

Sexual Misconduct Investigation Training

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Spring 2021



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Agenda

1. Title IX Introduction
2. Case Management Overview
3. Conducting an Investigation: Initial Steps
 - Notice of Formal Complaint
 - Party's Rights & Options
4. Interview Approaches & Example Questions
 - General Cases
 - Non-Stranger Sexual Assault Cases
 - Incapacitation vs. Intoxication
 - IPV & Stalking Cases
5. Closing Steps
 - Access to Evidence
 - Issues of Relevance
 - Investigation Reports
 - Transition to the Adjudication Stage



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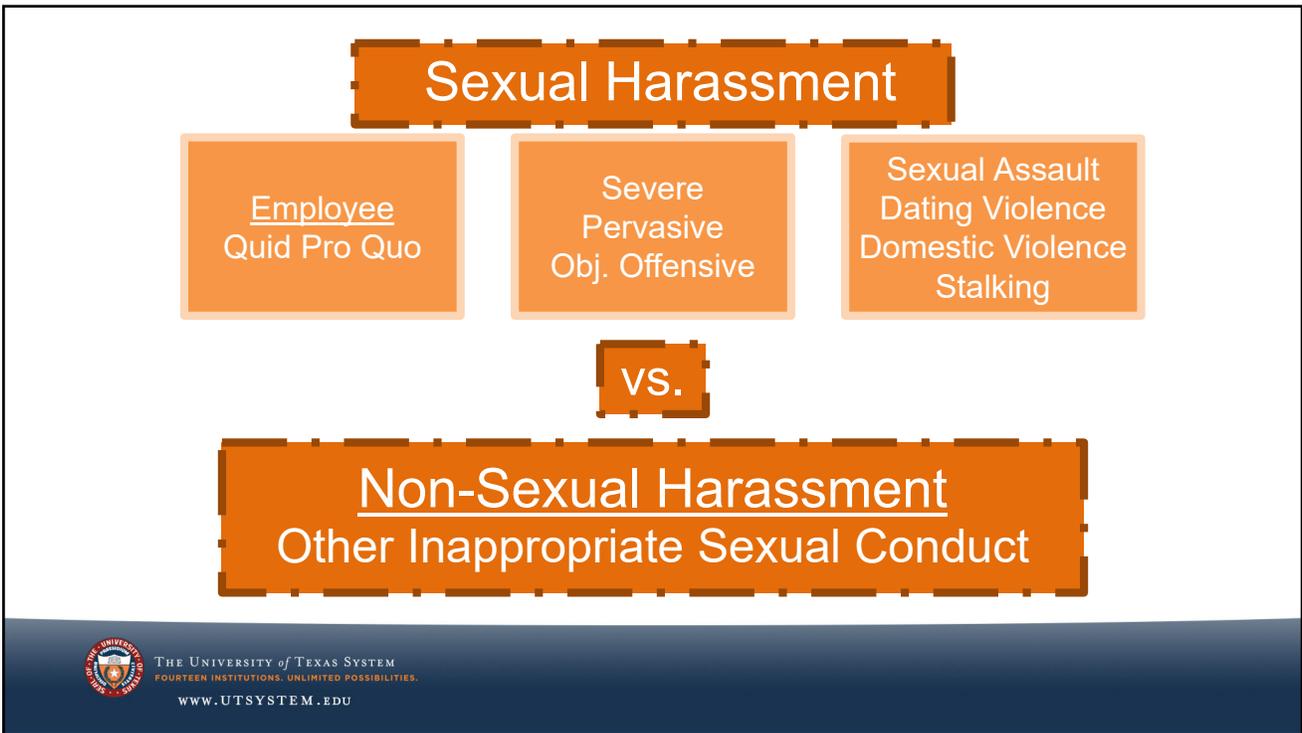


Introduction

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Sexual Harassment

- Employee Quid Pro Quo
- Severe Pervasive Obj. Offensive
- Sexual Assault Dating Violence Domestic Violence Stalking

vs.

Non-Sexual Harassment
Other Inappropriate Sexual Conduct

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Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



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Source: Title IX Regulations (2020)

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Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct...



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Source: UT System Model Policy for Sexual Misconduct (2020)

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Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



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Source: *Title IX Regulations (2020)*

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Key Pillars: Title IX Processes

Title IX processes should focus on
impartiality, respect, fairness, & equity
for all of the participants:

Complainants
Respondents
Witnesses
Third-party Reporters



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Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias**

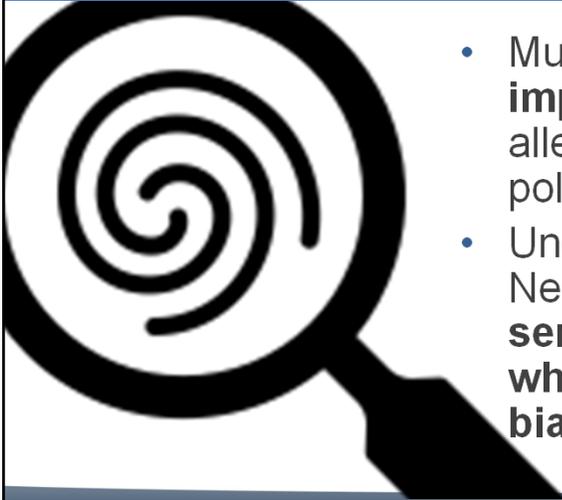


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Source: Title IX Regulations (2020)

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Principles for Title IX Process



- Must maintain **complete neutrality & impartiality at all times** in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an “**objective, common sense approach to evaluating whether a person serving in a role is biased.**” (*Title IX Preamble (2020)*)...



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Avoiding Bias

- Must **not** treat a party differently:
 - On the basis of the person’s **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person’s **characteristics**: sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, financial ability, socioeconomic status, or other characteristic.



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Relevant Evidence



- Must consider **all of the relevant evidence**, including all possible **inculpatory & exculpatory** evidence obtained in the investigation
 - **Exculpatory**: Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
 - **Inculpatory**: Evidence that places responsibility on the person of the alleged conduct.



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“Reasonable Person” Standard



Use a **“reasonable person”** standard for weighing all of the evidence:

- An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.



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Other Components of this Training

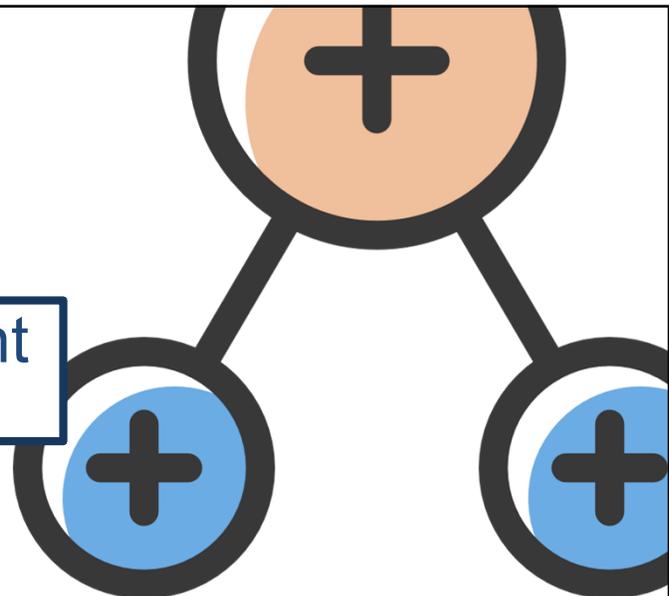
- Conducting an **investigation**
- Understanding **issues of relevance** to create an investigation report that fairly summarizes relevant evidence of questions posed and evidence obtained



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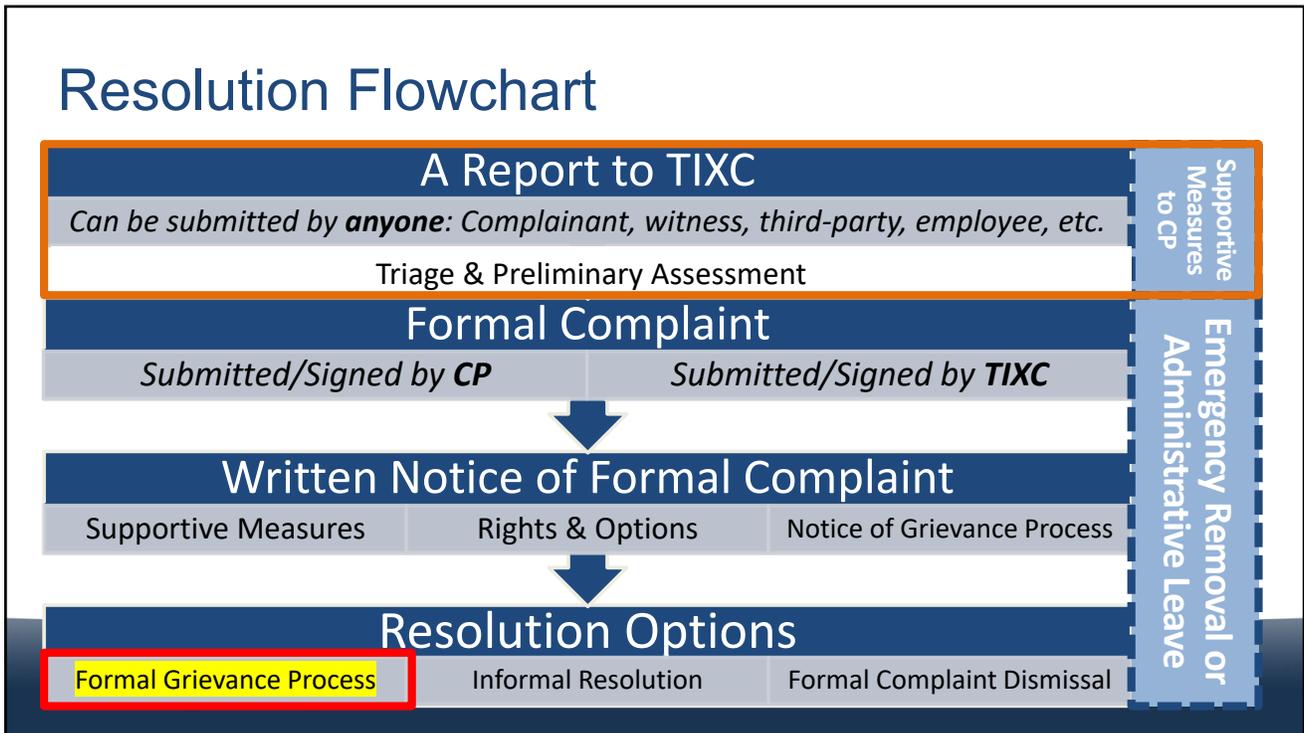
Case Management Overview



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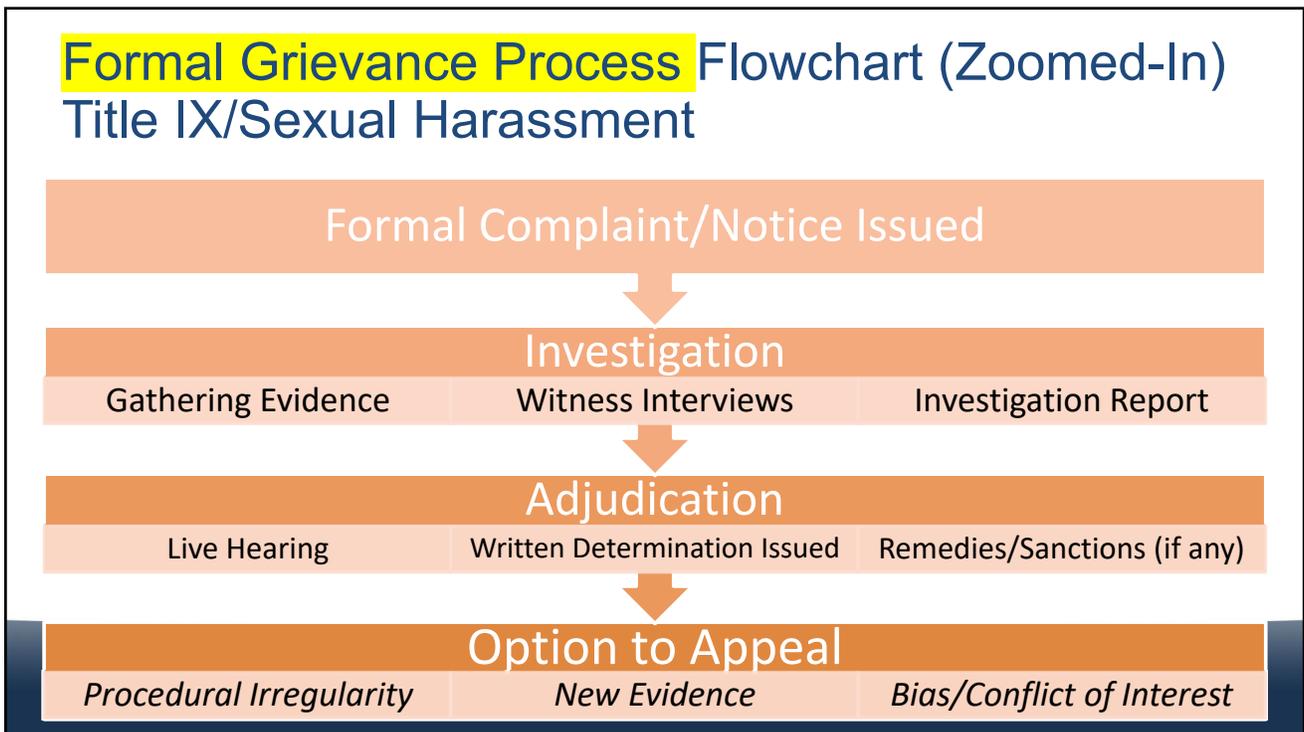
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Resolution Flowchart



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Formal Grievance Process Flowchart (Zoomed-In) Title IX/Sexual Harassment

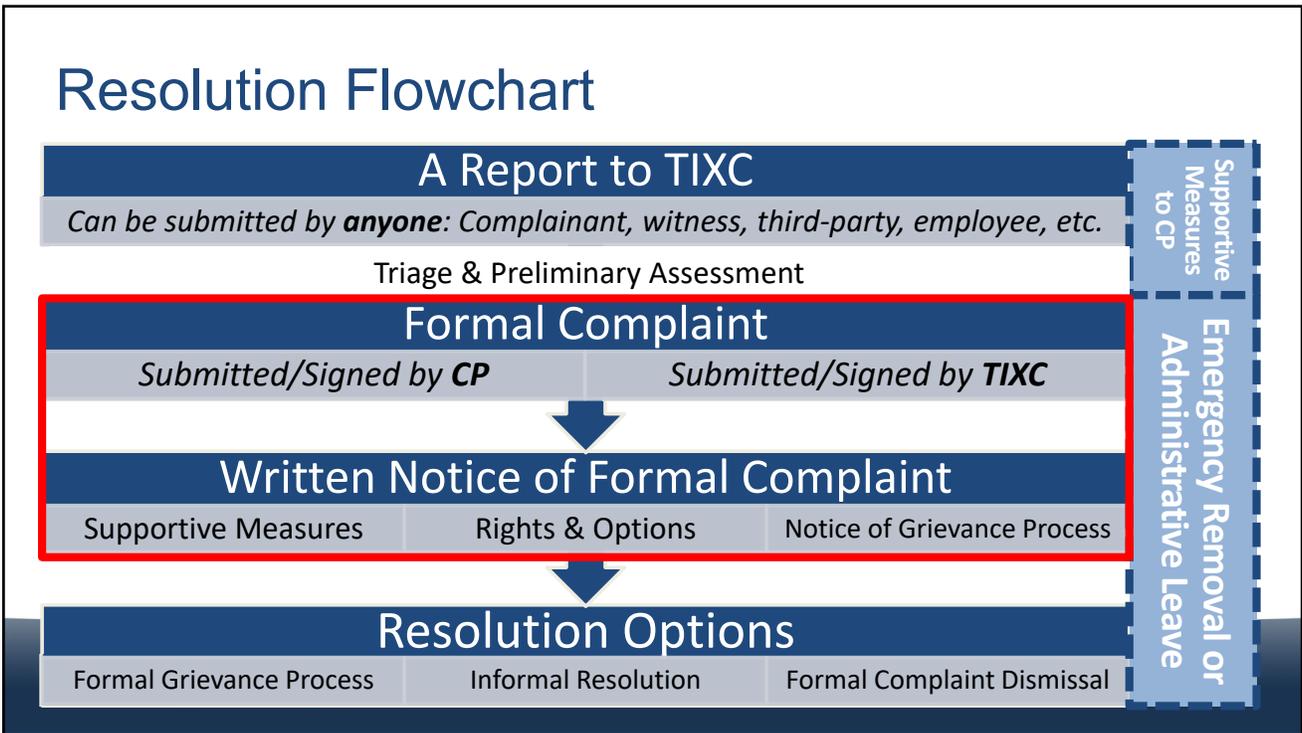


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Formal Investigation Initiated & Conducting an Investigation

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Written Notice of Formal Complaint

Upon receipt of a formal complaint, promptly send written notice to CP & RP:

- Notice of the grievance process under the policy;
- Notice of the allegations that potentially constitute prohibited conduct under the policy, sufficient details about the alleged conduct: Date(s), time(s), and location(s);
- A statement that the potential policy violations are being investigated;



Written Notice (Continued)

- A statement that the RP is presumed not responsible for the alleged conduct and that the determination regarding responsibility will be made at the conclusion of the grievance process;
- Both parties may have an advisor of choice, who may be, but is not required to be, an attorney, and may inspect and review all evidence;
- A statement that the parties may review evidence gathered as part of the any investigation;



Written Notice (Continued)

- A provision of the policy that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited and subject to disciplinary action;
- Any other relevant information for the written notice; and
- A statement that retaliation is prohibited under the policy. (recommended)



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Other resources to include with the written notice:

1. **Supportive measures** available for both parties
2. **Campus & local** resources or services
3. **Rights & options** of both parties
4. A copy of the **grievance process & policy**
5. Title IX Coordinator & Investigator(s) **contact information**



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Party's Rights

A **Complainant** and **Respondent** have the following rights during a grievance process:

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive a **prompt, fair, equitable, and impartial grievance process**.
- To receive information and ask questions about the **formal and informal processes**.



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Party's Rights (Cont.)

- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence.
- To choose **not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.



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Party's Rights (Cont.)

- To have access and equal opportunity to **inspect** and **review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To file a report with **local** and/or **campus law enforcement** authorities.



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Complainant's Rights

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).

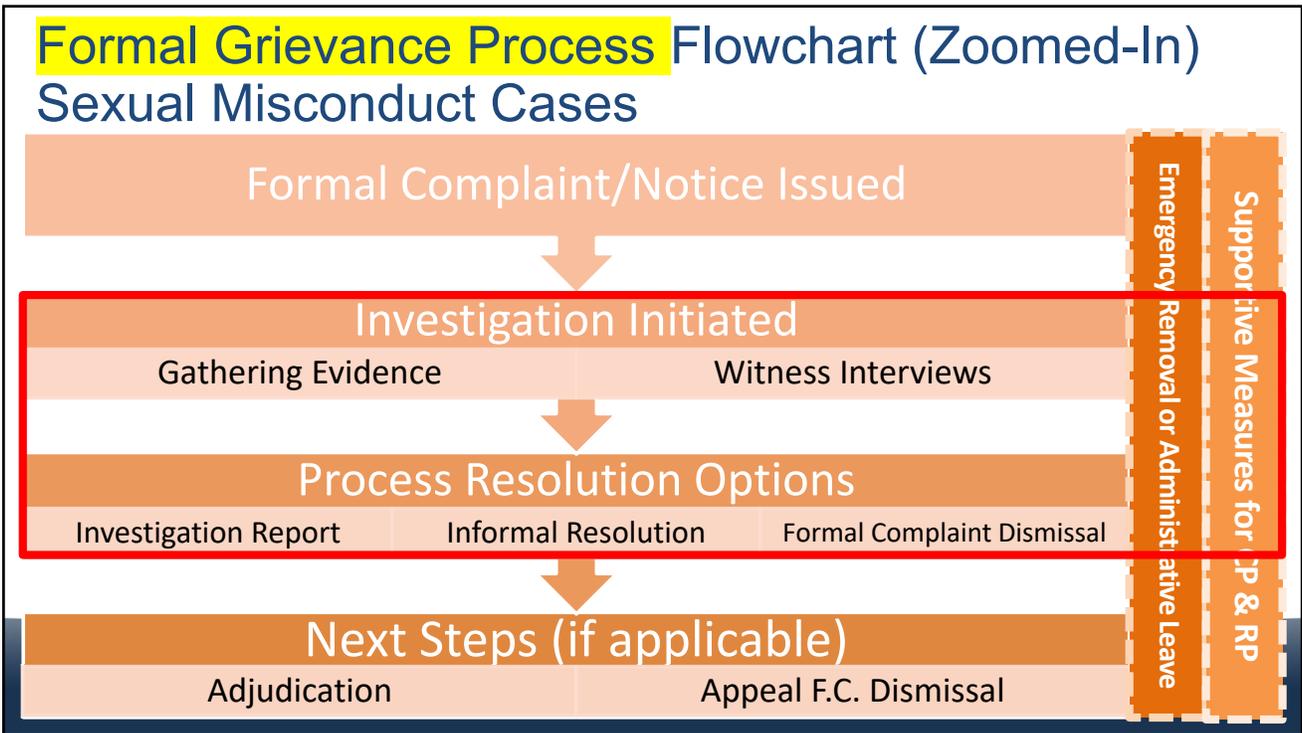


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Investigation Plan: The Foundation

Basis for the investigation?

- Alleged **incident** of prohibited conduct
- Alleged **pattern** of prohibited conduct
- Alleged **climate issue(s)** in an area or department



Investigative Framework

- Establish **facts & timeline(s)**.
- Understand each party's **perception & experiences** of the alleged incident(s).
- Elicit **details & descriptions** of the alleged incident(s) from the parties & witnesses.
- Address **disputed facts or conflicting evidence** (if any) & seek responses from the parties (if applicable).
- Gather **sufficient information available** for a determination of facts, importance, & relevance to the formal complaint.



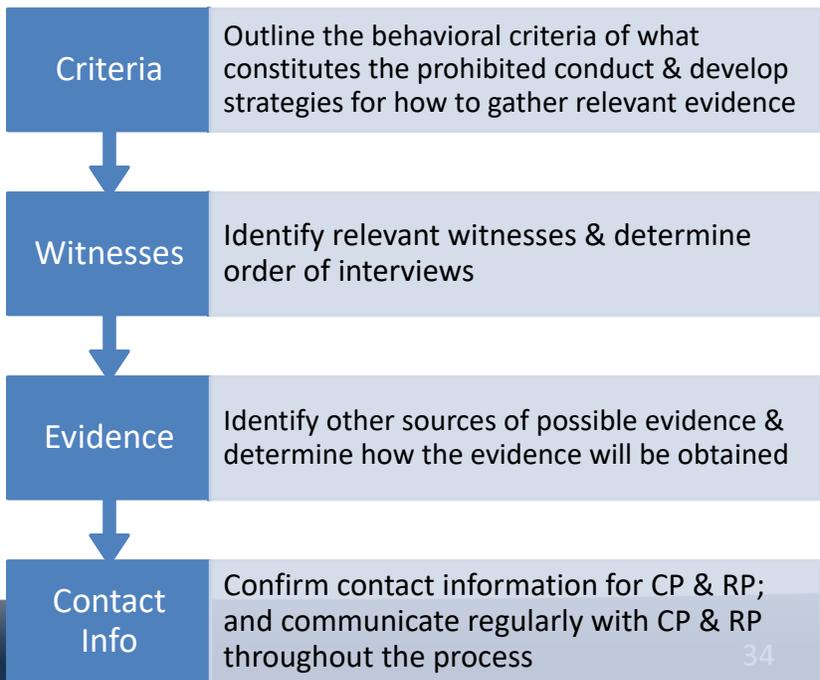


Investigator Considerations

- One or two investigators?
- Roles of each investigator?
 - Facilitator
 - Notetaker
- Interview notetaking or recording?



Investigation Plan (Continued)



Investigation Plan (Continued)



Partnerships	Establish communication with other relevant partners, as appropriate (e.g. BIT's, law enforcement, case managers)
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Flexibility	Be flexible & revise the plan, as necessary
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Timeline	Keep a working timeline of the investigation, as well as a timeline of the alleged incident



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Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



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Look at the Provision(s) at Issue:

Engaging in a (1) **course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.**

For the purposes of this definition:

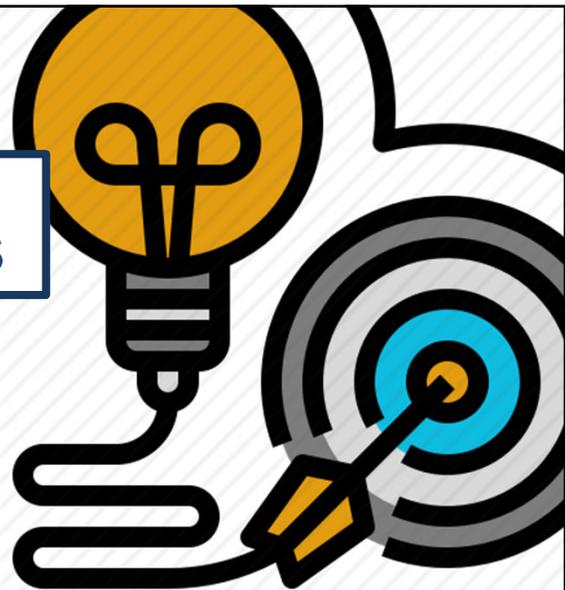
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Interview Approaches



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Key Pillars (Revisited)

Impartiality

Respect

Fairness

Equity

For all of the participants
in the process:

Complainants

Respondents

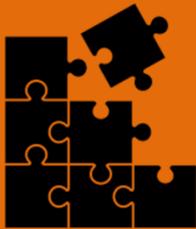
Witnesses

Third-party Reporters



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Basis for a
“Trauma-
Informed”
Approach

- A. *Encourages all participants to share what they are able to recall about their experience without demanding chronological recall; and*
- B. *Facilitates the gathering of information in a balanced manner from all individuals*

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Interview Notice

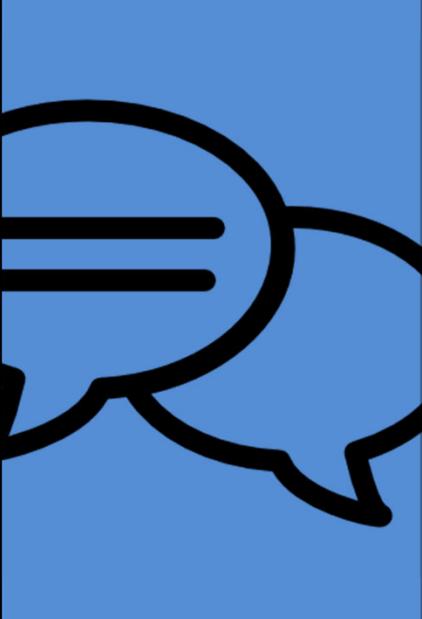
- Date, time, & location of the interview meeting
- Names of the invited or expected meeting participant(s)
- Purpose of the meeting or investigative interview
- Opportunity to present any information, evidence, and/or witnesses relevant to the formal complaint.
- An advisor of choice may attend, though not required.



Before an Interview

- Develop a **safe space** for a person's physical & emotional well-being
- Have **handouts & resources** readily available





Pre-Interview: Rapport-Building

- Weather
- Hometown
- Hobbies
- Favorite Classes
- Pop Culture
- Music



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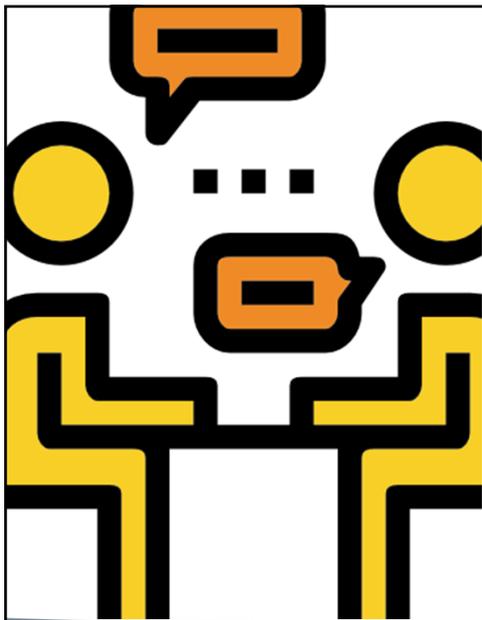
Pre-Interview: Explain the Process

- What to expect of the process
- Applicable policies; amnesty for alcohol/drug use; prohibition of retaliation
- Rights of the parties
- Purpose for the interview
- Options for decision-making
- Resources & supportive measures available
- Title IX Coordinator & investigator(s) contact information
- Follow-up & next steps



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Interview Start

- Allow the person to provide their account of the incident **in their own words & at their own pace**:
 - *“What are you able to tell me about your experience?”*
 - Allow time for the person to respond.
 - Do **not** ask a lot of questions at first.
- Be patient & respectful.
- Be comfortable with silence.
- **Nodding** or *“Mmm”* are ok.
- Follow-up (if a general prompt is necessary):
 - *What, if anything, do you remember once you...[insert last part]...?*



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Source: Forensic Experimental Trauma Interview (FETI)

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Clarification Prompts

- Attempt to clarify from **all** parties. Examples...
 - *“Tell me more about [blank]...”*
 - *“When you said [blank]...help me understand what you meant...”*
 - **Instead of asking “Why or why not...?”**
*Maybe say: “Help me understand **your thought process** for [insert the clarifying part]...”*
 - *“What did you mean by [blank]...?”*
 - *“There are **differences** in your account vs. [blank]...[insert specifics]...help me understand the reason(s) or rationale for this different account...”*



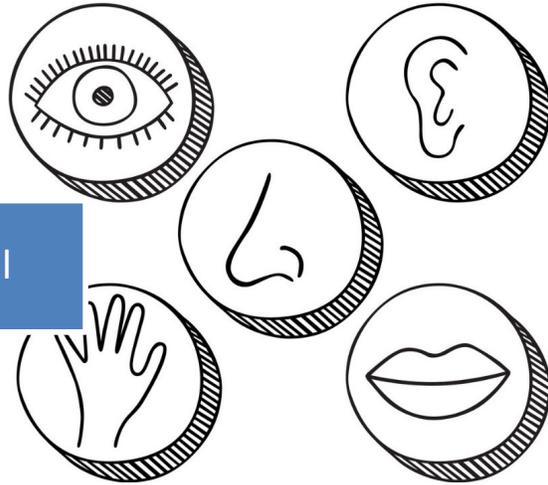
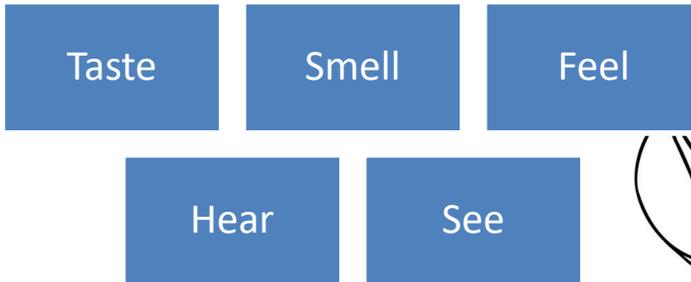
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Recall Prompts

Sensory recall: “What, if anything, are you able to **remember** about...”



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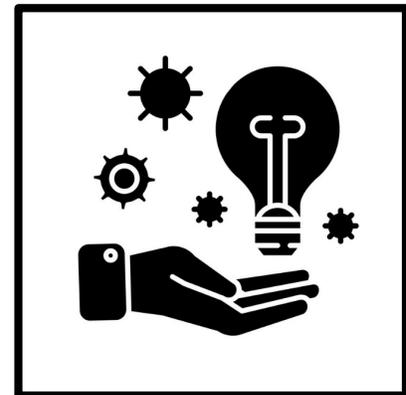
Source: Forensic Experimental Trauma
Interview (FETI)

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Recall Prompts (Cont.)

- **Instead of asking “Why or why not...?”**
“What was your **thought process**...”
 - ...**During** the experience?”
 - ...**Before** the experience?”
 - ...**After** the experience?”
- “What, if anything, are you able to **remember** about...?”
- “What were your **reactions** to...?”
 - Emotional response?
 - Physical response?
- “What was the **most difficult** part of this experience for you?”
- “What, if anything, **can’t you forget**?”



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Source: Forensic Experimental Trauma
Interview (FETI)

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Interview Documentation

Document the **psychological & physical responses** of the experience (if applicable):

Nausea

Flashbacks

Trembling

Muscle Rigidity

Terror

Memory Gaps

Sensory Recall

Injuries



Interview Documentation (Cont.)

Document **elements** of force, threat, coercion, intimidation, or fear (if applicable):

Note: These elements may not be based on weapon use or actual physical threat for it to be perceived as real



Interview Documentation (Cont.)

Document **defensive strategies** (if applicable):

- Forceful Physical Resistance (Fight)
- Verbal Resistance
- Attempt to Get Away (Flight)
- Bargain (Appease)
- Tonic Immobility (Freeze)


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Interview Wrap-Up

Explain the following:

- Revisit what to expect for next steps of the process, person's rights, person's options, resources available, and applicable remedies
- Decision options (and timelines or deadlines, if applicable)
- Ways to provide evidence, witnesses, or respond to other party's statements
- Contact information for the investigator and/or TIXC/Deputy


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Non-Stranger Sexual Assault Cases



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Consent Definition

A **voluntary, mutually understandable agreement** that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is **not effective** if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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First...Establishing Consent

Consent is not effective if:

- Physical force;
- Threat of physical force;
- Intimidation;
- Coercion; or
- Incapacitation



Consent (Example Questions)

- Refer to the definition of “**consent**” based on the **institution’s policy**.
- What was the nature, timing, & scope of the **relationship** btwn the parties?
- What were each party’s **expectations** (e.g. perceived, communicated), about the **nature of the contact** on the date of the alleged incident?
- What was the manner of communication **before, during, & after** the alleged incident (e.g. words & actions) btwn the parties?
- What were the circumstances of the **CP’s disclosure** & the **RP’s reaction** to the disclosure?
- What was the **impact** of alcohol or other drug use in relation to the **ability to give consent**?
- Are there any reported or demonstrated **predatory behaviors**?



Incapacitation Definition

Incapacitation is the **inability, temporarily or permanently, to give consent** because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Intoxication:

- Slurred speech
- Weaving or stumbling while walking
- Exaggerated emotions

Incapacitation*:

- Mentally or physically helpless
- Unconscious
- Asleep
- Unable to speak coherently or walk unassisted
- Unaware of the sexual activity occurring
- Unaware of time, place, or how they became engaged in a sexual act
- A state beyond drunkenness or intoxication



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* *UT uses a "reasonable person" standard*

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Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated, the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated? And if not...
2. Should a **sober, reasonable person in the same situation** have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the Respondent knew or should have known that the person was incapacitated.



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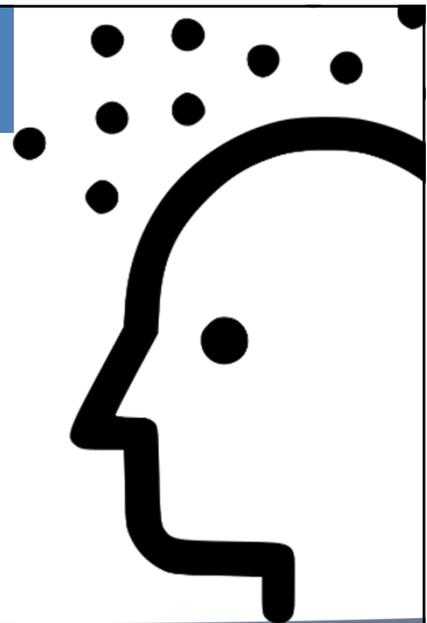
Source: UT System Model Policy for Sexual Misconduct (2020)

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Incapacitation (Example Questions)

- What were each person's **pre-incident** behavior?
- **Quantity and quality** of alcohol & other drug use:
 - What was the nature of the **event & setting**?
 - Was there any respective **power or control** of either party?
 - Who **supplied** the alcohol or other drug(s) to either party?
- What were each person's **expectations & mindset**?
- How did each person **reasonably know** the level of intoxication of the other party?
- Is there any information from **witnesses, video footage**, etc. as to the level of incapacitation?
- What were each person's **post-incident** behavior?



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IPV & Stalking Cases



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Determining Predominant Aggressors

Common Considerations:

- Indicators of **power & control**
- Presence or threat of a **weapon**
- **History** of dating or domestic violence
- Aggressive or hostile **body language**
- Pre-existing **protective orders** or “**no contact**” directives
- Comparative extent of **injury** (if both are injured)
- **Property** damage
- Elements of **fear**



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Has the RP:

- Prevented you from talking to others such as family or friends?
- Listened to your private phone calls or read your email?
- Acted jealous?
- Humiliated you at home or in public?
- Broken your personal belongings?
- Behaved violently or aggressively in public?
- Been arrested in the past for violence?

Assessing Danger (Example Questions for CP)

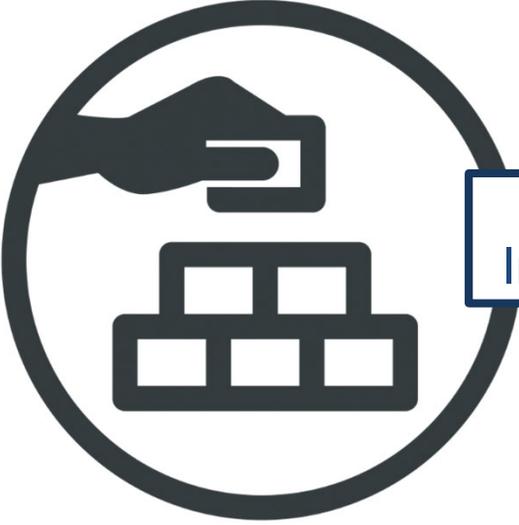


Assessing Lethality (Example Questions for CP)

Has the RP:

- Have access to a weapon, and/or threatened to use a weapon?
- Threatened to harm or kidnap your children?
- Threatened to kill you, themselves, or others?
- Harmed your pet(s)?
- Been abusing alcohol or drugs?
- Stalked or followed you?
- Forced you or your children to flee in the past?





Remember the Investigation Plan



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Closing Steps of the Investigation



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Advisor Considerations

- Is an advisor of choice involved?
- Access to the related evidence & the finalized investigation report (closing steps of the investigation).
- Consider providing an advisor, if an advisor of choice has not been involved.

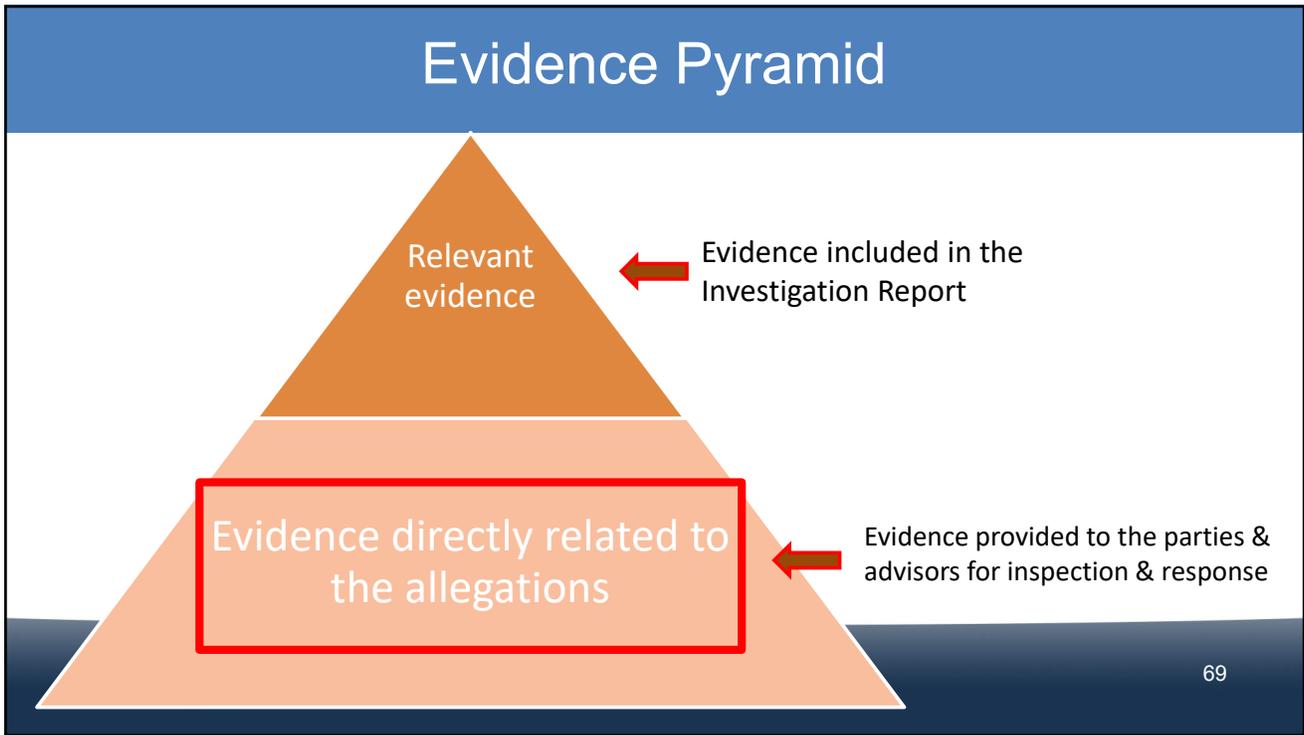


Evidence Collection

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

...that indicates whether a claim, belief, or proposition may be true or valid.





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Access to Evidence

Equal opportunity to both parties (& the advisors) to **inspect & review any evidence obtained** that is directly related to the allegations in the formal complaint.

The icon consists of two overlapping orange folders, one slightly behind and to the right of the other, representing a file or document.

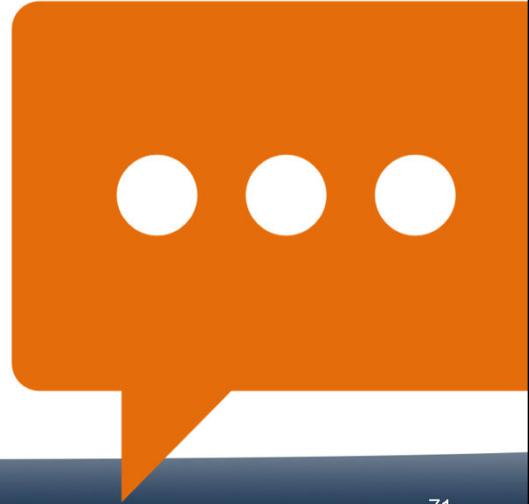


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Access to Evidence: Why?

So that each party can **meaningfully respond** to the evidence prior to the conclusion of the investigation.



Access to Evidence: When?

- Upon request from a CP, RP, or an Advisor?
- At the end of the investigation?



Access to Evidence (Cont.)

Send each party (& the advisors*) the applicable evidence:

- In hard copy or electronic format
- At least 10 days to inspect, review, & respond to the evidence
- All responses to the evidence must be submitted in writing to the investigator(s)

** Advisor of choice; or the provided advisor by the institution (If applicable)*



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Access to Evidence (Cont.)

The investigators will consider all timely responses submitted by the parties **prior** to completing the investigation report.



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Issues of Relevance



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Review the Evidence

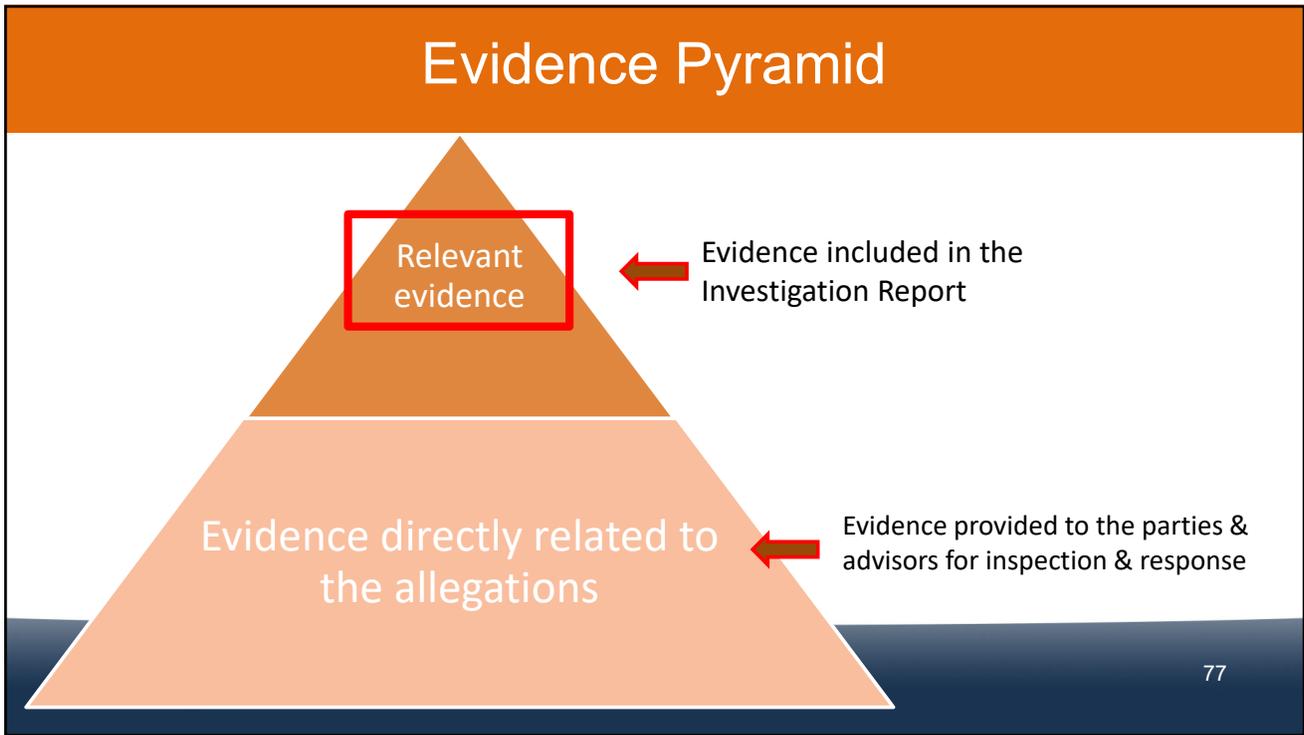
- Available body of facts or information:
 1. Tangible objects (real items)
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 4. Testimonial (statements)



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Relevant Evidence



Evidence is **relevant** if:

- The evidence has any tendency to make a **fact** more or less probable than it would be without the evidence; **and**
- The **fact** is of consequence in determining the action.

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Relevant Evidence



Another way to frame it:

- **Exculpatory evidence:** Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
- **Inculpatory evidence:** Evidence that places responsibility on the person of the alleged conduct.



“Reasonable Person” Standard



Use a “**reasonable person**” standard for weighing all of the evidence:

- An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.



Medical Records Evidence



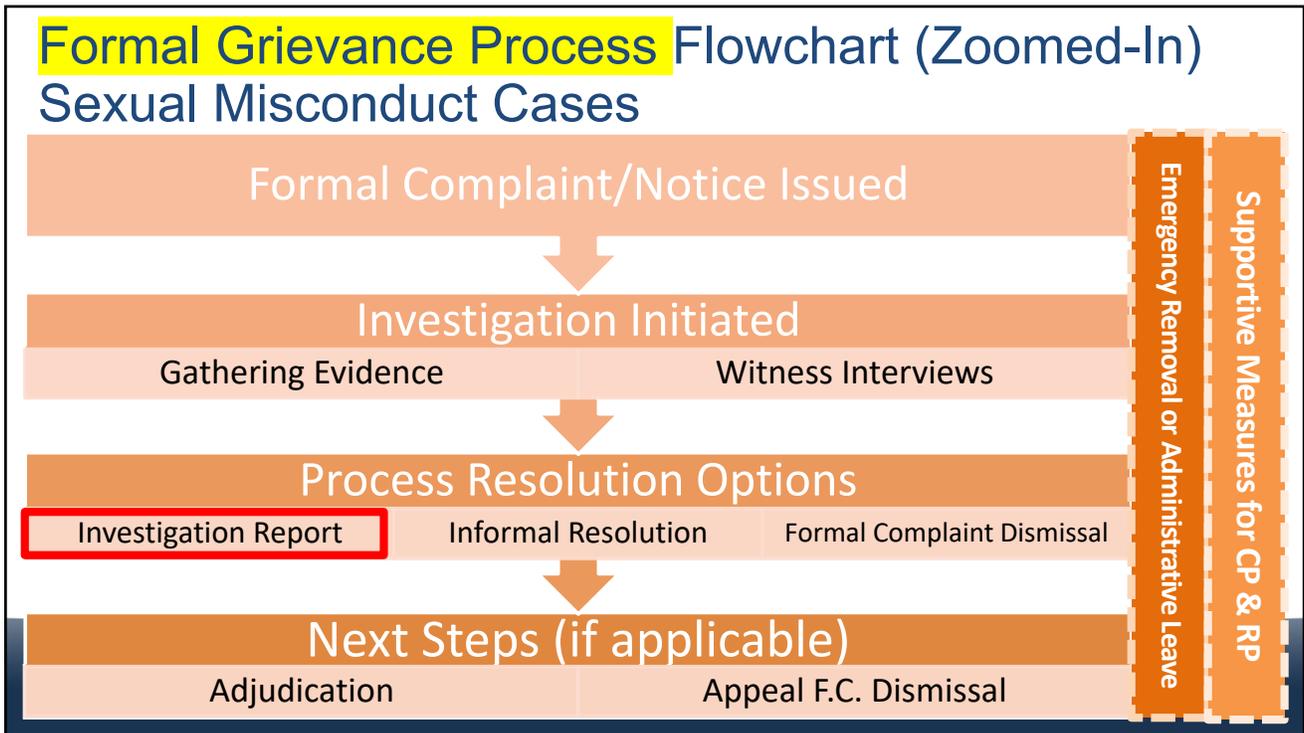
Cannot access, consider, disclose, or use a party's **medical** or **mental health records** as evidence unless the party provides voluntary, written consent to the institution for the grievance process.



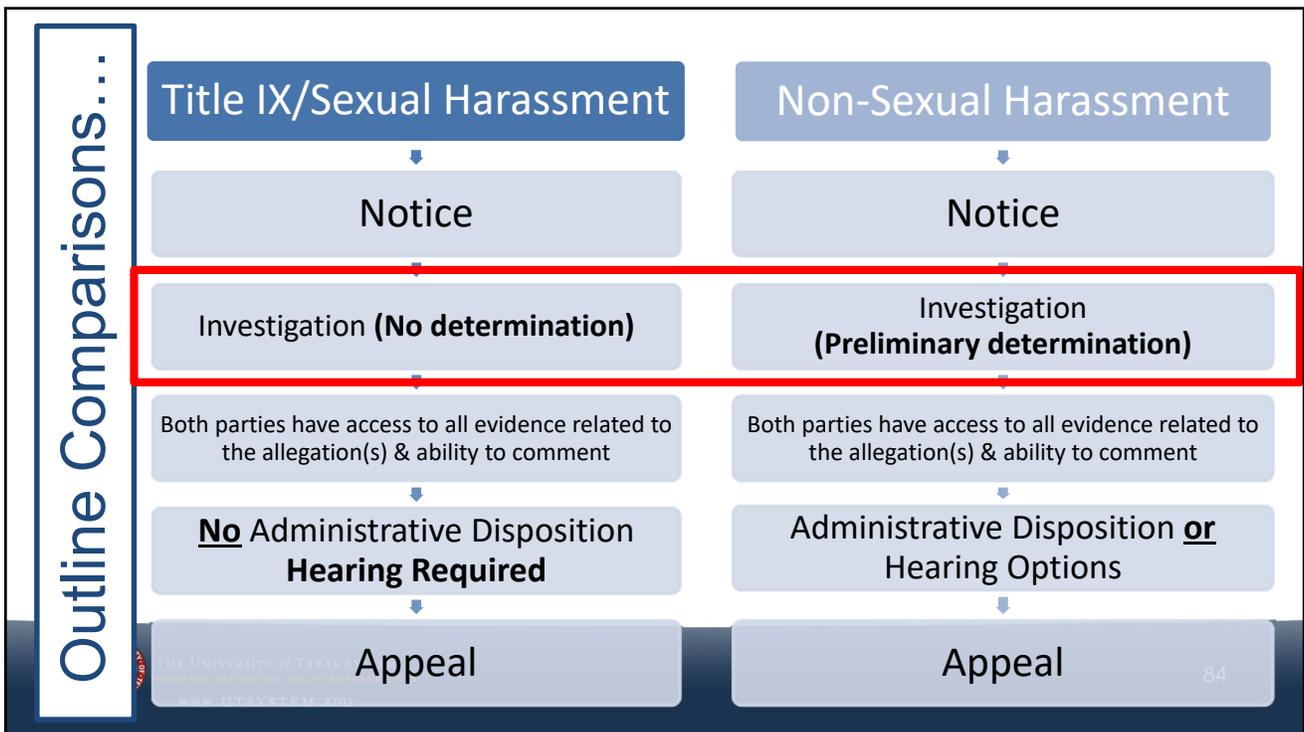
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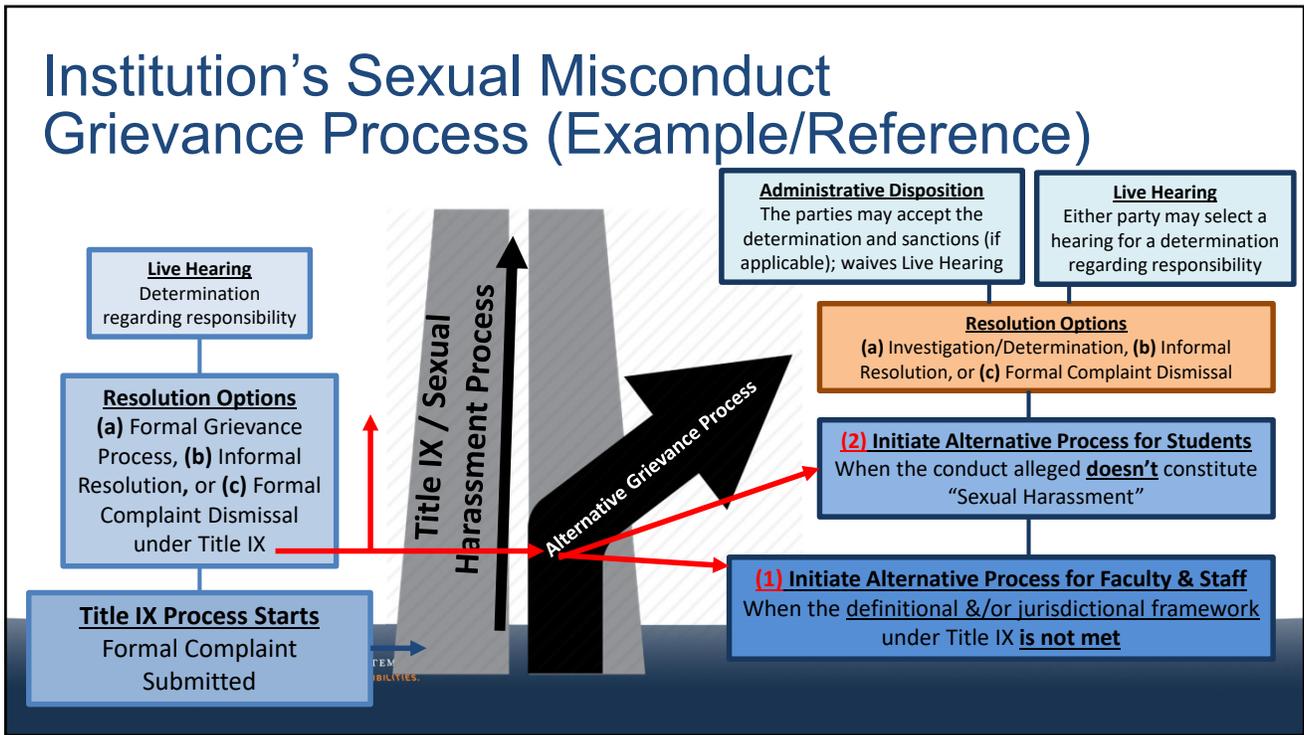


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Institution's Sexual Misconduct Grievance Process (Example/Reference)



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Draft vs. Completed Investigation Report



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Completed Investigation Report: Sexual Harassment Cases

1. Outline each of the **allegations** that potentially constitutes prohibited conduct under the Policy.
2. Provide a **timeline** (e.g. procedural steps) of the investigation. (recommended)



Completed Investigation Report: Sexual Harassment Cases (Cont.)



3. **Fairly summarize** relevant evidence, participate statements, and responses to questions.
 - **Exculpatory**: Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
 - **Inculpatory**: Evidence that places responsibility on the person of the alleged conduct.



Non-Sexual Harassment: Investigation Report



1. Outline allegations related to the Policy
2. Timeline of the investigation
3. Fairly summarize relevant evidence
4. Credibility assessments*
5. Evidence analysis & rationale*
6. Preliminary determination regarding responsibility*



Access to the Completed Investigation Report

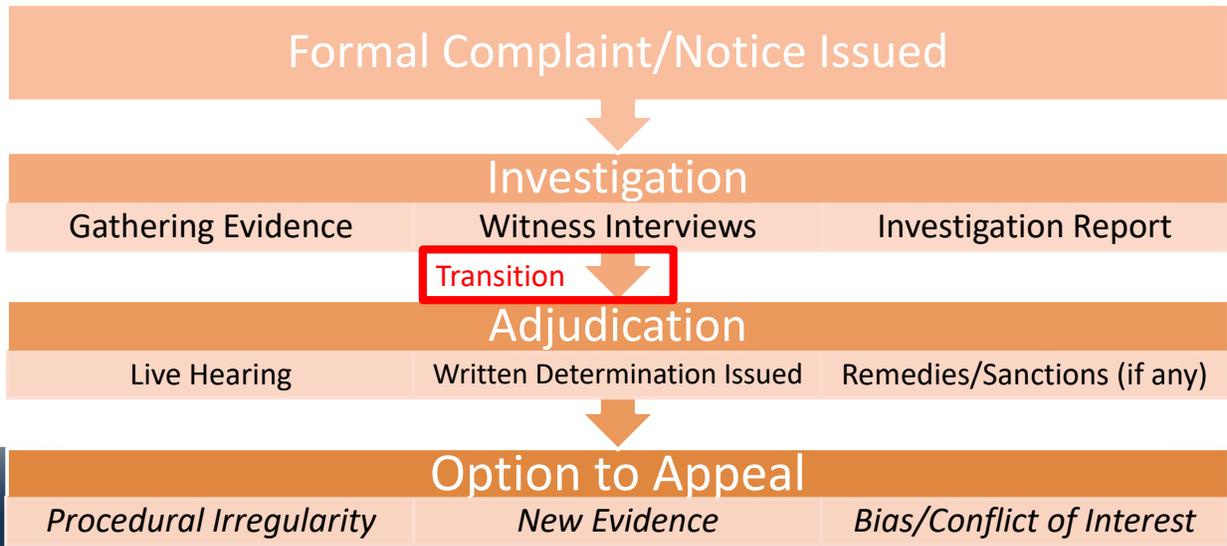
Send each party (& the advisors*) the completed investigation report:

- At least 10 days prior to the scheduled hearing
 - Why? Opportunity for the parties to inspect, review, & respond to the investigation report (at the hearing)
- A copy of the investigation report to the TIXC and hearing officer assigned.

** Advisor of choice; or the provided advisor by the institution (If applicable)*



Formal Grievance Process Flowchart (Zoomed-In) Title IX/Sexual Harassment



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Transition to Adjudication

- Transition process to the adjudication office? Referral?
- An administrative coordinator for the adjudication intake, scheduling, organizing, & communicating the next steps (e.g. hearing) to all participants.



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Q & A


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