



HUSCH BLACKWELL

**Institutional
Response to
Sexual Harassment**
—



What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- Conflict and bias-free institutional participants

Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Greeks can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”

Here Comes the Investigator



- University designates Paige Duggins-Clay to investigate the allegations
- PDC is a board member of the One Love Foundation which is a non-profit dedicated to ending relationship violence
- Respondent protests contending that PDC is biased and has a conflict of interest
- How do you assess?



What is a conflict of interest?

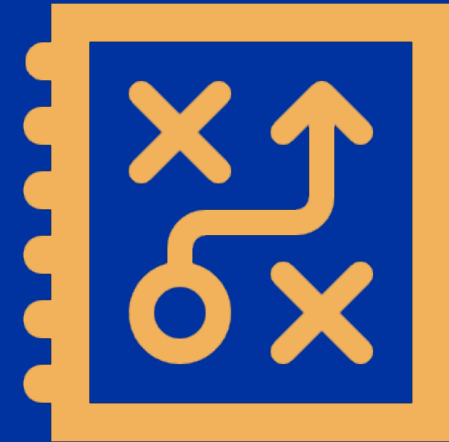
- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



Example of conflict of interest

—

Student A files a formal complaint of sexual harassment against Student B. One of the hearing panel members selected is Student B's faculty advisor who has previously written letters of recommendation for Student B's application to law school in which faculty advisor wrote that Student B is "honest to a fault."





Example of conflict of interest



Employee A accuses an employee of a food service vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the food service vendor and who directly supervises the accused employee.

Example of bias

—
Institutional employee chosen to serve on a hearing panel chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



Example of bias



Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” He tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”



Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should also **self-police** conflicts of interest and **self-identify** bias



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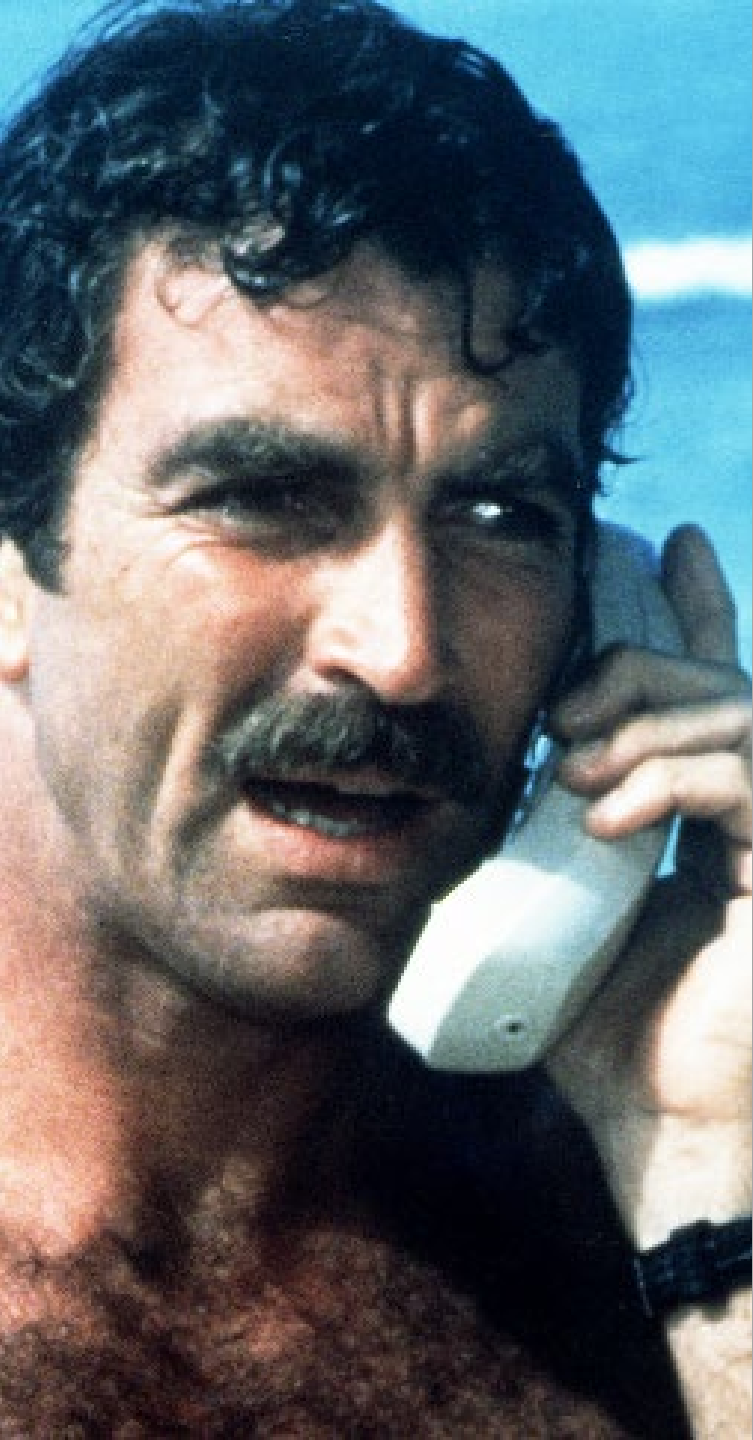
Investigations





Perspective





If The Formal Complaint Is Not Dismissed . . .

- “The recipient must investigate the allegations in a formal complaint.”
- What is the purpose of the investigation under the Title IX regulations?
- Organizing for the hearing?

Regs Rule 1 of Investigations

“When investigating a formal complaint and throughout the grievance process, a recipient must . . . Ensure that the **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

- Example of what not to do: “Get your friends and witnesses to write statements and send them to me”
- What is still permissible?

Regs Rule 1 Practical

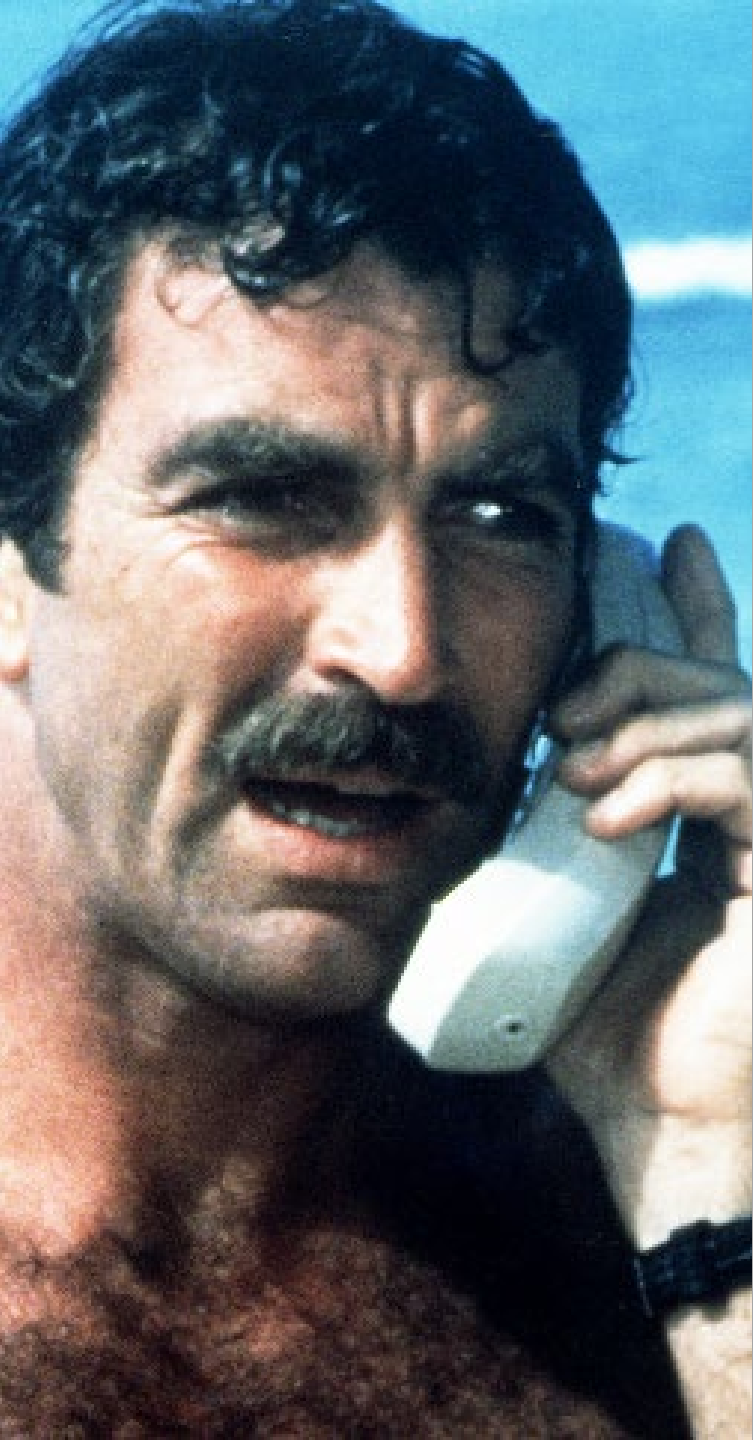
- Checklist for common sources of evidence
- Identify relevant information and witnesses in an investigation plan – to the extent it is within our control, get it
- Ask for it in interviews & in writing
- Meticulously document efforts to obtain (especially when you fail)

Common Sources of Physical Evidence

1. Text messages
2. Social media posts
3. Card swipes
4. On and off-campus video
5. Police reports
6. Medical reports
7. Teaching evaluations
8. Internal reports
9. Call logs
10. Other disciplinary records



- It's the first day of the Fall semester
- Catherine gets a call from an anonymous student that, over the weekend, she saw sophomore John Respondent punch Respondent's boyfriend, Roy Complainant, in a public parking lot.
- The anonymous student informed Catherine that she was concerned for Complainant because Respondent has been verbally abusive to Complainant throughout their relationship & the violence appears to be "escalating."
- This is the second complaint the University has received about Respondent's treatment of Complainant. In the first one, the University honored Complainant's request to not intervene.



Back to Hypo

- What does investigation plan look like here?
- What evidence to gather?
- What witnesses to interview?
- What are the material facts?

Step 1: Misconduct Rubric

1. Violence – is there “sexual or physical abuse, or threats of such abuse”
2. Committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim -- existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Text Messages Exercise

- You are investigating a case involving the alleged violation of a no-contact order
- Complainant prints out some text messages but not all
- Respondent deleted contact information for Complainant and all text messages. Says there is additional context for Complainant's text messages.
- How do you handle?

Some Thoughts on Text Messages

1. Can be powerful evidence in these cases, but beware.
2. Be skeptical of print outs – **ask to see originals for full context**
3. Check contact information associated with contact
4. **Corroborate with opposing party**
5. Is there any process where complete messages can be provided via subpoena?



One of the witnesses tells the Investigator that Complainant went to school's mental health center the day after the incident . . .

Regs Rule 2 of Investigations

“Provided that the recipient cannot **access, consider, disclose, or otherwise use** a party’s records that are made or maintained by a **physician, psychiatrist, psychologist, or other recognized professional or paraprofessional** acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that **party’s voluntary, written consent** to do so for a grievance process under this section.”



#News #Students And Violence

Staying Confidential

Months after U of Oregon's actions exposed the ability of colleges to seek mental health records of alleged rape victims, the outrage hasn't led to action to prevent others from doing the same thing.

By [Jake New](#) // August 3, 2015

Regs Rule 3 of Investigations

“Provide an equal opportunity for the parties to present witnesses, including fact and **expert witnesses**, and other inculpatory and exculpatory evidence”

- “106.45 deems certain evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege; evidence about a complainant’s prior sexual history; any party’s medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing.”



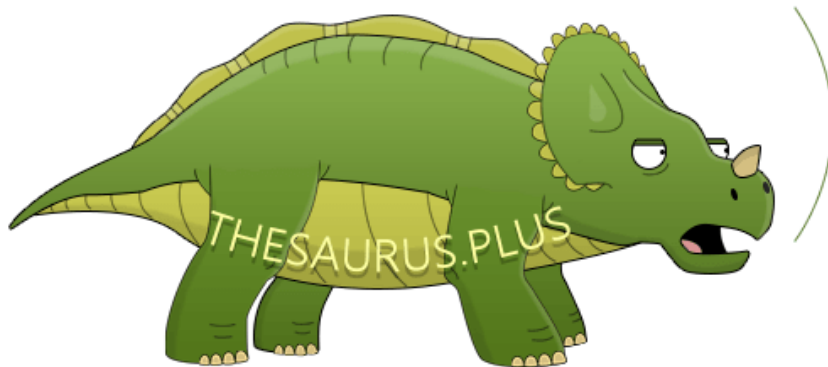
Respondent identifies
15 other former dating
partners for the
Investigator to interview

Regs Rule 4 of Investigations

“Not restrict the ability of either party **to discuss the allegations under investigation** or to gather and present relevant evidence”

synonyms for inartful:

inexpert, unskilful, unpractised, unartful, artless, inapt, scratchy, unaccomplished, unpracticed, unversed



- “This provision does not, therefore, apply to discussion of information that does not consist of ‘the allegations under investigation’ (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation . . . or the investigative report summarizing relevant evidence sent to the parties and their advisors).”
- “Where ‘disparaging communications’ are unprotected under the Constitution and violate tort laws or constitute retaliation, such communications may be prohibited without violating this provision.”
- “This provision applies to discussion of “the allegations under investigation” and not to the evidence subject to the parties’ inspection and review under § 106.45(b)(5)(vi).”
- **Remember:** applies to employment

Regs Rule 5 of Investigations

“Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and **not limit the choice or presence of advisor** for either the complainant or respondent in any meeting or grievance proceeding; **however**, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”





What if the Complainant identifies a material fact witness as the Complainant's advisor?

Regs Rule 6 of Investigations

“Provide, to a party whose participation is invited or expected, **written notice** of the **date, time, location, participants, and purpose** of all hearings, investigative interviews, or other meetings, with **sufficient time** for the party to prepare to participate.”

- **Practical 1:** How do we demonstrate we complied with this?
- **Practical 2:** What is “sufficient time”?

Regs Rule 7 of Investigations

“Provide both parties an equal opportunity to inspect and review **any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source**, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”



Regs Rule 8 of Investigations

“Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”



Memorializing Witness Statements

➤ **Option: Recording**

- Ensures accuracy, allows you to concentrate on conversation, logistically simpler, allows for meaningful feedback
- Transcript must be provided to all parties

➤ **Option: Written Statement**

- A. Convey all information relayed in narrative form
- B. Use quotes when appropriate (significant statements, jargon)
- C. Allow parties opportunity to review for accuracy but not make substantive revisions without notations
- D. Consider “multiple witnesses” to statement

Regs Rule 9 of Investigations

- “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.**”
- Fair to note undisputed material facts
- Disputed material facts are for hearing





At the end of the investigation, you are convinced there is not enough evidence of dating violence.

Rewind: Dismissal

- If no SH + EP + US then “**must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX”
....
- “The recipient **may** dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator **in writing** that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; **or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.**”
- Upon a dismissal “the recipient **must** promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.”

“The Department wishes to emphasize that this provision is not the equivalent of a recipient deciding that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence, but rather is intended to apply narrowly to situations where specific circumstances prevent the recipient from meeting its burden in § 106.45(b)(5)(i) to gather sufficient evidence to reach a determination.”

Hypothetical

- Professor B purportedly witnessed the alleged assault.
- You ask Professor B to sit for an interview. Professor B refuses.
- What options do you have under IX?

Retaliation

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated **or refused to participate in any manner in an investigation, proceeding, or hearing under this part.**”

What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain role as fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

Boundaries with Advisors (Especially Attorneys)



- Why is this important?
Follow policy and equity?
- How do we manage attorneys who will not be quiet?
- Empowered to pull the plug.

Super Important Aspect of Interviews

