

Conducting University Investigations

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In the Title IX Context and Beyond

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Background

Why are properly conducted investigations important?

- **To offer “Due Process,” which provides for fairness in decision-making. Thus, unless there are compelling overriding concerns, an accused party should have notice of the claim and an opportunity to respond BEFORE a decision is made, which is typically during the investigation phase. Title IX rules are changing in this area as to the extent of due process required, but due process should remain top of mind throughout the investigation process.**
- **To demonstrate that we care for the well-being of all of our students.**
- **To offer consistent and reasonable policies and procedures, governing both student conduct and employment.**
 - **Arbitrary decisions cause student mistrust, poor morale, bad public relations, and ultimately loss of student body.**
 - **Delayed or improperly conducted investigations cost the University credibility with students and other stakeholders.**
- **To comply with the law. Title IX requires investigations to be prompt and thorough.**

When to Investigate?

- Recognize when an investigation is in order, such as the following scenarios:
 - An student files an informal (passing conversation, email) or formal complaint;
 - An student (or a fellow student/faculty or staff member) reports a questionable situation, but says he or she does not want to make any trouble;
 - An student's morale, behavior, or performance mysteriously declines and there is reason to believe an incident occurred;
 - A video surfaces on social media suggesting an assault or there is social media chatter about an assault;
- Decide what the investigation should establish, such as, did an assault take place or why did a particular rumor start.
- The goal of the investigation is to obtain a clear picture of the events that transpired which, in turn, will allow the University to determine its response.

Background: Sexual Assault

- A 2000 study found that 20-25% of college women are survivors of a completed or attempted rape during the course of their college careers.
 - Less than 5% of completed or attempted rapes of college students are reported to either campus authorities or law enforcement.
- Most incidents occur after 6:00 p.m., with 52% occurring after 12:00 a.m.
- Vast majority of these incidents took place in living quarters.
- 90% of women know the person who sexually assaulted them.

Background: Sexual Assault

- Understand that the failure to immediately report an assault is common for various reasons, and not necessarily a sign of untruthfulness as it might be in an employment setting.
 - Delayed reporting or lack of reporting is due to fear of reprisal, fear of family members finding out, lack of proof, are not clear that a crime was committed, or a belief that the incident was not serious enough to report.
- Keep personal biases and judgments out of it. You should not question the complainant on clothing, prior sexual history, decisions to walk alone or attend a party alone, decisions to drink alcohol, etc.
- Understand that normal “credibility” determinations may not apply. Sexual assault victims may have wide changes in demeanor from one meeting to the next, may have moments of anger/hostility or tearfulness, or may be completely detached, may have difficulty making eye contact, etc.

Evaluating Consent

Our policy defines consent as follows:

An affirmative decision to engage in mutually acceptable sexual activity given by clear, knowing, and voluntary actions or words. Consent is active, not passive. Silence, alone, cannot be interpreted as consent. Consent can be given by words or actions, as long as those words or actions create mutually understandable clear permission regarding willingness to engage in (and the conditions of) sexual activity. Consent cannot be communicated in an individual's manner of dress. Consent can be withdrawn or modified at any time. Consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity. Prior consent cannot imply future consent to future sexual acts. Acts of a sexual nature initiated by an individual who a reasonable person knows or should have known to be incapacitated is not Consent. In order to give effective Consent, one must be of legal age (in Ohio & Michigan: 16).

Alcohol & Drugs

- Each year, 97,000 students are survivors of alcohol-related sexual assault.
- Half of college sexual assaults involve alcohol consumption by the complainant, the accused or both.
- Intoxication is not an excuse for failing to obtain consent. However, it is important to determine the role of intoxication in evaluating consent.

Alcohol & Drugs

Questioning witnesses about the role of alcohol in sexual assault:

- What type of alcohol did you consume?
- What period of time?
- How quickly did you consume alcohol?
- Did you eat any food, and if so, how much?
- Did you take any medications that may interact with alcohol?
- Describe the impact of the alcohol ingested.
- Did you ingest any drugs?
- Did you see anyone place anything in your drink?
- Do you have recollection from the event or did you black out?

Special Considerations: Incapacitation

Our policy specifically addresses incapacitation as follows:

State in which an individual is unable to consent to sexual contact. States of incapacitation include, but are not limited to: sleep, unconsciousness, intermittent consciousness, or any other state when a person is incapable of making an intentional decision to participate in a sexual act or unaware that sexual contact is occurring; a disability may also limit one's ability to Consent to sexual contact. Incapacitation is determined on a case-by-case basis and includes an analysis of whether the accused party knew, or should have known, that the alleged victim was incapacitated, or if the accused party played a role in creating the Incapacitation. Though consumption of alcohol or drugs commonly cause Incapacitation, their consumption alone is not sufficient to demonstrate Incapacitation.

Evaluating Incapacitation

Questions to determine incapacitation:

- Was the complainant conscious or unconscious?
- Did the complainant regain consciousness at any point?
- What did the accused do when the complainant regained consciousness?
- Could the complainant walk, or need assistance?
- Could the complainant talk, or was he or she slurring?
- Did the complainant black-out at any point?
- Did the complainant vomit?
- What was the complainant's condition when last seen by a reliable third-party witness?
- Did the complainant have to be carried or was he/she unable to walk?
- Could the complainant maintain eye contact?
- Could the complainant perform physical tasks, such as texting?

Which Office Investigates?

Disciplinary employment and certain discrimination matters = Human Resources/Legal Counsel

Faculty Disputes = Faculty Affairs Specialist or VP?

Sexual Assault/Prevention/ADA Accommodation/Title VII = Office of Student Affairs/Title IX

Athletic Non-Compliance = Athletics Department and/or Deputy General Counsel (me) and/or Outside Counsel

Criminal Wrongdoing/High-Level Accused/Widespread Misconduct = General Counsel/Deputy General Counsel and/or Outside Counsel

Modify?

Picking the Right Investigator

Regardless of the subject matter, the investigator must be

- knowledgeable about state and federal laws, other relevant laws, and University policies;
- must uphold the privacy rights of employees, students and others;
- must conduct a thorough investigation within a reasonable timeframe;
- must be objective and unbiased; and
- must retain focus on the ultimate goal of any investigation, i.e., discovering the underlying reasons for the problem so that administration can take corrective action; determining whether University policy was violated.

The Intangibles

The best investigators

- Do not act in a “prosecutorial” or adversarial manner;
- Have a natural curiosity leading them to pursue subtle leads, ask probing questions and connect inferential evidence together;
- Are comfortable asking tough questions about sexual matters without judgment or disdain for either party;
- Are personable enough to put a witness at ease, establish a rapport, and elicit information thoroughly and comfortably;
- Are able to remain neutral and calm under fire.

The Lawyer as Investigator

- Can be skilled at eliciting information, documenting, and maintaining confidence;
- Can protect some (but not all) of the investigation through attorney-client privilege;
- Can be necessary for widespread problems, cases where a high-ranking officer is accused, or cases involving criminal liability or potential civil liability.
- If called to testify at trial, can make a good witness (usually), but would be disqualified from defending the case at trial if required to testify.
- Can potentially avoid serving as witness if non-attorney party is present for interviews (but may impact information received);
- Only represents the University and not any of the constituents, so limits of representation must be made clear.

Bad Candidates to Serve as Investigators

- A person accused of discrimination or wrongful behavior (whether currently or in the past);
- Employees with a vested interest in the outcome or a close relationship with one of the parties;
- Former law enforcement personnel (tend to be heavy-handed);
- Someone whose personality is just not a “fit” with the person to be investigated or the witnesses (see the intangibles).
- Someone who cannot keep confidences or act with restraint.

Standard of Proof

- Unlike a criminal trial, there is no need to prove a violation of University policy “beyond a reasonable doubt.”
- The correct standard is “**preponderance of the evidence**” – is it more likely than not that a violation of policy occurred? Title IX now allows us to use a “clear and convincing” standard of proof, which is higher than preponderance of the evidence and requires a finding that it is “highly probable” an assault took place, but I do not necessarily recommend this.
- Like a juror in a trial, the investigator should consider all of the evidence as a whole, regardless of who presented it.
- The investigator decides the weight and credibility of all evidence, draws all reasonable inferences from such evidence, and decides whether this evidence persuades the investigator that misconduct has occurred.
- The investigator must do her best not to let the potential consequences of the decision on the accused dissuade her from determining whether the person is responsible.

A Note on Confidentiality

- As a general rule, you should not guarantee that an investigation will remain confidential, or that you will maintain the anonymity of witnesses since this is typically out of your control.
- You should explain that you will do your best to retain the confidentiality of the investigation, but it is impossible to guarantee this.
- You should ask any students and employees involved to act with discretion and take care not to spread unnecessary rumors but, according to the NLRB, you can no longer make a blanket prohibition on discussing an ongoing investigation in the employment context.

When the Complainant Does Not Want An Investigation

- University may have a duty to investigate without regard to the complainant's wishes, especially in cases of sexual assault/sexual harassment, and where circumstances suggest there is an increased risk of additional acts or a weapon is involved.
- Can still keep the complainant's identity confidential or honor the complainant's wish to inform the accused that the complainant did not want an investigation.
- University should also take steps outside of investigation, such as interim measures to separate parties, increased monitoring/supervision, additional training or education materials, updating policies or distributing climate surveys.
- Should notify the claimant of resources available (counseling, etc.) and leave the door open for a complainant to raise the complaint again at a later date.

Investigation Procedure

- Take the complaint seriously – do not assume it is “too trivial” to act upon.
- There may be a duty to act even if the complainant does not want an investigation.
- Select the appropriate investigator and plan the investigation (best to have a written plan). (See our sample documents).
- Once investigator is selected, decide whether to include particular supervisors, managers or an attorney in the investigation interviews.
- Determine whether interim measures are necessary to separate the parties, control publicity, or otherwise protect the integrity of investigation **without** appearing retaliatory.

Investigation Procedure

- Determine whether prior similar incidents have occurred or been alleged.
- Consider which documentary evidence is relevant to the investigation.
- Conduct computer/social media/phone search for relevant evidence before beginning interviews.
- Determine how you will obtain any additional evidence.
- Modify any record retention policies as needed to ensure evidence is preserved throughout investigation and up to potential litigation.

Investigation Procedure

- Identify potential witnesses to interview.
- If the witness is a employee who is a union member or if your policies require, address rights to have a representative present.
- Especially consider the order in which you will interview witnesses.
- In a harassment/assault situation, always interview the accuser first.
- Organize a list of questions to be asked of all witnesses or general topics to address, but retain flexibility to ask additional questions while meeting with witnesses.
- But all of these steps must be done **PROMPTLY!**

Handling the Evidence

- Think about the documentation—e.g., is there paperwork that was improperly completed? Time cards involved? Then those documents should be photocopied and available to show witnesses.
 - You do not have to provide copies of written complaints or witness statements to any employee or student.
 - Universities in the Title IX setting often provide written summaries of interviews for each witness to review to ensure accuracy – this can cut both ways.
- If the witness will have a representative in the room, make a courtesy copy for the representative.
- Establish the security protocol for files, evidence and records.
- If you are relying on videotaped evidence, allow the accused and other witnesses to watch the video during the interview. Gauge their reaction to the video.

Witness Interview Guidelines

- Hold individual interviews in a private, quiet location (off-site, if necessary) to uphold confidentiality and minimize peer pressure.
- At the start of each interview, explain the purpose of the interview and any attorney-client privilege considerations.
- Remind each witness of the University's commitment to not permit retaliation against anyone who participates in an investigation.
- Also explain the limits of confidentiality – will maintain to the extent possible and identity of complainant may come to light even if University does not disclose it.
- Emphasize the importance of honesty.
- Give the witness access to University resources – EAP, counseling center, etc.

Witness Interview Guidelines

- Maintain objectivity—avoid confrontational or accusatory questions.
- Use a conversational style to ensure the witness feels comfortable enough to share information.
- Ask broad, open-ended questions to encourage conversational flow.
- Assess credibility while the witness is speaking.
- LISTEN to the answers given and the word choice used.
- Raise questions about inconsistencies in a curious, but non-confrontational manner.
- Save tough questions for later in the interview so the witness does not get defensive.
- Refrain from asking questions about the complainant's character, reputation, or prior sexual encounters with anyone other than the accused.
- Consider exploring the nature of any current or prior sexual relationship between the complainant and the accused (although this does not establish consent).

Evaluating Credibility

- Pay attention to witnesses' body language and demeanor to assess credibility (but there are limits).
 - Does the witness seemed surprised at a document/video?
 - Does the witness make subtle movements while talking (like a tell)?
 - Does the witness seem exceptionally hostile? (not always a fair barometer)
- Is the witness's story changing?
 - Ask key questions several different ways to see if you get a different answer.
 - Ask the same question at the end of the interview that you asked at the outset to see if you get more information after the witness has opened up.
- Rely on your intuition – gut feelings can be correct.
- How is the witness's memory? Can the witness recall explicit details, tones of voice, shades of expression/gestures?
- Does the witness have a motive to lie?
- Did the witness keep a diary or tell others about the events as they happened?
- Does the witness' version of events make sense? Does it "fit"?

Evaluating Credibility

One federal judge assesses credibility by following a two-step process:

- 1) Do not prejudge credibility – find it later rather than working forward from it. Keep an open mind throughout.
- 2) Ruthlessly examine your own prejudices – only when the prejudice is recognized can it be removed from the decisional process. Question your personal discomfort, to see if it is due to your own experience, rather than some lack of credibility in the witness. If your discomfort stems from your personal experience, you must be able to set it aside.

Flexibility in Planning

- Be prepared to modify and update the investigation plan as needed based on new information that might come in as the investigation progresses.
- May need to add new witnesses to interview and re-interview witnesses as new information comes to light.
- Document the investigation in a detailed chronology containing the name of the note-taker, and the date and the time of each investigatory interview.
- Keep thoughts, impressions and ideas separate from summaries of the interviews to the extent possible – especially for attorneys who can claim work product apart from witness interview notes.

General Questions to Ask

Who

- Who said what?
- Who did what?
- Who was present in the immediate area?
- Who was within hearing distance?
- Who was supervising?
- Who gave work instructions?
- Who did you see?

Questions to Ask

What

- What happened, in chronological order.
- What were you doing just before?
- What were you doing just after?
- What part of the building were you in?
- What were you doing at the time (helps pin down the timeline)
- What do you normally do at that hour?
- What did you hear?
- What, if anything, did you tell others about the incident?
- What did you do about the incident?

Questions to Ask

When

- **What date?**
 - What time of year?
 - How many weeks ago?
 - How many months ago?
 - What project were you working on?
- **What time?**
 - Before or after a morning break?
 - Afternoon break?
 - Was it dark outside yet?

Questions to Ask

Where

- Where in the University building/frat house/off campus?
- Where were you standing or sitting?
- Where was other person standing or sitting?
- Where did you go before?
- Where did you go after?

Questions to Ask

Why

- Why were you in the location you were in (for employee disputes, was it an appropriate work location)?
- Why were you talking with this particular person?
- Why did you write the text or email?

Questions to Ask

The Closing

- Do you have anything to add?
 - Keep asking this until the witness runs out of things to add.
- Did I fail to address anything that you think is important?

The Lawyer's Bag of Tricks

Don't Write Out Each and Every Question:

- Typically, when doing this you will be reading the next question, instead of listening to the answers and learning important information or information you may need to follow up on.
- Instead, write out the general “Who, What, Why, When, Where” Questions only, to make sure you hit on all critical points.
- Also helpful is to write out areas of inquiry or the order in which you want to cover topics, for example, when investigating time card fraud:
 - Aware of policy on time card?
 - Go over policy (bring photocopy)
 - Show time card records
 - Ask about each time card change
 - Ask about handwriting on time card
 - Show videotape of nonproductive time during times when clock shows actively at work.
 - Any others doing this?
 - Anyone else know you have been doing this?
 - Ever told that this was permitted?
- Have someone take notes for you if possible so you can listen to the answers and think of the next question.

The Lawyer's Bag of Tricks

Ask Open-Ended Questions, and Avoid Yes/No Questions, to try to get the witness talking:

Bad Question: Were you working the day of the injury?

Good Question: What were you doing when Dave was injured?

Bad Question: Did you hear the supervisor say anything to Dave?

Good Question: What did you hear the supervisor say to Dave?

Bad Question: Do you know what happened to Dave?

Good Question: Describe everything that happened to Dave in detail.

The Lawyer's Bag of Tricks

Yes/No questions take a series of questions to get the same information as an open-ended question, which lengthens the questioning and does not give you as much information. They also prevent the witness from telling a narrative story, which is where you will get a lot of critical information.

Compare:

Question: Were you working the day of the injury?

Answer: Yes.

Question: Were you working with Dave?

Answer: Yes.

Question: Were others working with you?

Answer: Yes.

Question: Who was working with you that day?

Answer: Sherry and Susan.

Question: Who was the Shift Leader?

Answer: Susan.

With:

Question: What were you and Dave working on the day of the injury?

Answer: We were running the First Energy belt order on #7 line. We were rushing to get it out.

Question: Who was working with you, including your Shift Leader?

Answer: Sherry and Susan, who was Shift Leader. But Sherry had just left for lunch so it was just Susan, Dave and I when Dave was actually injured.

The Lawyer's Bag of Tricks

When an employee cannot remember, try to jog the memory by asking a different, but related, question:

Question: What time was it when Dave started mouthing off to your supervisor?

Answer: I don't remember.

Question: Was it before lunch?

Answer: I'm not sure.

Question: Can you remember anything about what you were doing at the time? Were you starting up the machine? shutting down the machine? Cleaning up?

Answer: Actually, I was about to go sweep, because I remember hearing him go off while I was looking for the broom, which I do at the end of a run.

Start with broad questions, then zero in on specifics by listening to the answer and formulating a question around it:

Question: What happened between Dave and his supervisor?

Answer: Dave started mouthing off and the supervisor told him to get back to work.

Question: What exactly did Dave say to first "mouth off"?

Answer: His usual whining about the supervisor paying too much attention to him.

Question: What is "his usual whining"?

Answer: You know, complaining that Mike wouldn't leave him alone and would constantly watch his every move and eyeball him.

Question: What else did Dave say?

Answer: That the supervisor didn't treat anyone else this way, just him because he's the only Mexican here.

Question: Did the supervisor respond to this complaint?

Answer: No, the supervisor just said "get your ass back to work."

The Lawyer's Bag of Tricks

- **Listen** carefully to the answers you are getting. Do they make sense? Do you need to follow-up to clarify something?
- **Use the answer to the question**, including the witness's own words, to help you formulate your next question (as in example above).
- **Do not interrupt** witnesses while they are coming out with relevant information or aimlessly talking--the chatty witness is your best friend for gathering information. Let the witness chatter on for a while (as long as it remains relevant).
- **Use silence** after a question as a technique to encourage reticent witnesses to start talking – people often feel a need to "fill in" periods of silence. Wait quietly and patiently for your response, but look at the witness expectantly, so he or she feels compelled to answer.
- **Repeat** important questions, but with different wording, to see whether the witness sticks with the same answer.
- Ask the same question at the end of the interview that you asked in the beginning to see if the answer has changed now that the witness is more comfortable with you (it usually does).

Documenting the Investigation

- To the extent feasible, have a second person attend interviews with you who can take notes for you (or in addition to you) so you can ask the relevant questions and listen to the answers.
 - Note that employees are not entitled to a representative in disciplinary meetings unless they are in a union or University policy requires.
- Read the notes as soon as possible so you can add your personal recollections, correct any errors, and have a more complete record.
- **ALWAYS** have the name of the note-taker and the **date AND time** of the particular interview included in the notes.
- Only have one person ask questions – the person who is taking notes can ask to clarify points at the end of the interview if necessary.

Documenting the Investigation

Read the notes right away. Look for **red flags** or information that must be followed up on.

Example: Investigation notes in a case included anonymous quotations—statements made during an investigation related to an employee's age and sex harassment complaint. **Spot the "red flags":**

"Don't see there is an overall problem or any person being singled out"

"Gina tends to be a little more sensitive in meetings"

"Gina could be a good sales person if given time"

"Mike is a good sales person and mediocre manager"

"Mike tends to play favorites"

"Office environment tends to be flirtatious"

"Morale in office is mediocre"

"Place is clickish [*sic*]"

"Hard to get to know people"

"Only certain people get talked to or invited to lunch"

"Told not to talk to other locations"

"Gina was different [from] the younger reps"

"Mike has good skills and good experience."

"Gina was not given 100% chance to succeed"

"Never seen Gina treated differently."

"No favoritism but seems to be clicks [*sic*]."

By the way, Gina, the complainant, was fired two days after this "investigation" based on her low sales!

Documenting the Investigation

Write down exactly what words the witness uses during questioning on key points:

Example: A complainant claimed that she reported to her supervisor that two co-workers were harassing her, but it continued for another year after the report. The supervisor, when questioned, claimed that she only told him that she wanted him to get them “to leave her alone” and he assumed they were bugging her because she was working too slow (a recurring issue). He still talked to the two employees to tell them to leave her alone, but did not report the potential harassment to HR. He said that had he known the harassers were physically touching the complainant, he would have reported to HR. A key issue in the case was whether or not the supervisor should have done more and should be disciplined for his failure.

Documenting the Investigation

Upon questioning the complainant, the HR Director's notes from her first interview alone with the complainant said "she complained to her supervisor asking him to get the co-workers to leave her alone. Another co-worker reported to the complainant that he had heard the two coworkers say the supervisor told them to give her a break."

My notes from the second interview with the complainant read as follows: "Gina says she went to supervisor Don so he could talk to her co-workers who were harassing her and get them to knock it off. She was going to go to another supervisor, Tom, since he was just coming on the shift, but thought maybe Don could speak to them "as a friend." On questioning from me about the exact words used, Gina said she told Don that one of the co-workers was "**grabbing me.**" She said Don apologized and said he would talk to him. Gina said that another coworker later told her that he heard the two accused harassers talking, and they stated that Don had told them that **they were not supposed to touch Gina.**"

These notes were critical in determining whether to discipline the supervisor for failing to escalate the harassment complaint to HR or take further action beyond telling the two alleged harassers to stop touching the complainant.

Witness Statements

- After questioning witnesses, it may be helpful to have them write a witness statement to communicate what they know in their own words, especially if there is a likelihood of a future hearing, or if you fear stories may change.
- If you are going to request witness statements, it is preferable that the witness writes it himself. If that is not possible (language or literacy barriers), write the statement and allow the witness to read it (or read it to him) and sign it. Make a note on the statement that you wrote the statement, but the witness approved the contents.
- Make sure to provide sufficient time for the witness to review and consider the written statement. Don't rush the witness.
- You should also review the statement at the time it is written to ensure the important points are covered and any omissions are addressed immediately.
- Statements should **ALWAYS** be signed and dated.

Final Report

- Main goal of investigation is to produce a reliable set of facts for a decision and to reach a conclusion, requiring the investigator to tie all the various facts and documents together, which should be done in a detailed report. Typically, the report should recommend the appropriate remedial action.
- Title IX regulations require the institution to: Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Final Report

- The report should
 - contain a description of the situation at issue and potential rule violated;
 - list the witnesses and documents used as evidence;
 - summarize the information from each document and witness in a general manner;
 - make an assessment of the credibility and weight of each piece of evidence and describe how it relates to the elements of the alleged problem; and
 - make findings of fact on each element of the alleged offense or violation of University policy, but if no conclusion can be reached as to whether there is a violation, the report should state this.
 - If a recommendation is needed, it should follow the findings of fact.
 - If the case involves assault, theft or fraud, consider whether criminal prosecution or notification to local or campus police is required or prudent.

Final Report

- Should be separate from the individual interview notes
- When recommending discipline, consider the employee's disciplinary record, but no other part of the personnel file (i.e., I-9, Medical File.) For students, consider whether there were prior similar infractions/warnings.
- Maintain all records regarding such investigations in a separate, confidential file, not in an employee's personnel file (which, under some state laws, can be reviewed by the employee).
- Discipline issued as a result of an investigation can be maintained in the employee's personnel file and should only address violations of company policy (not violations of law).
- In the harassment context, the University can, but does not have to, notify the complainant and the accused of the results of the investigation and any action it intends to take based on the results.
- Don't forget to follow-up at a later date to ensure harassment has ended and all is well with the complaining employee/student.

To Record or Not To Record

- Every state has its own law on recording conversations. Under federal law, it is legal if one party to the conversation agrees to the recording (which is you).
- It is not usually necessary to record a meeting unless the employee is particularly cagy and liable to change his or her story at a later date, or if criminal prosecution or a lawsuit is likely to follow.
- **NEVER** allow the employee or student to record your conversations. If you suspect the witness is recording the conversation, end the call or meeting immediately and advise that future communication must take place in writing.
- If the employee or student asks if your conversation can be recorded, politely decline.

Legal Issues in Investigations

Retaliation Claims—be conscious of whether your investigatory interview appears to be retaliatory against a current or past complainant.

Defamation Claims—Defamation consists of communicating false information about a person to a third party, either intentionally (with malice) or with reckless disregard for its falsity. The University could be liable to its employees or students if false information is released – whether by making the information known directly or negligently allowing the false information to be released.

- Be extremely careful with the information that often results from investigations and ensure that it is maintained in a confidential file that can only be accessed by those with a “need to know.”
- Press statements should be closely coordinated with counsel.

Legal Issues in Investigations

False Imprisonment—A cause of action that can be brought against the University by any employee or student who feels that during part of an investigation, he or she was restrained or confined to the point where he or she felt "imprisoned."

- Be very careful not to give the impression that the witness will be physically confined or restrained during an interview, by allowing the employee to sit closest to the door, and ensuring the witness understands the interview is voluntary.

Intentional Infliction of Emotional Distress—This can be the basis for a lawsuit if the investigator conducts an interview in such a way that the witness feels unusually humiliated or threatened.

- Successful suits on the basis of intentional infliction of emotional distress are rare, but can be successful if the University's action is seen as offensive to a reasonable person and would be viewed as outrageous by a reasonable society.

Assault and Battery—A cause of action that can arise if the witness charges that he either feared that an investigator was going to touch him in an offensive or harmful way (assault) or he was actually touched in such a way (battery).

Legal Issues in Investigations

Malicious Prosecution—May arise in cases where an accused is reported to the police, described as some sort of criminal, and the University prods the authorities into arresting and prosecuting the accused, but for some reason there turns out to be no reasonable basis for criminal charges. Best to let law enforcement handle its own investigation with assistance from the University as needed.

Invasion of Privacy—The common-law tort of invasion of privacy consists of the disclosure of private facts about a person. There are two main elements to invasion of privacy:

- the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person; and
- the information is of no legitimate concern to the third parties to whom the information was released.

Thus, since investigations often reveal highly intimate or embarrassing facts about people, the University should take great care to minimize disclosure of such facts to the fullest extent permissible under law.

Case Study: The Party

The women's lacrosse Coach informs you that one of her players, Amy, was sexually assaulted at a fraternity party, but Amy told her this in confidence and does not want to get anyone in trouble. The Coach counseled her to come forward but Amy refuses, and the Coach has come to you for advice because of your longstanding friendship, not because of your official role.

→ What do you do with this information?

Case Study: The Party

- Do you notify Title IX Coordinator?
- Is the Coach a mandatory reporter? Should she be?
- Do you give guidance to the Coach about addressing these types of issues in the future?
- Do you start by questioning the victim or do you question the Coach first?
- Does it matter that the student wanted this to remain confidential?
- Do you take any interim measures at this point?
- Do you try to determine the identity of the attacker?
- Do you provide any information to the complainant, even though she does not want to go forward?
- Do you question whether the Coach informed the student-athlete that the Coach would proceed with reporting this?

Case Study: The Party

You decide to question the Coach further to find out what she told the student. She tells you she promised the student that she would not share the information and that the student would remain completely anonymous, but continued to encourage her to go forward to report this to the University or the police, in the hope she would voluntarily do so. She also tells you that Amy told her that the accused is a male lacrosse player named Mark and that the Coach has heard rumors that he has been “aggressive” before.

→ What do you do with this information?

Case Study: The Party

- Do you honor the request for confidentiality?
- Do you meet with Amy to explain the process and to find out from her directly whether she wants to move forward?
- Do you take any interim measures at this point?
- Do you interview Mark without disclosing Amy's name?
- Do you start questioning other players on the lacrosse team?
- Do you tell Amy that the Coach informed you of the incident?
- Do you explain to Amy the role of the mandatory reporter?

Case Study: The Party

You decide to interview Amy. You inform her that you learned of the assault from a mandatory reporter, without giving the Coach's name, explaining the role of the "Responsible Employee." You ask Amy about the frat party, and she tells you that Mark was just an acquaintance since he's on the men's team, that she was drinking from a mix in the punch bowl that she heard had 151 in it, that she only remembers going upstairs with Mark to look for the room with the pool table when she blacked out.

→ What do you do with this information?

Case Study: The Party

- Do you ask Amy how she knows she has been assaulted if she blacked out?
- Do you ask her what she was wearing?
- Do you ask her if she had a prior sexual relationship with Mark?
- Do you ask her about other sexual encounters she has had?
- Do you ask her who she went to the party with and who she may have known at the party?
- If she tells you she went to the party alone, do you ask why she did that?
- Do you ask her if she took any medications?
- Do you ask her if she saw anyone put something in her drink?
- Do you ask her whether she ate dinner that night and if so, what she ate?
- Do you ask her if she has any memory of that night?
- Do you ask her whether she has any personal condition that might indicate she did not want to have sex, like her period or an infection?

Case Study: The Party

You ask Amy who she went to the party with, but do not question any decision to go alone. She did go with her friend Sue, but does not remember seeing her at the end of the night. You ask whether she knew anyone else at the party besides the person she went with, but she cannot recall. She did not see anyone put anything in her drink and has a vague memory of realizing that he was on top of her, which is how she knew she was attacked because she did not plan to have sex that evening, since she was on her period. Amy reluctantly decides that you should continue with your investigation, but asks that you not tell Mark her name.

→ What do you do with this information?

Case Study: The Party

- Do you question Mark about the incident?
- Do you honor Amy's request not to use her name with Mark?
- Or do you talk to Sue first?
- Do you question the residents of the frat house? Before or after talking to Mark and Sue?
- Do you question other members of the lacrosse team about the rumors that Mark has done this before? Which ones?
- How do you decide which lacrosse team members to question?
- Do you ask Sue to make a list of everyone she saw that night?
- Do you ask Sue to make a timeline of events?

Case Study: The Party

You decide to talk to Sue, then Mark, before talking to any players or frat house residents. Sue confirms that Amy was on her period and talking about how bloated she was, and just wanted to go out for a quick drink since the semester just started. Sue does not know how much Amy had to drink, she just saw her talking with Mark and told her she wanted to leave when Amy said to leave without her. Sue then says there is something you should know, and pulls up a Facebook group for select lacrosse players. Someone posted a video of Amy's assault. It is too short to tell whether Amy consented to the sex.

→ What do you do with this information?

Case Study: The Party

- Do you question Mark about the incident now?
- Do you go back to Amy and tell her about the video, to confirm that she did not consent to being videotaped?
- If you go back to Amy, do you ask her why the video does not show her resisting?
- Do you try to talk to the person who posted the video, who is obviously using an alias?
- Do you start questioning the members of the Facebook group, to the extent you can determine who they are?
- Do you question the residents of the frat house or the lacrosse teams now?
- Do you treat the video as a separate violation or as evidence in the assault investigation? Or both?

Case Study: The Party

You decide to go back to Amy to address the video first, before she hears it from someone else. Amy is devastated and you again offer her the University's resources to assist her. Amy denies that she consented to the video – in fact, she had no idea there was a video. You then interview Mark, who insists that the entire encounter was consensual and that Amy insisted they share a video with the Facebook group, since they would think it was funny. Mark does not know how much Amy drank and denies any awareness that she was incapacitated or unconscious. He says that she was talking to him throughout. He insists he did nothing wrong and threatens to get his father's attorney if the questioning continues, since this could damage his entire future.

→ What do you do with this information?

Case Study: The Party

- Do you try to talk to the person who posted the video now, to the extent possible?
- Do you find Mark's hostile behavior towards the end of the interview unusual, or suggestive that he is covering?
- Do you go back to Amy to ask again about the video and whether she thought it would be funny to post it to the group?
- Do you start questioning the members of the Facebook group, to the extent you can determine who they are, now?
- Do you question the residents of the frat house or the lacrosse teams now?

Case Study: The Party

Final Thoughts:

- How do you decide who to believe?
- Which factors stick out for you?
- If you cannot decide which person is telling the truth, what do you do? Nothing?
- Was the investigation enough, or does the University need to do something more?
- What happens if you do nothing at all beyond this investigation?
- What could have happened if you honored Amy's request and did not even investigate the incident further?

Case Study: A Love Triangle

A male faculty member, James, emails HR to say that he believes his male Department Chair, Raoul, is having an affair with a subordinate female professor, Eve, and that he is being retaliated against because he witnessed a sexual interaction between them. He says that he was working late one night and when pulling up to the building, his headlights flashed on the Dept. Chair's office, which showed the two in a compromising position. The female professor left the Chair's office right away, and seemed to be crying. He says since that time, he has been left off of an email chain, left out of a meeting he should have been in, and the Dept. Chair shared sensitive information from his personnel file with the female professor, which she relayed to him.

→ What do you do with this information?

Case Study: A Love Triangle

- Which office investigates this claim? Does it stay with HR or go to OIE?
- Do you start by asking the two professors whether they are involved in a relationship?
- Do you question the faculty member further about what he witnessed?
- Do you ask the female professor whether the interaction that the faculty member observed was consensual?
- Do you ask the Dept. Chair whether he attacked the female professor?
- Do you ignore the email because the faculty member is upset that he was voted down for Dept. Chair just before the current chair was voted in?

Case Study: A Love Triangle

You decide to notify OIE of the email, but jointly decide that HR will investigate. You decide to question James first about his allegations. James begins telling you a long story about spending time with Eve outside of work, attending a University football game together, and describes texts Raoul sent Eve while James and Eve were together that he viewed as controlling. He spends a great deal of time telling you why he thinks Raoul is a bad person and cannot be trusted. He repeats his allegations of retaliation for “walking in” on Raoul and Eve. He admits he did not actually perceive sexual activity when he saw into the office, but they were close to one another and jumped apart when his headlights flashed in. He repeats that Eve seemed to be crying when she left Raoul’s office. He tells you confidentially that Eve seems to be very emotionally fragile and, as she is much younger than Raoul, has “Daddy issues.” He says she had an affair with her previous married, older Dept. Chair at her earlier position, so this is a trend. He maintains that she is being manipulated by her supervisor.

→ What do you do next?

Case Study: A Love Triangle

- Do you question James about whether he had a prior sexual relationship with Eve?
- Do you question how he obtained the information he is relaying about Eve's past?
- Do you question James about the prior Dept. Chair vote?
- Do you question James about his relationship with Raoul, and how he obtained the information he relayed about Raoul's prior bad acts?
- Do you decide to continue interviewing or end the investigation since James clearly has personal issues with the involved parties?

Case Study: A Love Triangle

You question James further about his relationship to Raoul and learn that the two were friends for 20 years until recently, when James ended their friendship because of his perception that Raoul was treating Eve badly. James claims that Raoul has sent him a ton of sexist texts and emails over the years and that you should review Raoul's personal cell phone as proof. You decide to question James about his relationship with Eve as well, and he claims they have always just been friends. He denies having any feelings for her beyond friendship, but you are not sure you believe him, since he hands you a stack of emails he has sent to himself that are his notes about Eve and Raoul's interactions over the past six months, in which he appears to be watching her movements very closely.

You decide to interview Raoul next to address the claimed retaliation. Raoul says he left James off the email by mistake on one occasion, and that he was not involved with the meeting that he claims he should have been at (it was outside his area of expertise). He admitted to disclosing to Eve that James had been disciplined by HR for sending too many group emails, but said it was an offhand statement that "James was not supposed to do that" when she mentioned an email from him. Raoul says the interaction in his office with Eve was not a sexual encounter but a discussion over whether or not he would approve her attending a conference in an peripheral area to her expertise, and she got upset over their discussion. He denied any relationship with Eve beyond a professional one.

→ What do you do next?

Case Study: A Love Triangle

- Do you end the investigation since there is a legitimate business reason for each element of claimed retaliation?
- Do you end the investigation because there does not appear to have been any non-consensual sexual activity?
- Do you ask to review the contents of Raoul's personal cell phone, to see if James is correct about the sexually charged texts/emails?
- Do you decide to speak to Eve directly?
- At this point, are there any violations of University policy that need to be addressed?

Case Study: A Love Triangle

You decide not to ask to see Raoul's phone, since University policy does not extend to personal phones. You decide to question Eve about her relationship with the two men. Eve denies having a sexual relationship with Raoul and confirms that the conversation in the office was about the conference, that she was upset and crying because she thought the University should support the expansion of her career into this new area. She does relay a story from 2 years ago, when she mentioned to Raoul that she had to leave to go pump her breasts while nursing her son, and he responded "I can tell." She felt that was inappropriate, but not serious enough to warrant reporting at the time.

Eve then tells you that James previously told her that he had feelings for her, that she did not reciprocate but did not know what to say in return so said nothing, that after the ND game when he drove her home he berated her for flirting with other men at the game, that he sent her sexually suggestive texts and watched her all the time while they were at work, since his office was across from hers. He also gave her a painting as a gift that she found uncomfortably sexually suggestive since it was of a woman wearing only a man's shirt with nothing underneath while reclined in a chair, and had also come to her house unannounced in the middle of the night and left something on her car. She stated that she had no problem working with Raoul but was finding it more and more difficult to work with James, given what she felt was an unhealthy obsession with her.

→ What do you do next?

Case Study: A Love Triangle

- Do you re-interview Raoul about the breastfeeding comment?
- Do you discipline him for it, even though it was 2 years ago?
- Do you re-interview James about the new allegations? Keep in mind James already told you about attending games and some of their interactions, but did not mention any of the things Eve raised.
- Do you interview any other co-workers to see what they know about these interactions?
- Do you tell Eve that James has been sexually harassing her?
- Do you decide to drop the matter since Eve never complained about James and only reported these instances because James initiated this investigation?
- Do you question Eve's credibility because she did not tell James directly that she was not interested in him and did not tell him to stop texting her or watching her?
- Do you decide to drop the matter since neither James' nor Raoul's comments rise to the level of legal harassment?

Case Study: A Love Triangle

You decide that you have enough information to not re-interview either Raoul or James. You ask Eve to provide copies of the offensive text messages and a photograph of the painting, which she does. She also provides the card she received from James, referring to her as Miss Money Penny, his “pet” name for her, who is a character in the Bond films who has sexual tension with Bond. You find that despite her reluctance to inform James that his advances were unwelcome, her story is credible and explains some of the inconsistencies in James’ version, which just seemed off. Ultimately, you believe that James was using Eve to get Raoul fired, most likely in the hope of both obtaining the Dept. Chair position and perhaps the girl.

→ What do you do next?

Case Study: A Love Triangle

- Do you counsel Raoul on his management skills, for disclosing confidential information about James and for his inappropriate remark 2 years ago about Eve's breasts?
- Do you discipline Raoul for retaliating against James after James witnessed Raoul and Eve fighting in Raoul's office?
- Do you determine that James sexually harassed Eve?
- Does it matter whether it was severe or pervasive?
- Does it matter that some of the conduct took place off campus?
- Do you discipline or terminate James for his sexual harassment?
- Does it matter whether James' conduct rose to the level legally actionable sexual harassment?
- Do you discipline or terminate James for abuse of the harassment policy?

Case Study: A Love Triangle

When interviewing Eve, let's assume that instead of complaining about James' harassing behavior, Eve tells you that Raoul kissed her in his office that night, just as James had suspected, that James' headlights were the only thing that stopped him from doing more, and that she was not interested in Raoul but kissed him back because she knew he had influence over her career. She did not want to enter a sexual relationship with Raoul but felt she had no choice, which is why she was crying when James walked in.

→ What do you do next?

Case Study: A Love Triangle

- Do you tell Eve that Raoul sexually assaulted her in violation of University policy?
- Do you tell Eve that Raoul sexually harassed her in violation of University policy?
- Do you tell Eve that you have a duty to investigate this alleged assault, even though she went along with it out of what she believed was necessity?
- Do you ask Eve whether she has had other similar interactions with Raoul?
- Do you ask Eve whether she has heard about others who had similar interactions with Raoul?
- Do you write down everything she told you?
- Do you have her write down everything she told you?
- Do you go back and question Raoul about these new allegations?
- Do you go back to James and try to find out if he knows more about interactions between Eve and Raoul?
- Do you tell Eve to report the interaction to the police?

Case Study: A Love Triangle

You ask Eve about other similar interactions with Raoul, and whether she is aware of others who have had the same experience with him. Eve says that this is the first time this had happened, but she has heard that he did this to another junior female professor at his prior college. You do not tell Eve expressly that she has been assaulted or harassed, but you believe that Raoul's conduct was a violation of University policies against harassment and assault, since he did not have Eve's express verbal consent to kiss her. You write down all of your notes from these interviews to put into a written report, but you do not ask for a separate statement from Eve at this time. You return to Raoul to question him about these allegations. He admits he kissed Eve, but says it was completely consensual. When asked why she would have been crying if she left his office, he mentions the conference and says she was still upset about that, but they kissed in the "heat of that passionate argument." You do not find this explanation credible. You set up a meeting with OIE to determine whether to discipline Raoul for his behavior, and the appropriate level of discipline depending on his record and all of the circumstances.

Case Study: A Love Triangle

Final Thoughts:

- Was this a case of sexual harassment? By whom?
- Was this a case of retaliation?
- Does it matter whether this issue met the legal standard for either?
- Does it matter that Eve did not raise the issue herself?
- What could have happened if this situation was never addressed?