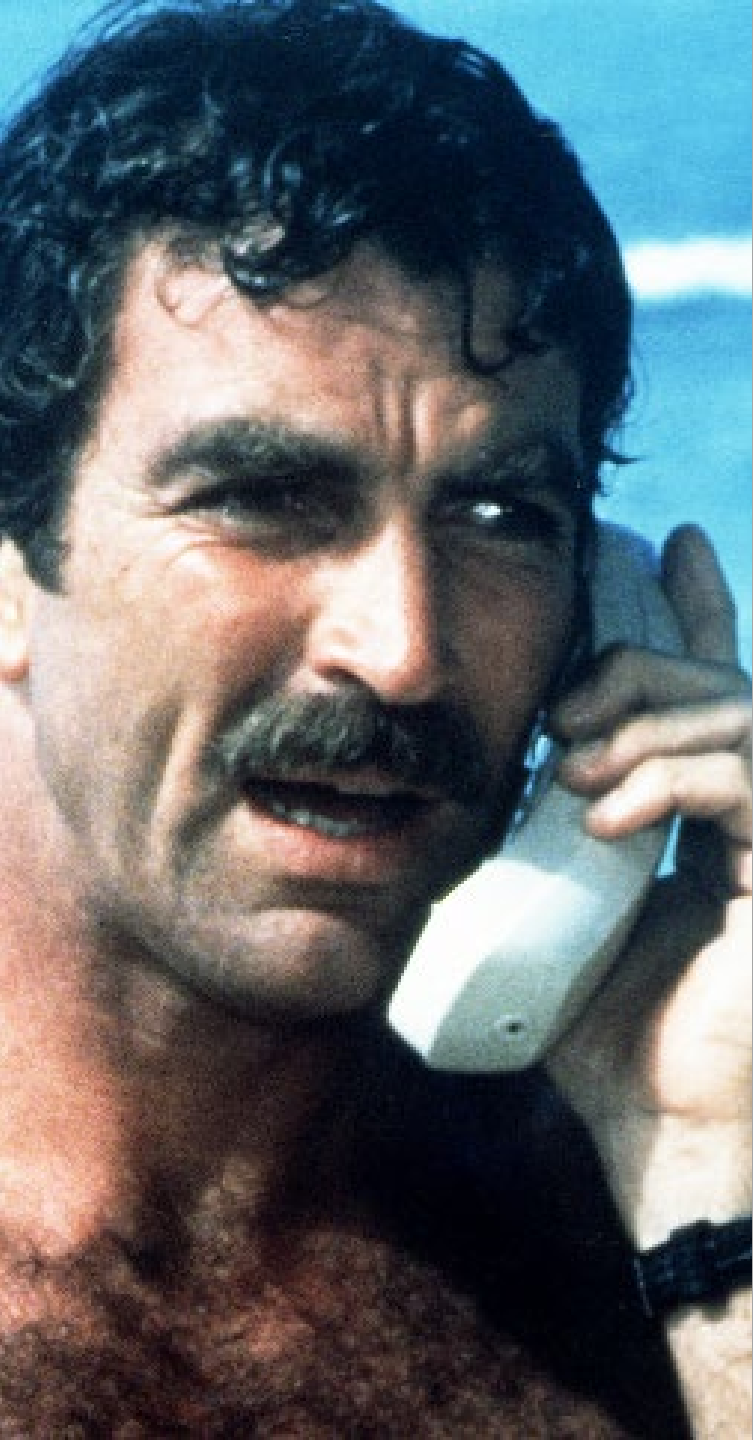


## New Hypo

- Complainant (who is 19 years old) accuses Respondent of sex assault – specifically, Complainant was “too drunk” to consent
- Respondent argues it was consensual sex
- Incident took place at 11:45 PM
- At 11:00 PM, Witness A (a student) saw Complainant & Complainant could not walk on own



## New Hypo

- During investigation, Respondent provided expert who submitted report indicating that there is no way Complainant was incapacitated when intercourse was initiated
- Investigator was provided police report where officer determined that Witness A was not credible because A's account changed significantly & A was "good friends" with Complainant

# Questions

1. What are the disputed material facts that need to be resolved in the hearing?
2. What are some of the practical concerns you have prior to starting hearing?

# Investigation Lays Foundation for Smooth Hearing



1. Appoint hearing officer
2. Allow parties meaningful opportunity to challenge for bias
3. Provide hearing officer a copy of the investigation report and a copy of all evidence transmitted to the parties by the investigator
4. Hearing officer should carefully review in preparation

# Recommended Next Steps

After the hearing officer is appointed, the hearing officer should:

1. set a deadline for the parties to submit any written response to the investigation report
2. set a date for a pre-hearing conference
3. set a date and time for the hearing

# What is Covered: Pre-Hearing Conference

- Discuss the hearing procedures with the parties
- Address matters raised in the parties' written responses to the investigation report
- Discuss whether any stipulations may be made to expedite the hearing
- Discuss the witnesses the parties have requested be served with notices of attendance and/or witnesses the parties plan to bring to the hearing without a notice of attendance



# During the Hearing

- In an in-person hearing, plan for parties to enter and exit the room separately (with their advisor, etc.). Give them enough time to vacate hallways, etc.
- Discuss how the parties can request breaks and expectations during breaks.
  - Put into the script at the beginning.
  - Plan for a break every 60-90 minutes, if the parties do not ask for one.
- Know when to stop.

# During the Hearing

## Evaluating questions

- Hearing officer must evaluate each question prior to the participant answering for relevancy and/or appropriateness (e.g. sexual history)
- If a question is deemed irrelevant, hearing officer must state the rationale for that decision.
  - Consider making a written notation of the question, denial, and rationale for the record
  - Not everyone asks questions well. A poorly worded question, in and of itself, is not a reason to not ask it.



# What Is Relevant?

- **Mantra:** Is the fact or information that is being offered likely to prove/disprove an issue in the investigation?
- If likely to prove/disprove, even indirectly, it is relevant. If it is not likely to do so, it is irrelevant.
- Product of narrow issue & contested facts
- When in doubt, err on the side of allowing it and giving it the weight it is due

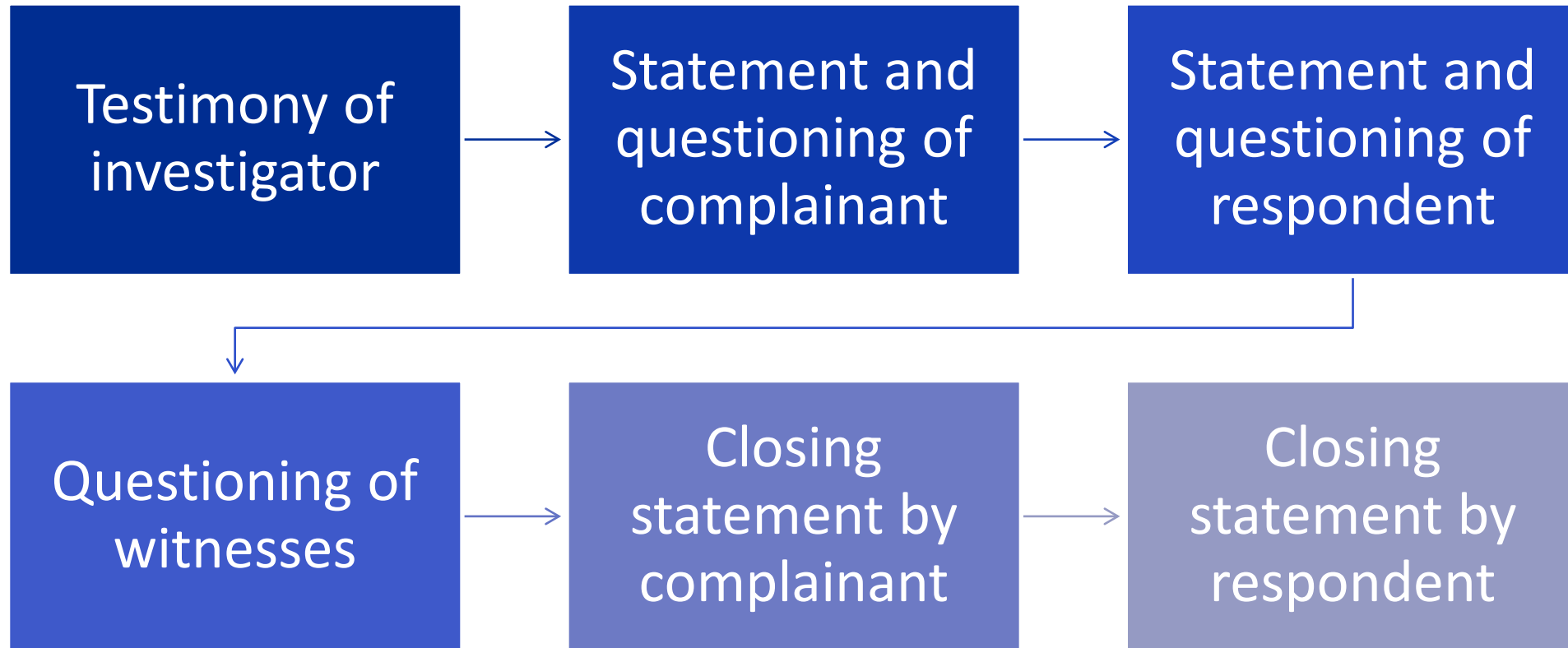




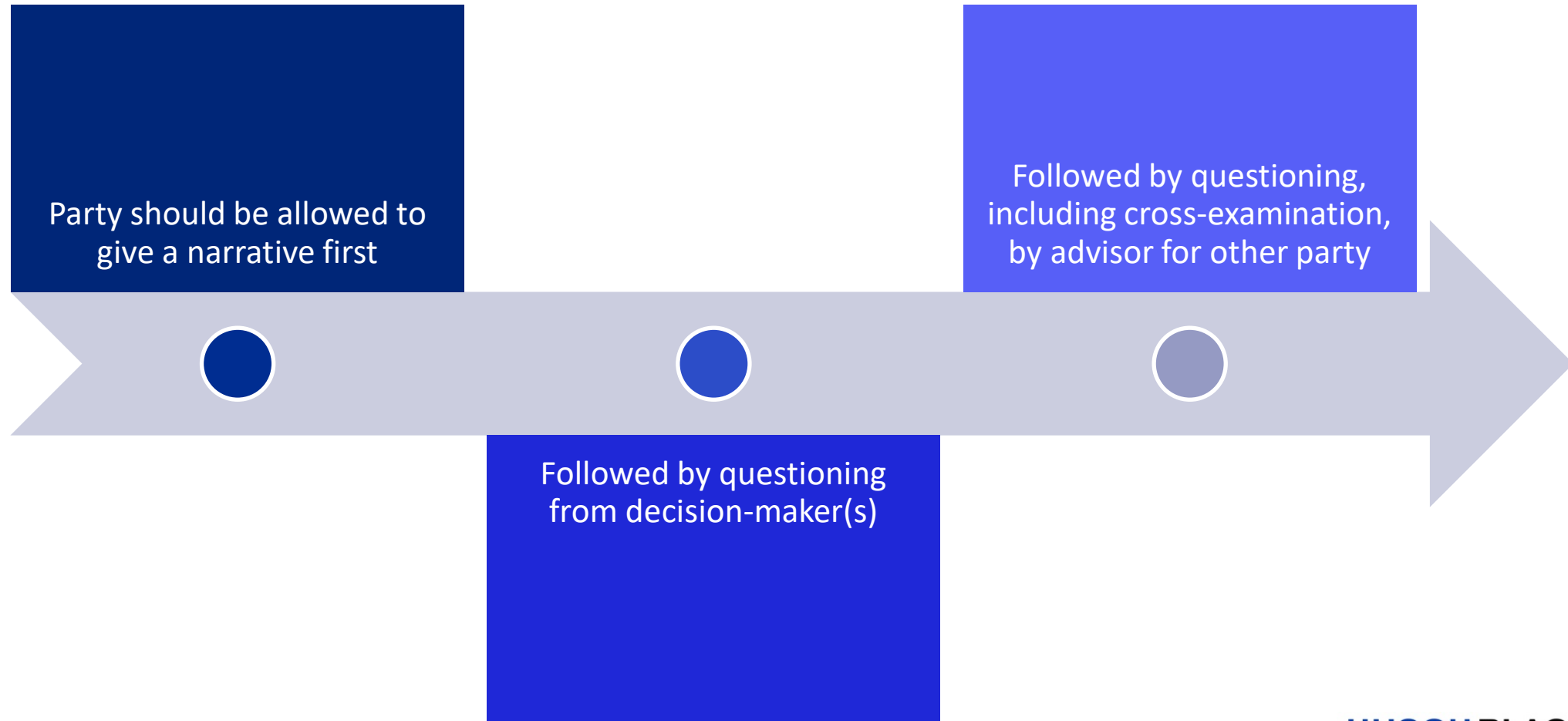
Complainant tries to introduce for the first time at hearing Complainant's own expert report demonstrating Complainant was incapacitated at 11:45 PM

# What is a potential sequence?

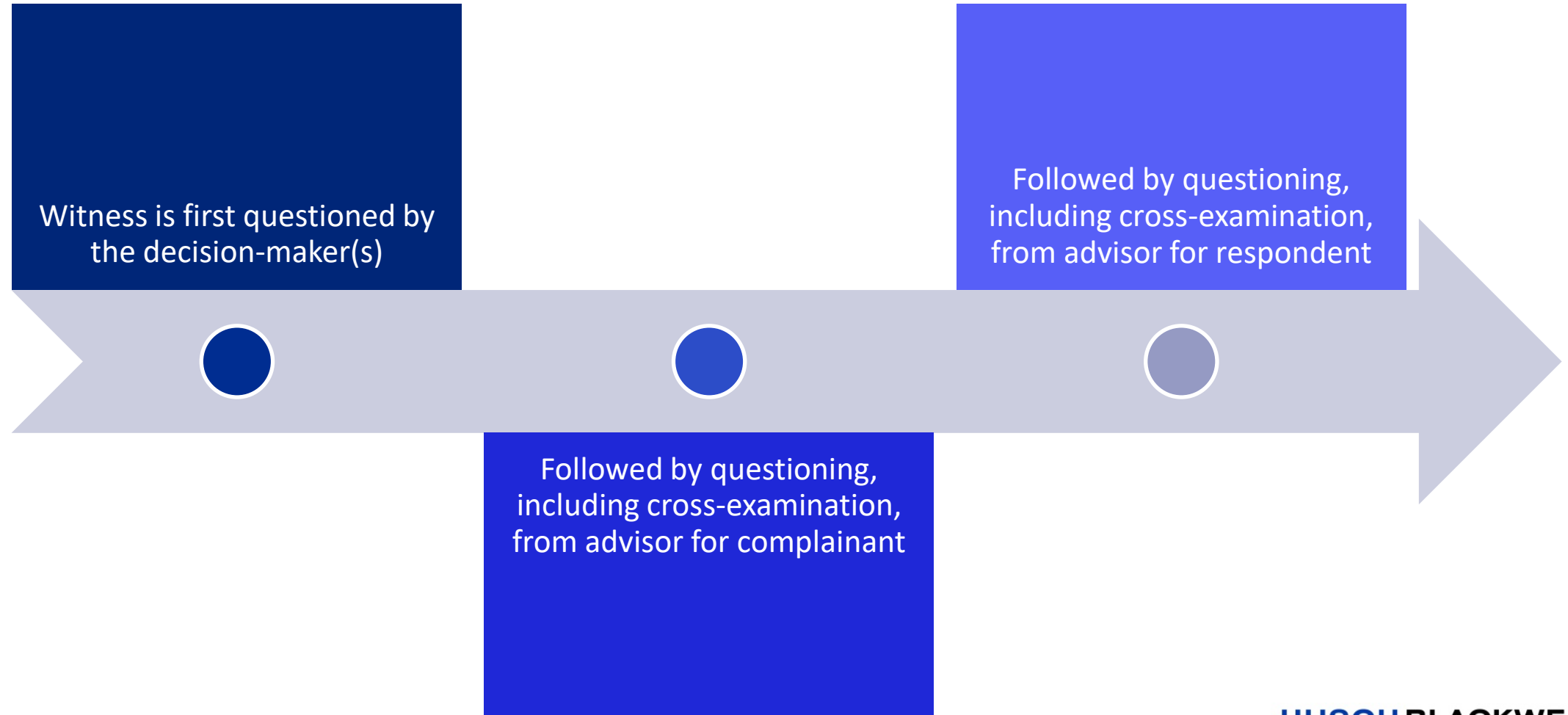
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# How might questioning of parties take place?



# How might questioning of witnesses take place?





What if the Respondent's advisor asks Complainant about a previous sexual encounter with the Respondent?



# Is sexual history considered?

---

- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant only if:
  - Offered to prove that someone other than the respondent committed the conduct, or
  - If evidence of specific incidents of the complainant’s prior sexual behavior with the respondent are offered to prove consent

# Hypotheticals: The Hearing

- A. Respondent refuses to answer a cross examination question regarding the inconsistency between statements to investigator and police. What happens next?
- B. Respondent objects to introduction of the SANE exam because the nurse did not testify at hearing. How do you resolve?
- C. Respondent's advisor would like to question Complainant on her childhood sex assault. Should you allow? What is basis for denial?



# How do(es) the decision-maker(s) decide a case?



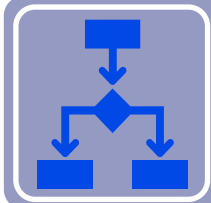
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



# What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.



# Assessing Credibility

- When “he said/she said,” look for more but . . .beware of trap
- There are always competing narratives
- Must thoughtfully assess credibility (which is always difficult)
- Over-reliance on demeanor



# Model Jury Instructions

- “In weighing the testimony of the witnesses, you may consider the witness’s **manner and demeanor** on the witness stand, any feelings or interest in the case, or any **prejudice or bias** about the case, that he or she may have, and the **consistency or inconsistency** of his or her testimony considered in the light of the circumstances. Has the witness been **contradicted by other credible evidence**? **Has he or she made statements at other times and places contrary to those made here on the witness stand**? You must give the testimony of each witness the credibility that you think it deserves.”
- “**You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted.** The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.”

## Detecting true lies: police officers' ability to detect suspects' lies.

Mann S<sup>1</sup>, Vrij A, Bull R.

[+ Author information](#)

### Abstract

Ninety-nine police officers, not identified in previous research as belonging to groups that are superior in lie detection, attempted to detect truths and lies told by suspects during their videotaped police interviews. Accuracy rates were higher than those typically found in deception research and reached levels similar to those obtained by specialized lie detectors in previous research. Accuracy was positively correlated with perceived experience in interviewing suspects and with mentioning cues to detecting deceit that relate to a suspect's story. Accuracy was negatively correlated with popular stereotypical cues such as gaze aversion and fidgeting. As in previous research, accuracy and confidence were not significantly correlated, but the level of confidence was dependent on whether officers judged actual truths or actual lies and on the method by which confidence was measured.

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PMID: 14769126 DOI: [10.1037/0021-9010.89.1.137](https://doi.org/10.1037/0021-9010.89.1.137)

[PubMed - indexed for MEDLINE]



## Nebraska Law Review

Volume 72 | Issue 4

1993

# A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility

Jeremy A. Blumenthal, J.D., Ph.D.

Syracuse University College of Law, [jblument@law.syr.edu](mailto:jblument@law.syr.edu)

## FBI Law Enforcement Bulletin

Home • 2014 • June • The Truth About Lying: What Investigators Need to Know



### The Truth About Lying: What Investigators Need to Know

By Brian D. Fitch, Ph.D.



# Credibility: 7 Factors to Consider

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Have there been similar complaints against the respondent? \*\*\*
7. Do any of the witnesses have a motivation to lie, exaggerate or distort information?



# How do(es) the decision-maker(s) issue a decision?

In a written document, provided contemporaneously to the parties that:

- Identifies the allegations of sexual harassment
- Describes the various procedural steps taken from the time the formal complaint was made
- States findings of facts supporting the determination
- Reaches conclusions regarding application of relevant policy definitions to the facts
- **Includes a rationale for each finding for each allegation**
- States the disciplinary sanctions and remedies, if implicated by the determination made, and
- Explains the procedures and grounds for appeal



# What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements





# What principles do we use to determine remediation?

- If a violation is found, institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

# A Moment on Being “Trauma-Informed”

1. How brains and bodies respond to acutely stressful and traumatic events **as they are happening**
2. How these experiences of extreme stress are **encoded, stored, and potentially retrieved from memory**



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[Nat Neurosci.](#) Author manuscript; available in PMC 2016 Mar 31.

PMCID: PMC4816215

Published in final edited form as:

NIHMSID: NIHMS771625

[Nat Neurosci.](#) 2015 Oct; 18(10): 1376–1385.

PMID: [26404712](#)

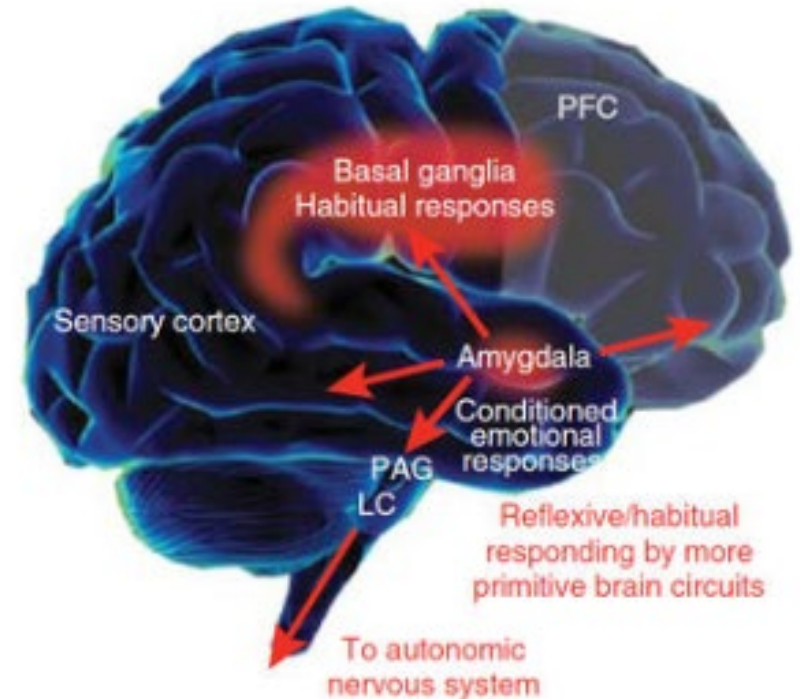
Published online 2015 Sep 25. doi: [10.1038/nn.4087](#)

## Stress weakens prefrontal networks: molecular insults to higher cognition

[Amy F T Arnsten](#)

# Trauma: Shift to Reflexes and Habits

- “Stress tends to promote simple decision-making strategies that depend on **ingrained habits**, at the expense of **more thoughtful, goal-directed actions**”
- “Uncontrollable stress flips the brain from a more 'reflective' state, mediated by the more recently evolved PFC [prefrontal cortex], to a more 'reflexive' state, mediated largely by subcortical structures.”



Stress shifts brain functioning to habits and reflexes. Image from review by the world's leading researcher on the topic (see Arnsten 2015 in references).

# Comparative Cultural Studies

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Houston, Texas 77204-5020





Ashley A 4 days ago

@ 1:07 Did he really say 'Get in the car?' after asking what he should do? Wow!



1



REPLY



Larry G 3 months ago

Wait! That was less than 2 feet of water....why did he swim? And did that reporter(out of breath) really "save" the guy? Omg



2



REPLY



Seth B 1 year ago

Face it our American people do NOT have any common since they might be book smart but dumb as a wooden fence post when it comes to common sense. I am talking about you city people ranchers and farmers would never do something like this without a tractor or horse .



2



REPLY

View 3 replies ▾



Aaron Bills aka KillSauce 1 year ago

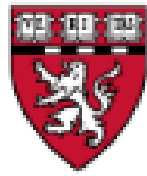
natural selection was at work... leave him

# Habit Responses

- **Some engage in fighting or fleeing**
- Passive ones (which can avert additional violence or retaliation)
- Tonic immobility -- fear-based state of rigid paralysis (which can render one mute as well)
- Collapsed immobility, a different survival reflex that sends heart rate and blood pressure plummeting. The brain's loss of oxygen brings on faintness or even passing out as the body goes limp. Can happen when there is extreme fear and physical restraint







[Home](#) > [July/August 2015 - Volume 23 - Issue 4](#) > [Fear and the Defense Cascade: Clinical Implications and Mana...](#)

[< Previous Article](#) | [Next Article >](#)

## **Fear and the Defense Cascade** Clinical Implications and Management

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Kozłowska, Kasia MBBS, FRANZCP, PhD; Walker, Peter BSc Psych, MPsychoI; McLean, Loyola MBBS, FRANZCP, PhD; Carrive, Pascal PhD

Harvard Review of Psychiatry: [July/August 2015 - Volume 23 - Issue 4](#) - p 283–287

doi: [10.1097/HRP.0000000000000085](#)

Perspectives

OPEN

SDC

# Memory

- Fragmentary memories – Considerable research shows how stress can enhance memory for details closer to the onset of stress and then impair it for details that come later.
- Many studies have shown that the “central details,” **which had the most attention and significance at the time**, can be strongly encoded and stored, while the “peripheral details” may not get into memory and, even if they do, may fade quickly or be recalled inconsistently
- Encoding sequence problems



## LSU kicker Colby Delahoussaye on final moments before friends' fatal crash

Glenn Guilbeau, USA TODAY Network 7:18 p.m. EDT August 18, 2016



(Photo: John Raoux, AP)

BATON ROUGE — Snapshots and flashes are all LSU kicker Colby Delahoussaye remembers from just before and just after the car accident that killed two of his friends last month on rural Beaver Lake Road between Wales and Merton, Wis.

The wreck on July 23 killed former Michigan State punter Mike Sadler of Grand Rapids, Mich., who was driving, and senior Nebraska punter Sam Foltz of Grand Island, Neb., who was in the passenger seat.

Delahoussaye, an LSU senior from New Iberia, La., happened to sit in the two-door Mercedes coupe's back seat, an arbitrary fact that saved his

life. That and the burning sensation he felt on his upper left leg after impact.

*Review Article*

# **The Temporal Dynamics Model of Emotional Memory Processing: A Synthesis on the Neurobiological Basis of Stress-Induced Amnesia, Flashbulb and Traumatic Memories, and the Yerkes-Dodson Law**

**David M. Diamond,<sup>1,2,3</sup> Adam M. Campbell,<sup>1,2</sup> Collin R. Park,<sup>1,2</sup> Joshua Halonen,<sup>1,2</sup> and Phillip R. Zoladz<sup>1,2</sup>**

<sup>1</sup> *Medical Research Service, VA Hospital, Tampa, FL 33612, USA*

<sup>2</sup> *Department of Psychology, University of South Florida, Tampa, FL 33620, USA*

<sup>3</sup> *Department of Molecular Pharmacology and Physiology, University of South Florida, Tampa, FL 33612, USA*

Received 28 July 2006; Revised 18 December 2006; Accepted 20 December 2006

# What Being Trauma-Informed Does Not Mean

## The Bad Science Behind Campus Response to Sexual Assault

Assertions about how trauma physiologically impedes the ability to resist or coherently remember assault have greatly undermined defense against assault allegations. But science offers little support for these claims.

EMILY YOFFE | SEP 8, 2017 | EDUCATION

- If someone cannot recall critical details, that does not necessarily mean they must have experienced trauma.
- If someone acts in an inexplicable way, that does not necessarily mean they must have experienced trauma.
- **Being trauma informed simply means that we don't immediately jump to "liar" when someone cannot recall all critical details or acts in an atypical fashion.**



HUSCH BLACKWELL



Appeals





# What is the purpose of the appeal?

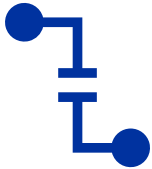
- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review





# What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

# Example (procedural irregularity)

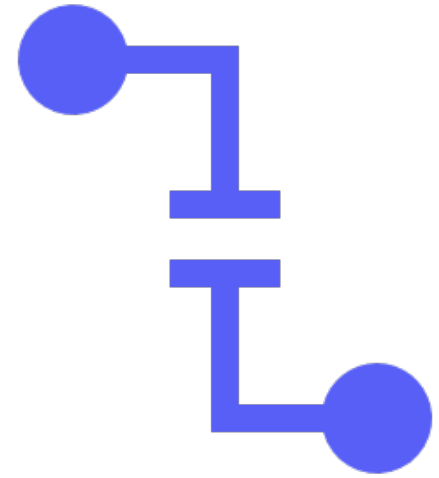
During a hearing, the hearing officer denies the respondent's advisor the right to question witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing officer must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.





# Are all procedural errors appealable?

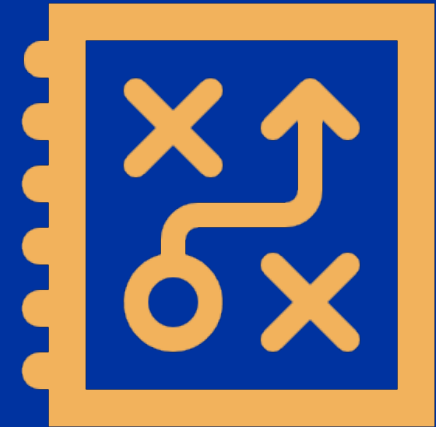
- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors





# Example (harmless error)

—  
Policy required hearing to be held within 60 days of submission of Formal Complaint. Hearing was held 61 days after submission of Formal Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.





# Example (new evidence)

—  
After determination is made that respondent did not commit sexual harassment, complainant secures a previously unknown video made by a bystander at the party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The student who took the video has been away studying abroad and only learned of the hearing after returning a few days ago.





## Example (conflict of interest/bias)

—

After determination is made that respondent committed sexual harassment, respondent sees social media post by hearing officer stating: “All victims of sexual harassment must be believed. False reports of harassment are exceedingly rare. A person accused of sexual harassment is a guilty person in my book.” Respondent argues bias resulted in a sham hearing with the outcome predetermined.





# Should we ever dismiss an appeal?

Yes – dismissal is appropriate if:

- Appeal is filed after the reasonable deadline set in the policy
- Appealing party does not articulate one of the three grounds for appeal



# How does the appeal officer make their decision?

- Appeal officer's review is limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
- Appeal officer must review the appeal, response, and hearing record (to the extent necessary, depending on the grounds for appeal)
- Appeal officer must then draft a written decision that states the outcome of the appeal and rationale



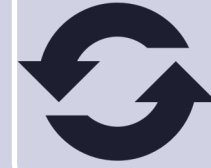
# What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



Appeal is granted and determination is changed by the appeal officer



Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found



HUSCH BLACKWELL

# Informal Resolution





# 34 C.F.R. § 106.45(b)(9)

## *Informal Resolution*

---

“[A]t **any time prior to reaching a determination** regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient . . .”

- (i) Provides to the parties a **written notice** disclosing: the **allegations**, the **requirements of the informal resolution process** including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
  - provided, however, that **at any time prior to agreeing to a resolution**, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint, and
  - any **consequences** resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties’ **voluntary, written consent** to the informal resolution process; and
- (iii) Does **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**.



# Written Notice of Allegations

---

- Identity of parties involved (if known)
- Specific section of university's policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process

# 34 C.F.R. § 106.45(b)(1)(iii)

## Conflict of Interest, Bias, & Training

---

- **Conflict of Interest/Bias:** Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, **or any person designated by a recipient to facilitate an informal resolution process**, **not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.**
- **Training:** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, **and any person who facilitates an informal resolution process**, **receive training** on the **definition of sexual harassment** in § 106.30, the **scope of the recipient's education program or activity**, how to conduct an **investigation and grievance process including** hearings, appeals, and **informal resolution processes**, as applicable, and **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .
- Any **materials** used to train Title IX Coordinators, investigators, decision-makers, **and any person who facilitates an informal resolution process**, **must not rely on sex stereotypes** and must promote impartial investigations and adjudications of formal complaints of sexual harassment;



# 34 C.F.R. § 106.45(b)(1)(v) Grievance Process Requirements

---

Include **reasonably prompt time frames** for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals **and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for **good cause** with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

**Good cause** may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;





# 34 C.F.R. § 106.45(b)(2)(9) Voluntary Participation

---

“A recipient **may not** require **as a condition** of

- enrollment or continuing enrollment,
- or employment or continuing employment,
- or enjoyment of any other right,

waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

Similarly, a recipient **may not** require the parties to participate in an informal resolution process under this section and **may not** offer an informal resolution process **unless a formal complaint is filed.**”



# How Do We Ensure Participation is Voluntary?

---

- Educate the parties and the community about informal resolution options
- Provide Notice of Rights & Options, such as:
  - Whether and when the process can be terminated
  - Whether information shared can be used in subsequent conduct matters
  - How RJ differs from formal investigation and adjudication
  - Whether the process involves face-to-face interaction
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement
- Frequent check-ins and monitoring





# Final Informal Resolution Agreement

---

Potential elements of final resolution agreement include:

- Procedural Background
- Sanctions and/or other remediation measures
- Confidentiality agreement/limitations
- Consequences for breach



# Informal Resolution is Not for All Cases.

---

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

**Remember:** Traditional investigative/adjudicative processes should be used when an accused student *denies* responsibility.