPORTING UNDER THE CLERY ACT

- By October 1 of each year, institutions are required to publish & disseminate crime reporting statistics occurring on campus for the current calendar year and two preceding years, and a description of certain security-related policies.

# AMENDMENTS TO THE CLERY ACT

In March 2013, Congress reauthorized the Violence Against Women Act (VAWA) which imposes new obligations on colleges and universities under its Campus Sexual Violence Act ("SaVEAct") provision

- Expanded list of reportable offenses
- Requires adoption of student discipline procedures
- Requires adoption of institutional policies to address and prevent campus sexual violence

# AMENDMENTS TO THE CLERY ACT

On October 20, 2014 the Department of Education published the final VAWA regulations which imposed expanded obligations on colleges and universities, effective July 1, 2015:

- Additional crimes of domestic violence, dating violence and stalking are added to the Clery Act
- Institutions must adopt policy statements regarding sexual assault, domestic violence, dating violence and stalking which must include: educational programs for new students and employees, ongoing prevention programs, reporting procedures, institutional disciplinary procedures
- Institutions must address how they complete publically available record-keeping while still maintaining the confidentiality of those who choose to report a violation
- Updates to reporting obligations

# Minnesota State Colleges & Universities

- 1B.1 – Covers Sexual Harassment and Other Protected Class Harassment and Discrimination
- 1B.3 – Covers Sexual Violence
- 1B.1.1 – Includes the procedures for investigating and adjudicating the 1B.1 and 1B.3 cases
- 1B.3.1 – Includes additional information relevant to the procedures for responding to sexual violence reports

# Minnesota State's 1B.1 Policy on Equal Opportunity & Nondiscrimination in Employment & Education

The **1B.1 Policy** addresses:

- Equal opportunity for students and staff
- Nondiscrimination
- Harassment
- Discrimination
- Protected Class
- Sexual harassment
- Retaliation

# Minnesota State's 1B.3 Policy on Sexual Violence

The 1B.3 Sexual Violence Policy addresses:

- Sexual assault
- Non-forcible sex acts
- Dating and relationship violence
- Stalking
- Aiding in acts of sexual violence - exploitation



# Forms of Sexual Discrimination

# Sexual Misconduct

- Non-consensual sexual contact (or attempt to commit)
- Non-consensual sexual intercourse (or attempt to commit)
- Sexual exploitation/Sexual Privacy

# SEXUAL HARASSMENT

**Though sexual harassment is typically addressed in the System's 1B.1 Policy & Procedure, it can have a nexus to sexual violence (Board Policy 1B.3)**

## **THREE KEY ELEMENTS OF SEXUAL HARASSMENT**

1. Conduct that is sexual in nature,
2. That is unwelcome, and
3. That denies or limits a student's ability to participate in or benefit from a school's educational program

# SEXUAL HARASSMENT

Under the law, a school may be liable for monetary damages for harassment by a teacher, administrator, staff member, fellow student, and/or a third party if the plaintiff can prove:

- Actual knowledge by a responsible employee, and
- Deliberate indifference

# SEXUAL HARASSMENT – 1B.1

## TO CONSTITUTE SEXUAL HARASSMENT, THE CONDUCT:

- DOES NOT have to include an intent to harm
- DOES NOT need to involve repeated incidents
- DOES NOT need to be directed at a specific target
- DOES NOT have to be by a member of the opposite sex

# Sexual Harassment – 1B.1

- **Quid Pro Quo**
  - Can only be carried out by a teacher, administrator, or staff member
- **Two factors:**
  1. Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; and
  2. Submission to, or rejection of, such conduct results in adverse educational or employment action

# Sexual Harassment – 1B.1

## Hostile Environment

- Occurs when harassment is sufficiently severe, pervasive, or persistent so as to interfere with or limit a person's ability to participate in or benefit from the services, activities, or opportunities offered by an educational institution
- Fact-based inquiry (***Facts*** are isolated pieces of information, where ***concepts*** are larger ideas that show the relationships between facts)
- Can be created by teachers, administrators, staff members, other students, and third parties visiting the educational institution
- Can occur off campus

# Stalking

- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E-mails
- Social media use
- Showing up at a location



# Relationship/Dating Violence

- Physical harm or abuse
- Threats of physical harm or abuse

# Retaliation

- Occurs when an adverse educational action is taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct

# Investigating Sexual Violence – Dating Violence – Stalking – Sexual Harassment

Investigators must ensure that these investigations into these complaints are:

- Prompt – Completed in reasonable time frame
- Thorough – Adequate information used in formal or informal investigation
- Impartial – Investigators trained and no bias, including free of cultural bias

# The Purpose of an Investigation

- Conducting an investigation to allow the decisionmaker to determine:
  - Based on the facts, did a policy violation occur?
  - If yes, what is the appropriate sanction?
  - How can the institution:
    - Stop the discrimination, harassment, violence
    - Prevent its recurrence
    - Remedy the effects of the incident(s) on the Complainant(s) and the community

# Know the Policies

Why is this important to an investigation?

-It helps you determine if an investigation is appropriate

\*Who does the policy apply to?

\*What do the terms refer to?

-It helps you frame the ultimate investigative questions in issue

-You understand the elements of a claim

-You have time to seek guidance, if needed

-You prepare for and conduct thorough interviews and minimize any unnecessary re-interviews

-You provide the decisionmaker with necessary information to make a decision



MINNESOTA STATE

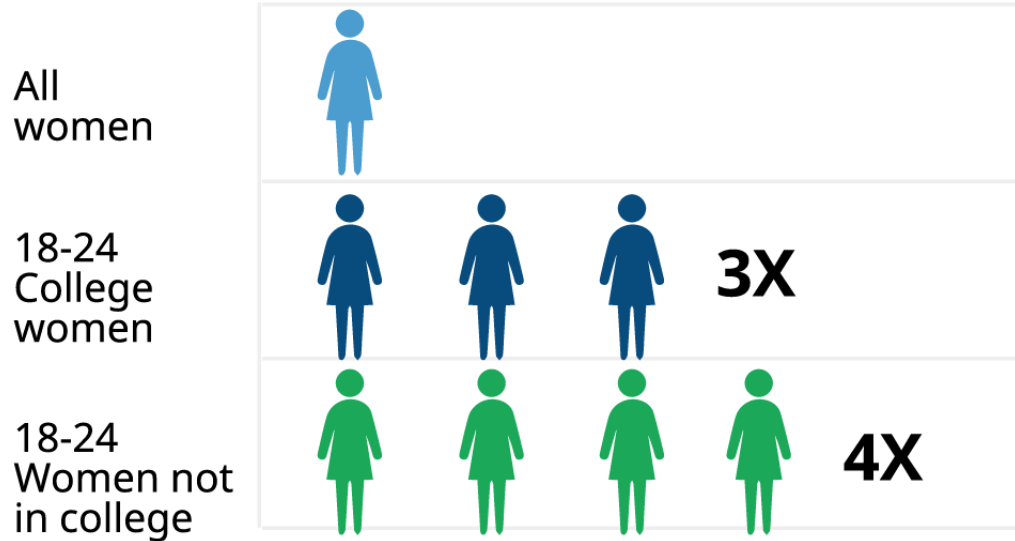
# Sexual Violence Background



What if bears killed one in five people?

# THE ISSUE OF SEXUAL ASSAULT

## COLLEGE-AGE WOMEN ARE AT RISK



**RAINN**

National Sexual Assault Hotline | 800.656.HOPE | [online.rainn.org](http://online.rainn.org)  
Please visit [rainn.org/statistics/campus-sexual-violence](http://rainn.org/statistics/campus-sexual-violence) for full citation.<sup>1</sup>





# THE ISSUE OF SEXUAL ASSAULT

- 11.2% of all students experience rape or sexual assault through physical force, violence, or incapacitation (among all graduate and undergraduate students).
- 21% of TGQN (transgender, genderqueer, nonconforming) college students have been sexually assaulted, compared to 18% of non-TGQN females, and 4% of non-TGQN males.
- Among graduate and professional students, 8.8% of females and 2.2% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- Among undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- 4.2% of students have experienced stalking since entering college.

RAINN



# THE ISSUE OF SEXUAL ASSAULT

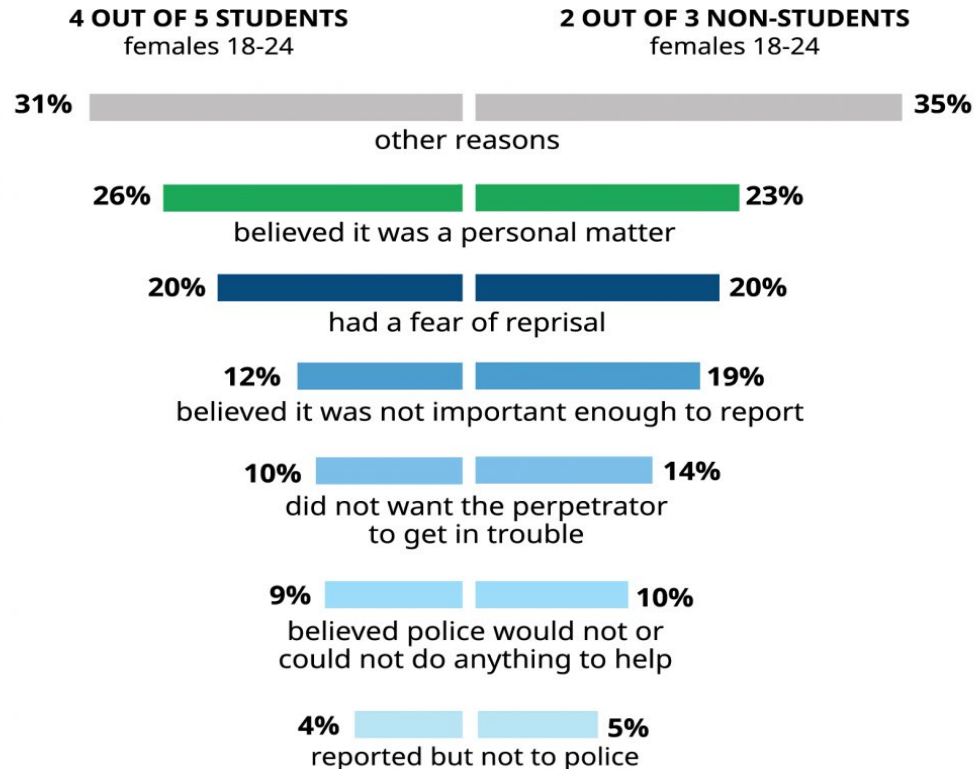
- Freshmen and sophomores are at greater risk than upperclassmen (“red zone” at the beginning of school year)
- 60% of sexual assaults of college students occurred on campus
- 10.3% took place in a fraternity
- 70% of females assaulted on campus knew their attacker
- Students with disabilities experience assault 50% more frequently than students without disabilities
- Sexual assault victim/survivors are more likely to suffer from depression and/or post-traumatic stress disorder, abuse alcohol and drugs, and/or contemplate suicide

RAINN



# REPORTING SEXUAL VIOLENCE

## REASONS VICTIMS CITED FOR NOT REPORTING



**RAINN**

National Sexual Assault Hotline | 800.656.HOPE | [online.rainn.org](http://online.rainn.org)  
Please visit [rainn.org/statistics/campus-sexual-violence](http://rainn.org/statistics/campus-sexual-violence) for full citation.<sup>1</sup>



# Bias in Sexual Violence Investigations

Title IX requires a college or university to conduct a “prompt, thorough and impartial inquiry.”

Bias is defined as “to feel or show inclination or prejudice for or against someone or something.”

# Types of Bias

- Protected Category Biases (non-exhaustive list)
  - Race
  - Gender
  - Sexual Orientation
  - Gender Identity
  - Religion
  - Class
  - Age
  - National Origin
  - Disability
- Investigator-Specific Biases
- Title IX-Specific Biases

# Implicit Bias

- What is it?
  - Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner
- Who has it?
  - Implicit biases are pervasive. Everyone possess them
  - The implicit associations a person has do not necessarily align with their declared beliefs or even reflect stances they would explicitly endorse
  - A person generally tends to hold implicit biases that favor their own “in” group (although research shows that people can hold biases against their own “in” group too)

Kirwan Institute for the Study of Race and Ethnicity

# Implicit Bias

- What can we do to counteract it?
  - Implicit biases are malleable and can be unlearned
  - Be conscious of the reality of implicit bias
  - Be aware of our own implicit bias
    - Educate yourself – Consider taking the Implicit Association Test (IAT) at [implicit.harvard.edu](http://implicit.harvard.edu)
  - Check ourselves in our work – Be accountable
    - When confronted with bias, take the time to examine your action or beliefs. Think of how you would explicitly justify them to other people.

# Investigator-Specific Biases

- Investigators are charged with finding the facts and evaluating credibility
- We all have instincts, hunches, feelings, a sense about things as we investigate a case
  - How much can we rely on these things?
  - Does implicit bias disguise itself as these things?



# A Wake-Up Call

Group	Accuracy
Students	.25
Prisoners	.32
Customs officers	.22
Police detectives	.22
Prison guards	.23
Patrol police officers	.24
Aldert, Vrij, & Semin (1996)	<i>Journal of Nonverbal Behavior</i>



# Investigator-Specific Biases

- Complainant/Respondent is likeable/sympathetic
- Complainant/Respondent is not likeable/sympathetic
- Repeat Complainant/Respondent
- Fact pattern similar to a prior, unrelated investigation
- Complainant/Respondent behavior patterns

**“One’s own culture provides the ‘lens’ through which we view the world; the ‘logic’ ... by which we order it; the ‘grammar’ ... by which it makes sense.”**

**-Avruch and Black**

# Cultural Considerations

- Communication styles
- Attitudes toward conflict
- Approaches toward completing tasks
- Decision-making styles
- Approaches to knowing
- Attitudes toward disclosure
  - Appropriate to share emotions, reasons for conflict

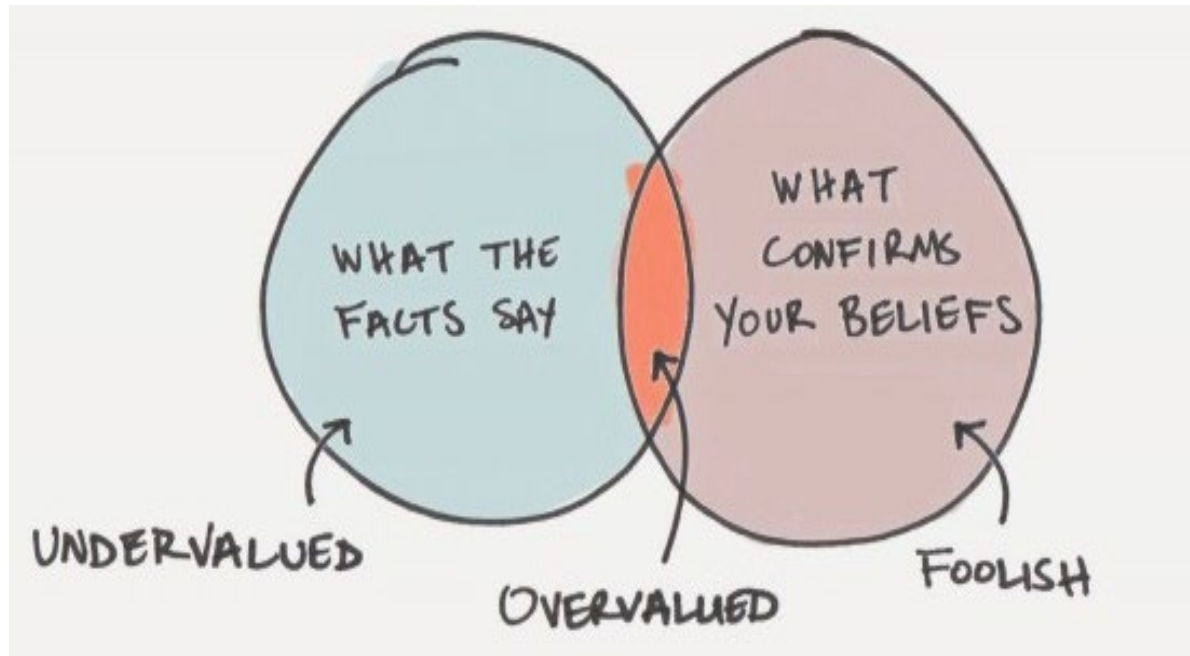
--Sue Ann Van Dermyden, 2017

# Investigation Impact

- Establishing rapport
- Language may need to be altered
- Storytelling style may need to be accommodated
  - Linear versus circular styles
- Recognize ethnocentric behaviors
  - Assumption that own culture is “right” while others are “wrong”
- Avoid stereotyping and assumptions

--Sue Ann Van Dermyden, 2017

# Confirmation Bias



--JamesClear.com

# Confirmation Bias Examples

- A person who believes that left-handed people are more creative will note every time they meet a creative person who is left handed, but will disregard or not place mental emphasis on those they meet who are right handed.
- An employer who believes that a job applicant is highly intelligent may pay attention to only information that is consistent with the belief that the job applicant is highly intelligent.

# What other role might bias play in an Investigation?

- Priming – Your pre-investigation or mid-investigation thoughts about the case
  - “This is a really bad case.”
  - “This person has complained three times before.”
  - “This is low level.”
- Phrasing – The way you ask a question can influence the answer – The misinformation effect
  - Do you get headaches frequently, and if so, how often? 2.2/week
  - Do you get headaches occasionally, and if so, how often? 0.7/week
  - How long was the movie? 130 minutes
  - How short was the movie? 100 minutes

Headaches: Elizabeth Loftus (1975); Movie: Richard Harris (1973)



# Sexual Violence Case Specific Biases

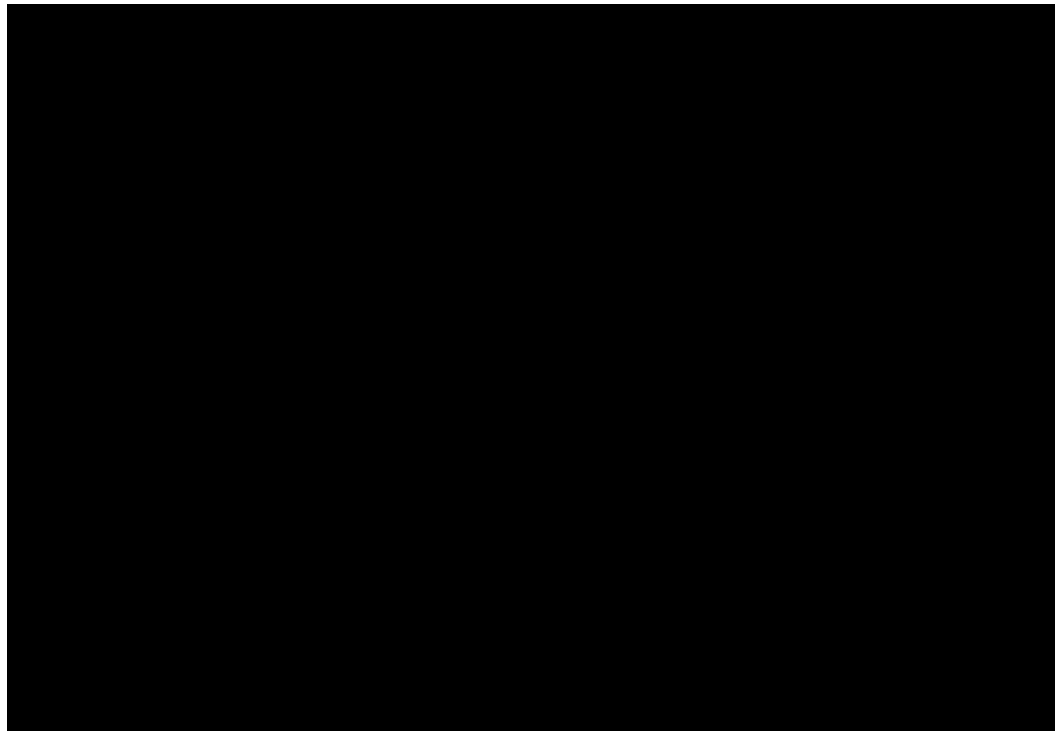
- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area and it is important not to intentionally or unintentionally cast your lens on the matters you investigate
  - Your own sexual experiences
  - Moral or religious views about sex
  - Comfort level in using terms – subject matter

# Alcohol and Drug Use Biases

- You may have your own views on and experiences with:
  - Alcohol use
  - Drug use
- These things may have impacted your life

# Rape Myth Acceptance

- Many studies have found that the higher the rape myth acceptance (stereotypical beliefs about rape), the more responsibility is attributed to the victim/survivor.
  - The victim/survivor wanted it
  - The person causing the harm didn't mean to
  - Clothing
  - Alcohol



# Counterintuitive Behavior of Rape Victims

- Delay in reporting
- Change in account of what happened
- Unexpected demeanor/disposition
- Unexpected behavior
  - Contact with person who caused the harm
  - Resumption of normal routine
  - Subsequent sexual activity (sometimes with the person who caused the harm)

# “Delayed” Reporting

“If the victim/survivor was truly raped, why would they wait so long to report it?!”

# Significant Time Between Incident And Report

- The norm when the person causing the harm was not a stranger
- Many victim/survivors are able to report only after they receive the necessary support to do so
- Why do they wait? For many of the same reasons they later recant
  - They fear repercussions
  - They are pressured by others not to report
  - They feel shame, embarrassment
  - They are afraid of the person who caused the harm
  - They are afraid of not being believed
  - Fear that nothing will be done about it

# When do victims report?

A study: For non-SANE/SART cases, an average of **33** days elapsed between the time the incident occurred and the time when the victim reported the assault.

The majority of victims do not immediately report.

Source: Testing the Efficacy of SANE/SART programs: Do They Make a Difference in Sexual Assault Arrest & Prosecution Outcomes?



# Understand the Target

Sexual offenders rely on investigators and those within our institutions to make the same judgments about the victim/survivor, which may help the person causing the harm to get away with it . . .

# Scenario #1

Joe and Sue broke up and Sue is not taking it very well. For the past two or three weeks she has been texting Joe and begging him to take her back. She has also shown up at Joe's off-campus apartment and left him presents twice. Joe has made it clear that he feels bad about the breakup, but that he needs Sue to "move on". Sue cannot seem to and continues to text, show up and call Joe. Today, Joe posted a picture on social media of him and his new girlfriend, Taylor. Sue does not take it well and calls Joe and threatens to kill herself. Joe's roommate Chandler comes to you, the Dean of Students and reports this, but says he doesn't want to get anyone in trouble.

Identify next steps.



# Neurobiological Responses to Trauma

# Why is this Important?

- Recognize what a victim/survivor goes through (physically and mentally) during an assault
- Understand how a victim/survivor's brain may process information during an assault
- Identify the effects trauma has on memory and a victim/survivor's ability to recall details of an assault (especially the way in which they are asked to do so)
- Identify reasons for varying behaviors and emotions in victim/survivors following assault

# The Eight General Dimensions of Trauma

1. Threat to life or limb;
2. Severe physical harm or injury (including sexual assault);
3. Receipt of intentional injury or harm;
4. Exposure to the grotesque;
5. Violent, sudden loss of a loved one;
6. Witnessing or learning of violence to a loved one;
7. Learning of exposure to a noxious agent; and
8. Causing death or severe harm to another.

--Wilson & Sigman, 2000

# Types of Trauma

- \*Physical trauma;
- \*Medical trauma;
- \*Psychological trauma;
- \*Social or Collective trauma;
- \*Historical or Intergenerational trauma;
- \*Immigration trauma;
- \*Developmental trauma;
- \*Ongoing, Chronic, and Enduring trauma; and
- \*Vicarious or Secondary Trauma (“Compassion fatigue”)

--Brenda Ingram, 2017

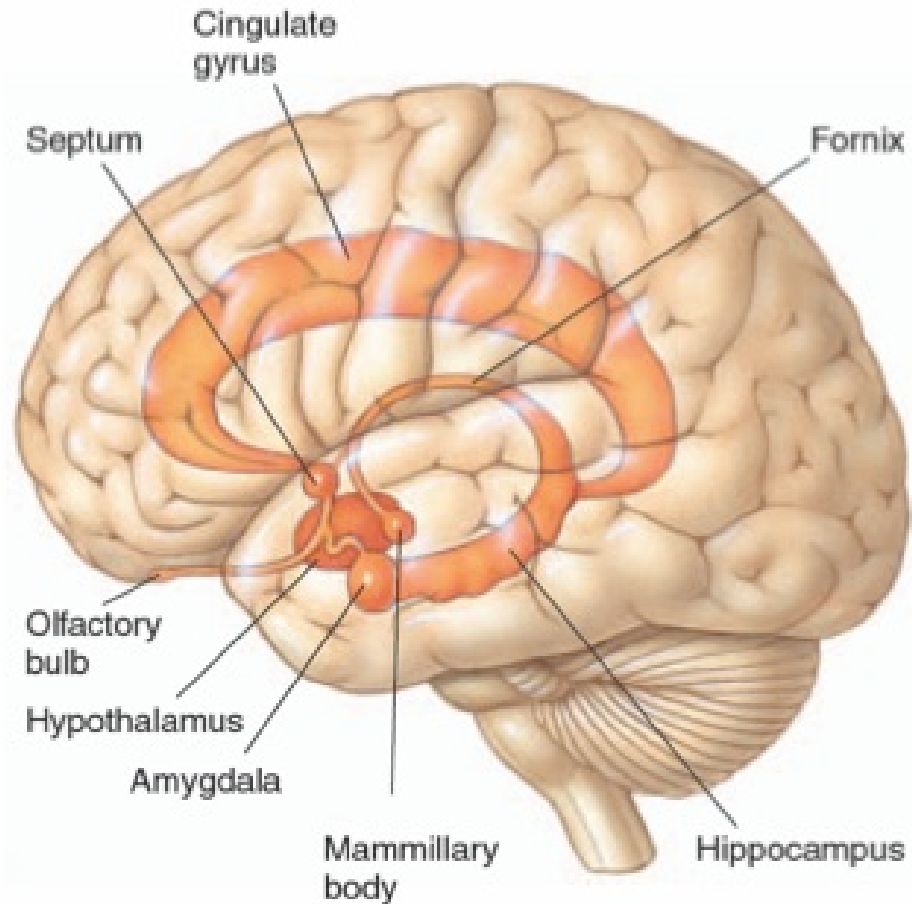
# Examples of Traumatic Events

- Car accidents
- Surgery
- Child abuse
- Divorce for young children
- Community violence
- Sexual abuse and assault
- Domestic Violence
- Diagnosis of a terminal illness
- Suicide or murder of a loved one
- Earthquakes, tornadoes, natural disasters
- War
- Violent Crime

--Brenda Ingram, 2017



# Neuroscience – The Limbic System



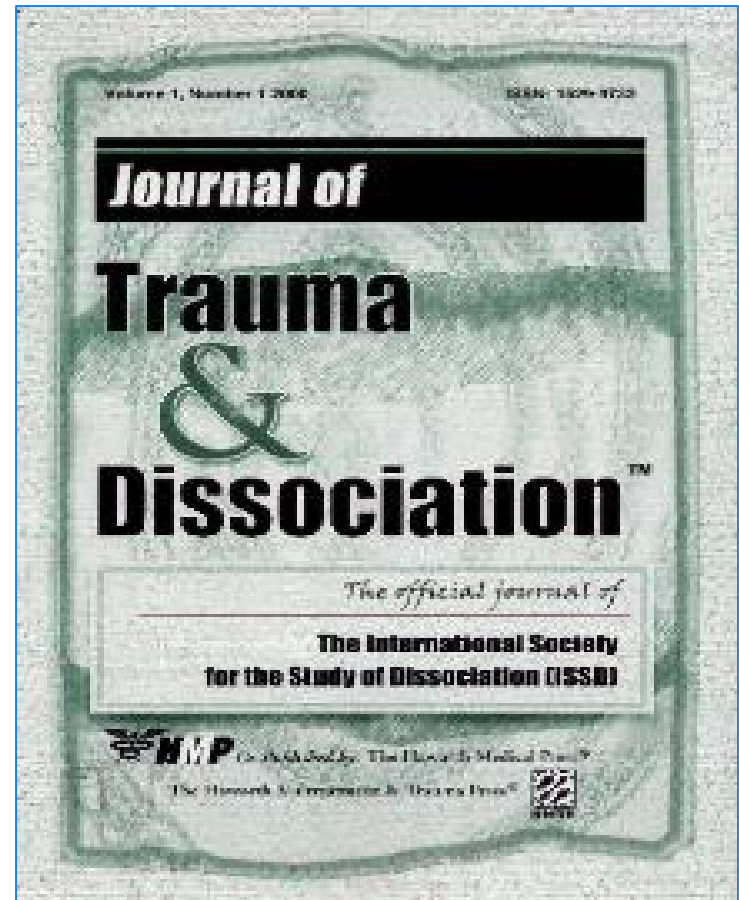
# Responses of the Brain & Body During Trauma



- **Freeze**
  - Assess situation, avoid (more) attack
- **Flight and Fight**
  - Avoid (more) attack
- When ***flight*** is impossible & ***fight*** useless.....
  - **Dissociation**
    - Protect from overwhelming sensations & emotions
  - **Tonic Immobility**
    - Last ditch effort to avoid (more) attack – or at least survive

# Dissociation

- Defense mechanism (of the brain) to protect against overwhelming sensations & emotions
  - Occurs automatically, without trying
- Portions (i.e., memories) of an experience that are normally linked together become “dissociated”
- Examples (during & immediately following a trauma):
  - “Blacked out” or “spaced out” – in some way felt that I was not part of what was going on
  - What was happening seemed unreal to me – like I was in a dream or watching a movie or a play
  - Felt “disconnected” from my body



# Tonic Immobility

- Uncontrollable response
- Mentally know what's happening but physically unable to move (like being awake during surgery)
- Rate of occurrence
  - 12 – 50% victim/survivors of rape experience tonic immobility during assault (most studies are closer to 50%)
  - It is more common in victim/survivors with prior history of sexual assault
    - Result of activation of memories of old assault plus stress hormones response activation related to new assault

# Tonic Immobility (continued)

- Caused by:
  - Fear
  - Physical restriction
  - “Perceived” inability to escape
- Occurs suddenly
  - Usually after a failed struggle (escape response)
- Can end suddenly
  - Followed by more struggle or efforts to escape
- Can last from seconds to hours

# Memory Fragmentation

- Memory recall can be very slow and difficult (or not possible)
  - Memories are “fragmented” – they come only in bits and pieces (often do not follow a timeline)
  - Process can be very frazzling and frustrating for victims

# Traumatic responses can alter...

- Physiology
  - Heart rate, respirations, dilated pupils, dry mouth, knot in the stomach
- Affective (mood and emotion) responses
  - Fear, helplessness, horror
- Cognitive (thought) processing
  - Memory – fragmented, out of sequence
  - Time distortion
  - Increased confabulation
  - Trauma memory and recall

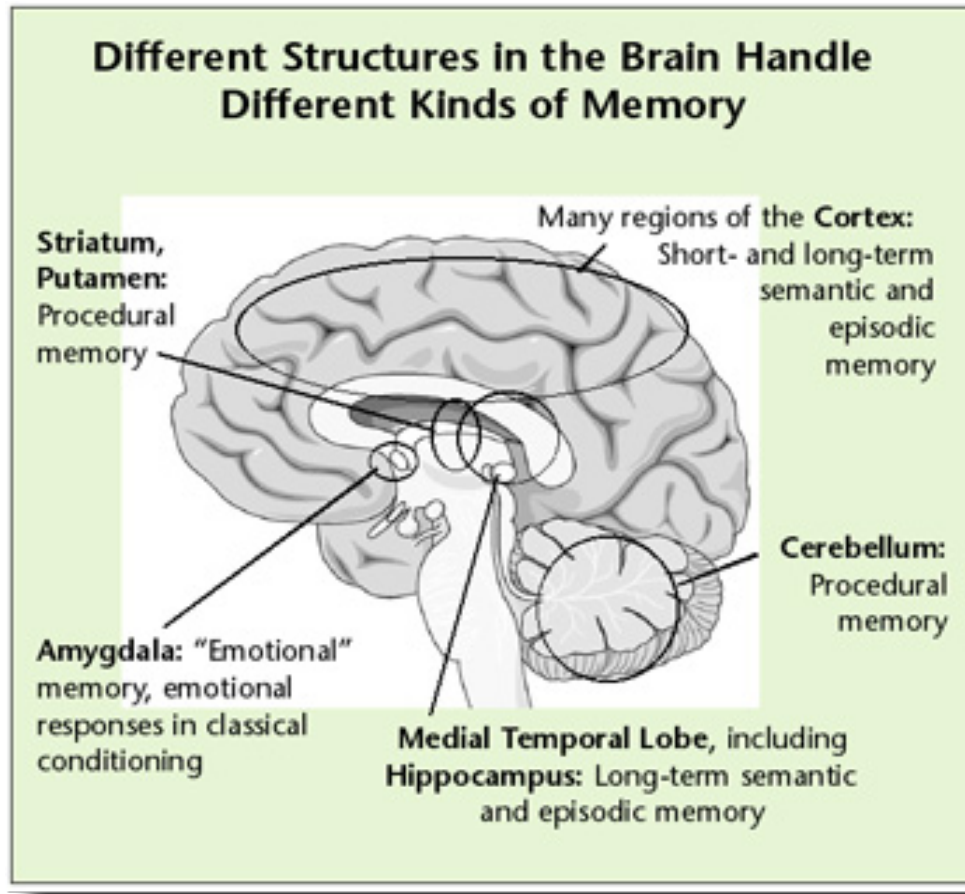
# Trauma and Memory

- The body and brain react to and record trauma in a different way than we believed traditionally
- Many professionals were trained to believe that even when a person experiences a traumatic event, the pre-frontal cortex records the vast majority of the event including: Who, What, When, Where, Why, and How

The Forensic Experiential Trauma Interview, Strand & Heitman



# Trauma and Memory



# Trauma and Memory

- Most trauma victims are not able to accurately provide detailed information, but when asked to do so often inadvertently provide inaccurate information and details which frequently causes the fact finder to become suspicious of the information provided
- Inconsistent statements are often thought of as red flags – especially in the criminal justice system—however, research shows this is not a reliable assumption when stress and trauma impact memory

--Strand, 2013

# Memory phenomenon in traumatic situations

**During trauma incident:** Sensory overload, fixation on a particular aspect, miss other things

**Immediately after:** “post incident amnesia”—failure to remember most of what was observed

**After a healthy night’s sleep:** “memory recovery”—result in remembering majority of what occurred; probably most ‘pure’ recollection

**Within 72 hours:** final & most complete memory—but at least partially reconstructed after normal process of integrating other sources of information

By Lt. Col. Dave Grossman & Bruce K. Siddle  
*The Firearms Instructor: The Official Journal of the International Association of Law Enforcement  
Firearms Instructors*  
Issue 31 / Aug 2001

# Common Victim/Survivor Behaviors to Consider

- May be trying to protect others – physically, psychologically
- May feel pressure from the person causing harm or others
- May actually feel safer maintaining the relationship
- May have some emotional/physical attachment with the person causing harm
- May still be under the influence or manipulation and control of the person causing harm
- May be worried about collateral misconduct – perceived or real

# Trauma and Memory

- One of the mantras within the criminal justice system is “inconsistent statements equal a lie.”
- Nothing could be further from the truth when stress and trauma impact memory, research shows.
- In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.

--Strand, 2013

# The Impact of Trauma on Victim/Survivor Behavior

- The effects of trauma can influence behavior of a victim/survivor during an interview
- People are often reluctant to recall experiences that evoke negative feelings and emotions such as anger, fear, humiliation, or sadness

--Strand, 2013

# The Impact of Trauma on Victim/Survivor Behavior

- Interviewers should be familiar with the signs of trauma and not assume the victim/survivor is evading the truth.
- Memory loss, lack of focus, emotional reactivity, and multiple versions of a story can all be signs of trauma exhibited during interviews.
- For example, lack of linear memory is often a sign of trauma, so it may be helpful during initial interviews to ask, “What else happened?” instead of “What happened next?”

--Strand, 2013

# The impact of Trauma on Victim/Survivor Behavior

- Environmental barriers such as the layout of the room, the length of the interview, and the comfort of the interview room are also factors to consider.
- Privacy and security may be a large concern for people who have just experienced something traumatic; therefore, the interview room should be a quiet area.

--Strand, 2013



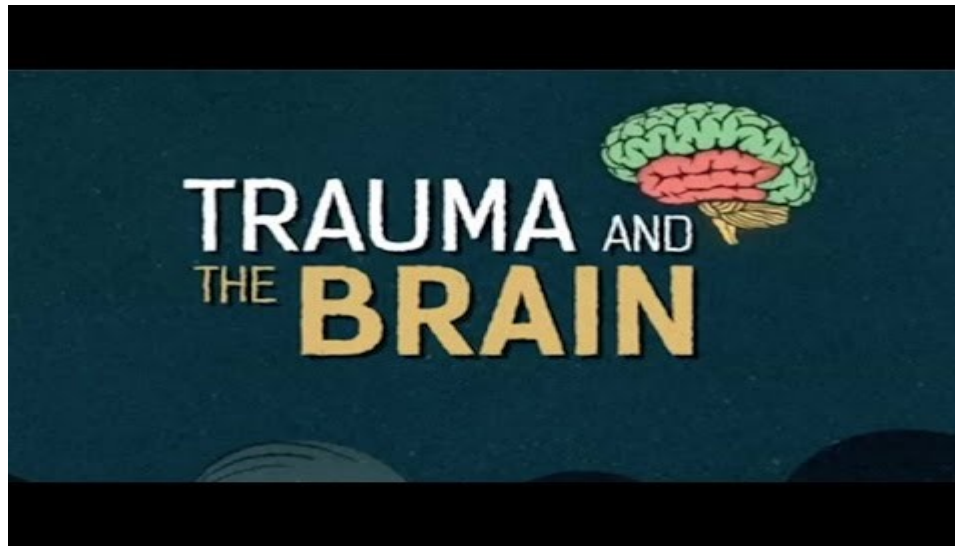
# The Impact of Trauma on Victim/Survivor Behavior

- Cultural and language needs must be ascertained and reasonably accommodated to avoid shutdown due to culturally offensive or inappropriate approaches.
- Be aware of cultural considerations of gender, subject matter, and narrative style.
- Some cultures reveal a story in a circular rather than linear manner.

--Strand, 2013



# Trauma-Informed Interviewing



# The Science of Forensic Interviewing

A forensic interview is:

- Non-leading
- Victim/survivor sensitive
- Victim/survivor centered
- Neutral and
- Developmentally appropriate that helps investigators determine what happened

--Strand, 2013

# The Science of Forensic Interviewing

- The goals of a forensic interview are to minimize any potential trauma to the victim/survivor, maximize information obtained from the victim/survivor and witnesses, reduce contamination of the victim/survivor's memory of the alleged event(s), and maintain the integrity of the investigative process.
- The Forensic Experiential Trauma Interviewing (FETI) approach is a trauma-informed interviewing approach.

--Strand, 2013

# Initial Meeting with Complainant

- Information on Retaliation
- Request for Confidentiality or to Not Pursue Complaint
- Transparency in the process and its limitations
- Clear information about the school's complaint resolution process versus law enforcement's process and information/options about both

# Initiating the Interview

- Creating expectations
  - Timeline
  - Safe and comfortable location
  - Explanation of role as a fact finder
  - Explanation of need to ask a range of questions
  - Recognition of awkwardness
- Determine who accompanying complainant
- Openness to questions at any time throughout the investigation



# The central investigative question

- What is the issue you are attempting to determine in your investigation?
- For instance:
  - Did Robert engage in forcible, non-consensual sexual intercourse with Susan in violation of Minnesota State's 1B.3 policy?
  - Did Sarah intentionally and without consent touch Robert's genital area in violation of Minnesota State's 1B.3 Policy?
  - Did Professor Smith engage in stalking Professor Johnson in violation of Minnesota State's 1B.3 policy?

# Information You Should Obtain During the Course of the Interview

- Description of the complainant's behavior and relationship with the respondent
- Description of the respondent's behavior
- Documentation of the specific incidents or acts committed and whether they were repeated
- Establish whether or not there was consent
- Establish whether there was force or threat of force

# Interviewing

*First, do no harm...*

Any possible efforts should always be made to minimize potential further trauma to the complainant.

# Trauma Informed Interviewing

- Most investigators and decisionmakers believe when a victim/survivor experiences trauma, the brain records most of the event including the “Who, What, Where, Why, When and How,” as well as other details of the event
- Most investigators are trained to obtain this type of information in interviews with victim/survivors
- High-stress situations can result in a trauma response on the part of the victim

Source: [http://www.army.mil/article/72055/Army\\_expert\\_receives\\_national\\_recognition\\_for\\_combating\\_sexual\\_assault](http://www.army.mil/article/72055/Army_expert_receives_national_recognition_for_combating_sexual_assault)

# How Does Trauma Informed Interviewing Work?

- Start with one basic, open-ended question
  - What are you *able* to tell me about your experience?  
(in your own words)
    - Just let them talk (ask clarifying questions later)

# Avoid “why” questions

- Interpreted as blaming
- Fear of being blamed is a huge part of why victims do not seek help
- Victims are easily re-traumatized by healthcare personnel, LE, prosecution, and loved ones

## Examples:

- Why did you go with him?
- Why didn’t you scream”
- Why didn’t you kick him in the -----?
- Why did you wait so long to come forward?

# Continuing the Trauma Informed Interview

- Engage victim in recalling memories from the event based on their personal experience and their senses
  - What was your thought process during this experience?
  - What are you *able* to remember about.....the 5 senses?



The Forensic Experiential Trauma Interview (FETI), Russell W. Strand & Lori D. Heitman

# Continuing the Trauma Informed Interview

- Gather information about the victim/survivor's reactions during and as a result of experience
  - What were your reactions to this experience?
    - Physically...
    - Emotionally...
      - Ask them to describe and recall as many memories as possible
        - Give them time
        - Try to avoid probing them with additional follow-up questions at this point
  - What was the most difficult part of this experience for you?
  - What, if anything, can't you forget about this experience?



# Finalizing the Interview

- Clarify any information and details gathered during interview
  - This step is completed only *AFTER facilitating* all you can about the victim/survivor’s “experience”
  - “Can you tell me more about....”

--The Forensic Experiential Trauma Interview (FETI), Russell W. Strand & Lori D. Heitman

# Conclusion of the Interview

- Thank the complainant for bringing the issue forward
- Give them your contact information in case they remember anything
- Explain future procedures and timeline
- Explain retaliation policy and procedure for reporting

# Evidence – comprehensive investigation

- Your main goals:
  - Gather all facts the complainant is able to provide about their experience and try to understand the context
  - *Show* that you gathered all the facts from every avenue – even if you do not think it will change the outcome! *Why?* **Your investigation will be highly scrutinized!**

# Other Witnesses

- Locate any witness who may have been around the complainant or the respondent before, during, after - try to document all interactions between respondent and complainant from any witness who saw/heard the interactions.
- Someone may have noticed level of intoxication, etc.

# Other Witnesses

- Since in many instances only two people saw the actual sexual assault take place, sexual assault cases allow for testimony from a broad definition of witnesses
- “Ear” witnesses – overhearing corroborative statements made by the complainant or the respondent to each other, before, during, or after the alleged assault

# Chain of Disclosure Witnesses

- Interview the disclosure witnesses – what did the complainant tell to others in the first hours/days after the assault?
- These are *invaluable* witnesses for the investigation – show the “unfolding” of the complainant’s disclosures to friends/family.
- Often these people helped the complainant decide to make a complaint
- How did the respondent describe to friends or acquaintances what took place between themselves and the complainant?

# Documentary Evidence

- Text messages
- Videos/Photographs
- Social media
- Emails
- Uber receipts
- Key card swipe records
- Police report
- SART exam, medical records

# Scenario #2

Mary has worked at Davis Community College in the Bursar's Office for over 32 years. She recently left her husband Dave, whom she has been married for 30 years, and has filed for divorce. Dave works at Park State University up the street, in facilities , and Mary put him out because he has battered her physically for many years in addition to calling her names and withholding money from her. Mary and Dave's daughter, Madison, contacts HR this morning because:

- 1) Dave has been drunk for 3 days and has told the kids that if he cannot have Mary, no one can.
- 2) Dave admitted to Mary that he came to Davis campus this morning and flattened her tire; and
- 3) Dave has called Mary's cell phone today 8 times while she was working. Mary called Madison crying asking her to "make her daddy stop all of this".

Mary is a private woman and when HR calls her in, she denies everything and says she is "fine".

Identify next steps in this scenario.





# Affirmative Consent





CONSENT

IT'S SIMPLE AS TEA

*of initiating sex, you're  
making them a cup of tea.*

# Affirmative Consent – 1B.3 Policy Language

## What is Affirmative Consent?

- Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions**.
- A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent. Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.

# Who has the responsibility to obtain affirmative consent?

- It is the responsibility of the person who wants to engage in sexual activity to ensure that the other person has consented to engage in the sexual activity.

# Can affirmative consent be revoked?

- Consent must be present throughout the entire sexual activity and can be revoked at any time. If coercion, intimidation, threats, and/or physical force are used, there is no consent.

# Who cannot give affirmative consent?

- If the complainant is mentally or physically incapacitated or impaired so that the complainant cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes conditions due to alcohol or drug consumption, or being asleep or unconscious.

## Scenario #3

Lisa and Steve are first year students at Patterson State University. They both live in Kent Hall and both on the 3<sup>rd</sup> floor. They met during orientation and hit it off. They have been dating for two weeks. Last night, an FA received a report from another resident that Lisa was crying in the bathroom. The resident states that Lisa told them that Steve kept pressuring her (Lisa) to have sex and she agreed, but only if he used a condom. Halfway through intercourse, Lisa said she noticed that Steve had removed the condom. She asked him why, and he said "The sex is way better." Lisa let him finish but has not talked with him since. The resident thinks the FA should keep an eye on Lisa because she is really upset and disappointed at Steve.

Identify what steps should be taken.



# Intoxication versus Incapacitation

# Incapacitation is ...

- A state where a person cannot make an informed and rational decision to engage in sexual activity.
- A person who was incapacitated due to the influence of drugs, alcohol, and/or medication and could not understand the fact, nature or extent of the sexual activity.

# Determining Incapacitation

- Incapacitation is a **subjective determination** made in light of all the facts available.
- Why is it a subjective determination? Because people reach incapacitation in different ways and as a result of different stimuli (e.g., alcohol, marijuana, substance interaction with medication, etc.). They also exhibit incapacity in different ways.

# What is the investigator evaluating?

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.

# Areas of Inquiry

- Body weight, height and size;
- Tolerance for alcohol and other drugs;
- Gender
- Amount, pace and type of alcohol or other drugs consumed
- Signs of intoxication
- Food and non-alcoholic drinks

# Incapacitation Analysis

- Evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs impacts an individual's:
  - Decision-making ability
  - Awareness of consequences
  - Ability to make informed judgments; or
  - Capacity to appreciate the nature and the quality of the act.

Occidental College Policy

# Incapacitation Analysis

- Incapacitation is a very high bar
- You can be very intoxicated and still not incapacitated

--Keith Rohman, 2017

# Assessment of Incapacitation

- Obvious indicators
  - Physically helpless?
    - Difficulty with motor skills, like walking
  - Unable to communicate?
    - Cannot communicate consent to sexual activity
    - Cannot communicate unwillingness to engage in sexual activity

--Keith Rohman, 2017



# Assessment of Incapacitation

- Other indicators:
  - Does the person know where they are or how they got there?
  - Did the person do things in public that were out of character?
  - Possible memory blackout
  - Cannot verbalize coherently
  - Bizarre or risky action

--Keith Rohman, 2017

# Assessment of Incapacitation

- Counter-indicators
  - Stops to use or request birth control
  - Stops to do things to prepare for sexual activity
    - Brushes teeth after vomiting
    - Goes to the bathroom
    - Carefully removes clothing
  - Carries on relatively normal conversations
  - Motor abilities are not impaired

--Keith Rohman, 2017

# Assessment of Knowledge

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the Respondent knew or reasonably should have known that the Complainant was unable to consent to the sexual activity.

--Keith Rohman, 2017

# Assessment of Knowledge

- Respondent observed Complainant asleep or unconscious
- Respondent observed Complainant unable to communicate due to physical or mental condition
- Respondent observed Complainant ingest alcohol and/or drugs, rate of ingestion, time of consumption
- Respondent observed Complainant's physical and verbal behaviors
- Respondent was told about the amount of alcohol and/or drugs Complainant ingested
- Respondent's actions like assisting Complainant after Complainant threw up
- Respondent's comments to others about Complainant's state

--Keith Rohman, 2017

# Incapacitation Analysis

- 1. What is the evidence that the complainant was under the influence of alcohol and/or drugs?
- 2. Did the alcohol and/or drugs cause the complainant to be incapacitated?
- 3. What did the respondent know, or what should the respondent have known, about the complainant's level of intoxication and/or incapacitation?

## Scenario #4

Angela and Aaron have been dating for two years at State Community College and have engaged in consensual sexual intercourse. They both live on campus. One night while become intimate, Angela stops and says she doesn't feel like having sex that night. Aaron continues to touch her which Angela enjoys, but say that she got him excited and it isn't fair of her to lead him on like that. Later that night they had a few alcoholic drinks and Angela says she fell asleep. She wakes up and finds Aaron on top of her having sexual intercourse. She says nothing and after intercourse tries to go back to sleep. Angela reports this to you the Director of Res Life.

Identify what steps should be taken.

# Assessing Credibility



# What is CREDIBILITY?

- Credibility is about the believability of a party or witness (sometimes about a piece of evidence)
- It is an assessment of the evidence/facts using a set of factors as tools
- **Caution:** We are investigating on a preponderance of the evidence standard. It is important to acknowledge how this is different from determining the truth or who is lying. Even a criminal standard—beyond a reasonable doubt, which is much higher does not purport to determine the truth. Including the words truth, lie, or variations, is a misnomer and clouds the standard we are applying.



# When and Why USE CREDIBILITY

- EVERY investigation requires a credibility assessment – the length and depth of that assessment varies based on other factors in the investigation
- Why?
  - Demonstrates the investigator's impartiality
  - Ensures the investigator knows the case in detail
  - Provides extra information/added value for the decisionmaker
  - Creates a stronger report

# Comprehensive Consideration

- Put every credibility factor in your report template.
  - Corroboration/Lack of Corroboration
  - Consistency/Lack of Consistency
  - Actual Knowledge
  - Inherent Plausibility
  - Motive to Falsify
  - Material Omission
  - Past Record
- Consider each factor as you work through the evidence collected.
- Delete the ones that do not apply.

--Sue Ann Van Dermyden, 2017

# Corroboration

- Is there testimony from a party or witness, or a piece of physical or documentary evidence that corroborates the party's or witness' testimony? Did the party or witness contemporaneously document or report the incident(s) in some way?
- What to do in party said versus party said situations? Is corroboration required? Can there be a preponderance of the evidence without corroboration?

# Consistency

- Is there party or witness testimony or physical evidence that is consistent with the party's or witness' testimony?
- Example: Complainant said he and Respondent went to a party at ABC House around 9 p.m. Friday night. Respondent said she went to a party with Complainant and Witness B on Friday night. There is an Uber receipt confirming a ride from the address of the party to Witness B's apartment.

# Actual Knowledge

- The extend of the interviewee's opportunity to perceive matters about which they testified.

# Inherent Plausibility

- Is the testimony believable on its face? Does it make sense?

# Inconsistent Statements in a Trauma Environment

- Recall Trauma Effects
  - Memory loss, lack of focus, emotional reactivity, lack of accurate and detailed information, non-linear stories, and multiple versions of a story can all be signs of trauma
  - Trauma victims may have an interrupted memory process
  - Trauma victims reluctant to recall experiences that evoke negative feelings
  - Lack of linear memory is often a sign of trauma

--Brenda Ingram and Sue Ann Van Dermyden, 2017

# Trauma effects continued

- Inconsistency by trauma victim is the rule
- The more confused the victim, the more likely they experienced trauma
- Additive stories with more details over time does not harm credibility
- Inconsistent statements do not equal a lie
- Wildly varying stories more challenging
- Weigh material vs. immaterial inconsistencies appropriately

--Brenda Ingram and Sue Ann Van Dermyden, 2017



# Additional factors

- **Motive to falsify.** Did the person have a reason to lie? Does the person have a bias, interest, or other motive? Consider relationships, history, context.
- **Material omission.** Did a party omit a material piece of evidence, despite having a reasonable opportunity to provide it?
- **Past record.** Does the Respondent have a history of similar behavior in the past? Does the Complainant have a relevant history?

--Sue Ann Van Dermyden, 2017

# Caution!

- Reputation. Does the interviewee have a reputation for honesty or veracity or their opposite?
- Attitude. Did the person cooperate when participating in the interview and/or providing information?
- Demeanor. Did the person seem to be telling the truth or lying (and why)?

--Sue Ann Van Dermyden, 2017

# MINNESOTA STATE CONTACT INFORMATION

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