

# Title IX Essentials Workshop The Nuts & Bolts of Investigating Title IX Complaints

**Course Material**  
**May 18-19, 2021**



Presented by T9 Mastered, LLC  
a joint venture of Public Interest Investigations, Inc. and  
Sue Ann Van Dermynen, Esq. and Deborah Maddux, Esq.



Title IX Essentials Workshop:  
**The Nuts & Bolts of  
Investigating Title IX  
Complaints**

**Course Materials**

May 18-19, 2021

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## Biographies

**Deborah Maddux** is a Shareholder at Van Dermyden Maddux Law Corporation. She is licensed to practice law in the State of California. She is also a certified Senior Professional in Human Resources, as well as a certified EEOC investigator, and is trained in conducting Trauma Informed Forensic interviews. She is experienced in conducting Title IX investigations for federally funded education programs or activities, particularly in the University setting. She provides hearing officer services, and is a panel member for National Arbitration and Mediation (NAM).



Prior to creating her law firm, Deborah served as Counsel to the University of California, Davis, where she was routinely called upon for counsel in a wide variety of situations. In this role, she conducted, oversaw and managed many investigations and advised and collaborated with leadership regarding the appropriate follow-up to investigative findings and conclusions. Deborah worked with campus units related to all aspects of employment management and student discipline issues. This included the proper application of and compliance with state and federal laws, grievance and arbitration administration, personnel policy development and interpretation, and complaint resolution processes. She provided direction regarding the proper administration of personnel actions, evaluations, hiring decisions, corrective action, and progressive discipline, up to and including dismissals. She also negotiated and drafted separation agreements. At UC Davis, Deborah served as an active member and collaborated on a variety of campus team projects and standing committees, including the Ethics Advisory Committee, the Sexual Harassment and Discrimination Case Management Team, the Faculty Accommodation and Disability Assessment Team, and the Student Crisis Response Team.

Deborah's current practice focuses on investigations into claims of misconduct, including claims of harassment, discrimination, retaliation, and of improper governmental activities. She is experienced in testifying regarding completed investigations. Deborah has also been trained in mediation through Pepperdine Law School's prestigious Straus Institute for Dispute Resolution.

Deborah is also an experienced and effective trainer. She has provided training to hundreds of campus investigators regarding how to conduct effective investigations that focus on ensuring a process that is fair and thorough. Deborah provides training on a variety of other issues, including sexual harassment prevention, discrimination prevention, and other legal compliance topics. Her training is consistently rated excellent, and focuses on best practices and practical approaches and solutions. Deborah has written online training courses in the areas of sexual harassment prevention and best employment practices.

**Liz Paris** is a Partner with Van Dermyden Maddux. She is licensed to practice law in the State of California, and is certified as a Senior Professional in Human Resources (SPHR).



Prior to joining Van Dermyden Maddux, Liz was employed at UC Davis where she routinely provided policy and contract interpretation to management and staff, responded to grievances and complaints, acted as the University Advocate for administrative hearings, and negotiated contracts with labor unions. Additionally, she conducted investigations and fact-findings and served as a Hearing Officer in student discipline hearings. Prior to law school, Liz worked in Human Resources for various companies, providing advice and assistance with recruitment, hiring, termination, and performance management.

Liz is also an experienced investigator in Title IX sexual misconduct claims. She has investigated cases involving underage Complainants, multiple Respondents, and allegations involving incapacitation and inability to consent. Liz understands best practices in the Title IX arena, and the challenges facing schools and parties when sexual violence allegations surface.

Liz frequently serves as an Appeal Hearing Officer for Title IX cases. In this role, Liz reviews campus responses to Title IX allegations within the framework of the individual school's appeal process. In her deliberations, she considers whether the administration's response to claims of sexual misconduct were compliant with policies meant to provide a safe campus for students. Liz has overseen cases involving dating violence, drug abuse, sexual assault, and incapacitation. She has experience questioning parties using trauma-informed techniques, making admissibility and relevance decisions, and issuing well-reasoned, thorough decisions.

Additionally, Liz has investigated matters at K-12 Districts, including allegations involving discrimination and compliance. Her investigations have included interviews of administration, classified staff, as well as paraeducators.

Liz graduated from McGeorge School of Law in 2012 and earned an undergraduate degree from UC Davis.

**Keith Rohman** is the founder and president of Public Interest Investigations, Inc., in Los Angeles, a legal investigations firm that has served educational institutions, public-sector employers, corporations, and the legal community since 1984. He has worked as an investigator in both the public and private sectors for more than 30 years.



During his career, Keith has been involved in numerous high-profile cases, including investigations involving the torture of prisoners at Abu Ghraib; the role of Blackwater, Inc., in the mass shooting of Iraqi citizens; the Rodney King case; and the enslavement of dozens of Thai workers in an El Monte, California, sweatshop. Keith has also conducted investigations in death penalty cases in California, Utah, Alaska, Arizona, and Washington.

On campuses, Keith has investigated allegations of rape and other sexual assaults under Title IX at several Southern California campuses. He was the principal investigator for attorneys in landmark litigation filed on behalf of service women and men sexually assaulted in the U.S. military. In the workplace, Keith has conducted third-party investigations into allegations of sexual harassment, sexual assault, discrimination, and retaliation for private- and public-sector employers, including school districts and universities.

Keith is the past President of the Association of Workplace Investigators (AWI), a professional membership association for attorneys, human resource professionals, private investigators, and others who conduct or manage workplace investigations. Additionally, Keith is an Adjunct Professor of Law at Loyola Law School, where he teaches fact investigation. Previously, he was appointed by the L.A. County Board of Supervisors to the Equity Oversight Panel (EOP) of the Los Angeles Sheriff's Department, a civilian oversight board that oversees Internal Affairs investigations.

Keith has appeared as a guest on "CNN" and "Good Morning, America" and has been quoted in *The New Yorker*, *Newsweek*, and the *Los Angeles Times*. His articles have appeared in the *Cardozo Law Review* (Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 2009 *Cardozo L. Rev. de novo* 96), *Los Angeles Daily Journal* and the *Daily News*.

**Nora Rohman** has been an investigator at Public Interest Investigations, Inc., since 2013. Her cases have focused on campus investigations involving sexual misconduct allegations; workplace investigations into complaints of harassment, discrimination, and/or retaliation; and mitigation investigations for death penalty matters, both at the trial and appellate levels.

An engaging lecturer and trainer, Nora has been part of the faculty of T9 Mastered since 2017. She has also given presentations to numerous groups on conducting effective investigations. These presentations have included the annual conference of the Association of Workplace Investigators (AWI) in 2015 and 2018, and an annual training for the Title IX and Equity investigators for the California State University (CSU) system in 2019.



Nora also has specialized knowledge in the area of sexual assault prevention education. She completed an internship at Peace Over Violence, working on interpersonal violence prevention education, and trained as a Peer Counselor at Concordia University's 2110 Center for Gender Advocacy, including violence prevention and sex education. She also has extensive experience with education and activism in the LGBTQ community.

Nora frequently participates in workshops, conferences, and training programs to stay current on legal developments. She completed the Investigations Training Institute for AWI and has regularly attended the annual Capital Case Defense Seminar, held by California Attorneys for Criminal Justice. She has also received training on conducting interviews using trauma-informed approaches.

Nora earned her bachelor's degree in Interdisciplinary Gender Studies from Concordia University in Montreal. Following this, she pursued a master's degree in Gender Studies at New York University.

**Cathleen Watkins** is a Senior Investigator who has worked for the past 20 years as part of the investigative team at Public Interest Investigations, Inc. (PII), in Los Angeles. Her caseload has focused on conducting third-party investigations into workplace complaints of sexual harassment, sexual assault, discrimination, and retaliation for a range of employers, including corporations, governmental entities, and educational institutions.



On college campuses, Cathleen has investigated complaints involving faculty and staff regarding allegations of sexual misconduct, racial discrimination, gender bias, and disability claims. Under Title IX, Cathleen has conducted investigations of numerous student complaints of sexual assault. Following such investigations, she has attended hearings on these matters and provided additional information to adjudicators, faculty panels, and Title IX officers.

Additionally, Cathleen has investigated cases involving misuse of public funds, whistleblower allegations, environmental violations, and matters involving top-level management and boards of directors. Cathleen has trained and supervised staff investigators and managed several large-scale investigative projects, including PII's work, as part of a federal court order, to monitor the treatment of disabled inmates in the Orange County jails. She has also managed an investigative team assigned to conduct investigations of complaints of workplace discrimination and retaliation brought by employees of the County of Los Angeles.

Together with [Keith Rohman](#), Cathleen developed "The Truth Matters"® training, a seminar for in-house investigators. She has also designed and presented customized training for investigators and their managers on addressing allegations of sexual harassment, racial discrimination, gender bias, and other workplace issues. Cathleen is presently the Program Director for T9 Mastered, working on the program's curriculum, marketing, and business development.

Cathleen has a bachelor's degree from the University of Southern California. She is licensed as a private investigator in California.





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Overview of Nuts & Bolts Training	
Day One	Day Two
<ul style="list-style-type: none"><li>• Interview of Complainant</li><li>• What's Next? Developing an investigative plan</li><li>• Interview of Respondent</li><li>• Trauma-awareness in interviews</li></ul>	<ul style="list-style-type: none"><li>• Unconscious Bias in Investigations</li><li>• Special Topic: Consent</li><li>• Preparing for a Hearing</li><li>• Wrap up</li></ul>

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**Next Steps:  
Planning it out**



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**Complainant Interview**

**Observations of interview with Zach Stephens**



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**Formal Complaints of Sexual Harassment**

Under Title IX's Final Rule:

Schools are **required** to investigate sexual harassment allegations in any formal complaint.

A formal complaint is a document signed and filed by a Complainant or signed by a Title IX Coordinator alleging sexual harassment and requesting that the school investigate.



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### Investigative Plan: Consider the End Result

To develop the investigative plan:

- Consider what the investigation needs to accomplish

Grievance process under Title IX requires:

- Objective evaluation of all relevant evidence, inculpatory and exculpatory



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### Relevant Policies

Based on Zach's allegations, what are the potential policy violations?



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### Relevant Policy Language

**Sexual Harassment:** Unwelcome conduct that is so severe, pervasive **and** objectively offensive that it effectively denies a person equal access to the College's education program or activity.

**Stalking:** A course of conduct that would cause a reasonable person to fear for their safety or the safety of others; **or** suffer substantial emotional distress

--Meadows College Title IX Sexual Misconduct Policy, August 2020



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## Relevant Policy Language

Consider other pertinent parts of the Sexual Misconduct Policy and/or other applicable policies

- Jurisdiction
- Non-fraternization policies
- Other applicable policies?



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## Determining the Scope

What did Zach specifically allege?

- Inappropriate sexual comments about his appearance and physique; comments that were overly familiar and/or used sexual innuendo, such as Prof. Bartoli saying she could “teach [Zach] some things” followed by an invitation to her house for a meeting
- Leered at his body, squeezed his bicep, and winked
- Going to Zach’s apartment uninvited and posting photos on Instagram of Zach playing badminton



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## The Investigative Steps Who? What? When? Where? How? Why?

### INTERVIEWS

Who should the investigator interview to understand Zach’s allegations?



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**The Investigative Steps**  
**Who? What? When? Where? How? Why?**

**Things to consider when planning interviews**

- Trauma-informed approach
- Invitations to witnesses
- Role of the advisor
- Note-taking methods



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**The Investigative Steps**  
**Who? What? When? Where? How? Why?**

**Sequence of Interviews**

- Art and science to sequencing interviews
- Devote time necessary to consider the benefits and drawbacks of timing
- When do you talk to the Respondent?
- Multiple parties and/or witnesses
- Circling back



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**The Investigative Steps**  
**Who? What? When? Where? How? Why?**

**DOCUMENTS/SOCIAL MEDIA**

What documents/social media will be relevant in investigating Zach's complaint?



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## The Investigative Steps Who? What? When? Where? How? Why?

What were some unexpected sources of information that were useful as evidence in your investigations?



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## Other Sources of Evidence

### Documents

- Emails
- Medical records
- Performance Evals
- Journals
- Incident reports
- Relevant statistics

### Physical evidence

- Hand-written notes
- Receipts

### Visual

- Photos/videos
- Diagrams
- Security camera footage

### Electronic

- Computers, phones, tablets
- Social media posts/messages, on-line chats
- Key card access



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## Working with Campus Police or other law enforcement agencies

### Campus investigations may overlap with criminal

- Sexual Assault
- Workplace violence, stalking
- Theft, fraud, bribery
- Narcotic sales

### Relevant Sources of Information

- Police report
- Transcript of pretext call
- Computer forensics of laptop, tablet, phone



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## Documents/Physical Evidence

### Other considerations

- Confidentiality of medical records
- Get familiar with *Lybarger Admonition*
- Chain of custody/Storing physical evidence



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## Medical Records and HIPAA

- Take care with private medical information
- Waivers will be necessary
- Safeguarding medical information throughout investigation and beyond
- Relying on confidential information in findings
- Medical examinations that take place on campus
- Check on special campus procedures about these records



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## Scope Creep

### Beware of Scope Creep

Impacts your timeframe and ability to complete the investigation

May bleed into areas outside your jurisdiction

Consult with Title IX office or case manager before expanding your scope



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## Develop a Written Investigative Plan

- Date complaint received by institution
- Date of initial contact by investigator
- Report due date
- Parties
- Relevant policy (policies)
- Scope and issue under investigation
- Witness list (evolving), with contact information
- Sequence of witnesses
- Identify evidence seeking to obtain
- Timeline for anticipated activities
- Maintain log of actions, communications
- Re-evaluate the plan



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## When do you have enough information?

### Review your investigative plan. Ask yourself:

- Did you collect everything you needed?
- Have you analyzed the information you collected?
- Does it address the relevant campus policies?
- Did you miss obvious sources of information?
- Do you have enough to reach a "preponderance of evidence"?
- Does your case manager agree that you have finished collecting facts?



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## Trauma-Awareness in Interviews



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## Overview of Training

- What is trauma?
- Trauma's effects
- Trauma informed interview techniques



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## Trauma Informed Interview Techniques

*People will forget what you said,  
people will forget what you did, but  
people will never forget how you made  
them feel.*

– Maya Angelou



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## What is trauma?

**Psychological trauma** is the unique individual experience of an event or enduring conditions, in which:

- The individual's ability to integrate his/her emotional experience is **overwhelmed**, or
- The individual experiences (subjectively) a **threat to life, bodily integrity, or sanity**.

(Pearlman & Saakvitne, 1995, p. 60)



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## Examples of trauma

- Threat to life or limb;
- Severe physical harm or injury, including sexual assault;
- Receipt of intentional injury or harm;
- Violent, sudden loss of a loved one;
- Witnessing or learning of violence to a loved one;
- Learning of exposure to a noxious agent; and
- Causing death or severe harm to another.

(Wilson & Sigman, 2000)



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## Reactions to trauma

- Anxiety
- Fear
- Shock
- Upset
- Numbness
- Disturbances in sleep, with nightmares
- Reactions can interfere with activities of daily living



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## Trauma and memory

- Trauma can interrupt the memory process.
- Survivors may not be able to accurately provide details.
  - Or inadvertently provide inaccurate information.
- This can cause the investigator to become suspicious of the information, or the interviewee.



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## Trauma and credibility assessments

- Memory loss or mistakes can indicate trauma
- But does not *necessarily* indicate trauma.
- So, investigators should
  - understand the signs of trauma and
  - not *assume* the interviewee is evading the truth
  - or telling the truth.
  
- That's what the investigation is for!



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## The Science of Forensic Interviewing

### Goals:

- Minimize potential trauma to the interviewee;
- Maximize information obtained;
- Reduce contamination of the interviewee's memory;
- Maintain the integrity of the investigative process.

The Forensic Experiential Trauma Interviews (FETI) is a trauma informed interviewing approach.



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## FETI Process

### **Interviewees need to feel safe at all times.**

- Make sure the environment is right.
- Ask about how the person is feeling about the process so far. Acknowledge how difficult this process can be.
- Explain your role and what you will be asking in general.
- Use empathy to build a relationship with the interviewee.



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## FETI in the room

Persons affected by trauma need to feel safe.

- A comfortable, quiet, and private environment;
- Offer water and tissues;
- Have fidget objects handy;
- Give them some control over the room when possible.



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## FETI with our presentation

- **Transparency**: explain your role and what you will be asking in general.
- Empathy: to build **rapport** with the interviewee.
- Active **listening**.
- Acknowledge pain of their traumatic experience.
  - But what can we say and what can we NOT say?



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## FETI over Zoom

- Good technique
- *Not-so-good* technique
- Put your reactions into Chat
  - What went well
  - What went badly



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## Motivational Statement

- *I want you to know how much I appreciate you participating in this interview.*
- *I know how difficult this is to talk about. I am sure you would rather be anywhere than here answering these questions.*
- *Your answers will help me to better understand what happened so that we can accurately document it in our report.*



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## FETI questions

- “What are you *able* to tell me?”
  - Using “able” relieves some pressure.
- Open ended questions like,
  - “What do you remember about that...” or, “Tell me more about that...”
- Lack of linear memory is often a result of trauma, so ask:
  - Ask “What else happened?”
  - **instead of** “What happened next?”



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## FETI questions

- Ask the person if they remember any smells, sounds, tastes, or sights. This triggers the memories of the event.
- Don't get hung up on chronological narrative, at least at first.
- “What was the most difficult part of this experience for you?”



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## FETI Process—Reframing the Questions

**These are some of the typical questions asked during a sexual assault investigation:**

Typical questions asked

- Where did this happen?
- How long did this last?
  
- Did you get hurt?
  
- Questions about appearances (Height, clothing, etc.)



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## FETI Process—Reframing the Questions (cont'd)

Typical framing

- Why didn't you scream or fight back?
- Did he penetrate you?
  
- How drunk were you?



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## Self-care for investigators working with trauma

- Trauma is contagious.
- By just conducting the interview, the investigator can experience a variety of emotional reactions.
- These can be secondary or vicarious traumatization, or compassion fatigue.
- Reactions can include PTSD-like reactions, reliving a personally traumatic experience, or suffering from witness guilt.
  - Witness guilt from witnessing the distress but not having been part of the traumatic experience.



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What is your preferred type of self-care?

- Put your ideas in the chat box



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Day Two



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**Unconscious  
Bias  
in Title IX  
Investigations**



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## Overview

- Review each category of bias
  - Protected category related biases
  - Investigator-specific biases
  - Title IX-specific biases
- Look at the science and research
- Examine techniques for managing our biases



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“Ensure an adequate, reliable, and impartial investigation of complaints . . .

- U.S. Department of Education



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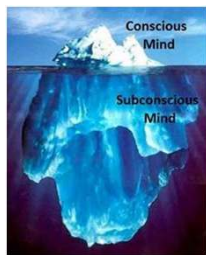
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## How Our Unconscious Affects Investigation

- Unconscious beliefs and feelings can affect our investigations



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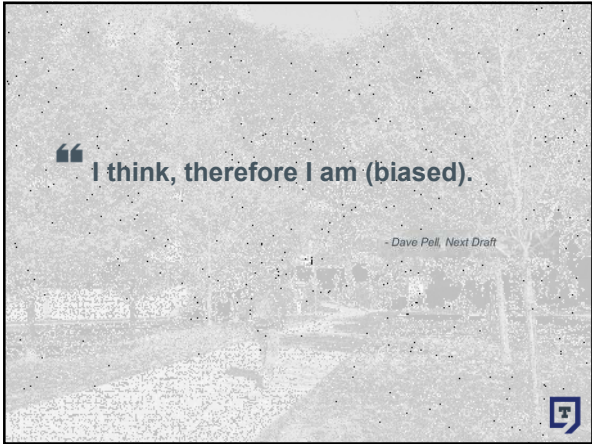
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**Substitute “investigator” for the word “judge”**

*To be impartial does not mean a judge does not [have] many existing sympathies, antipathies or attitudes.*

*There is no human being who is not the product of every social experience, every process of education, and every human contact.*

*The wisdom of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of [their] past attitudes and sympathies.*

—Supreme Court of Canada, R. v. S. (R.D.), [1997] 3 S.C.R. 484




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**Protected Category Biases**

- Race
- Gender
- Sexual orientation
- Gender identity
- Religion
- Class
- National origin
- The list goes on and on and on and on...




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## Studies of Bias: Tipping

- All passengers **tipped White cab drivers 60% more** than drivers of other races
- Black and White passengers tipped White drivers 48% more; Hispanics gave White drivers 146% more
- Asian Americans – only group to give Black drivers more than White drivers (2% higher tip)



Ayres, Ian, Vars, Frederick E., and Zakariya, Nasser, To Insure Prejudice: Racial Disparities in Taxicab Tipping, *The Yale Law Journal*, Vol. 114, no. 7 (May), pp. 1613-1674 (2005)



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## Studies of Bias: Symphony Orchestra



- As recently as 1980, orchestras had only 10% women, while top music schools included 45% women.
- Blind orchestra auditions, with musicians behind a curtain, increased the number of female musicians hired by 25% percent.

Goldin & Rouse (2000) *The American Economic Review*, 90(4), 715-741. Unconscious Bias in Hiring



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## Investigator-Specific Biases

- Not unique to our field
  - Scientific research
  - Law enforcement
  - Historians
  - Journalism



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## Investigator's Feelings: How Reliable?

- As investigators, we all have instincts, hunches, senses, but...
- How good are our instincts?
- Bias: A particular...feeling, or opinion, especially one that is **preconceived** or **unreasoned**.



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## Investigator's Instincts – How Reliable About Credibility?

- College Students *52.3 percent*
- Psychiatrists *57.6 percent*
- Judges *56.7 percent*
- Robbery Detectives *55.8 percent*
- Federal Polygraphers *55.7 percent*
- Secret Service agents *64.1 percent*



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## Priming

A memory effect in which exposure to a stimulus influences a response to a later stimulus.



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## Priming

Two groups watching flatworms told to count “head turns” and “body contractions.”

- Group A: told to expect a lot of turning and contracting. Group B: told to expect only a small amount of turning and contracting.
- Group A recorded almost **five times** as many head turns and **twenty times** as many body contractions as Group B.

Lucien Cordaro and James R. Ison, *The Psychology of the Scientist: X. Observer Bias in Classical Conditioning of the Planarian*, 13 Psychol. Rep. 787 (1963).



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## Examples of Priming in Title IX

- Pre-investigation:
  - “Oh, this is a really egregious case.”
  - “This one doesn’t sound too serious.”
  - “This is her third complaint this year.”
  - “We’ve had complaints about this student before.”
  - “There are just a few witnesses. This shouldn’t take too long.”



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## Confirmation Bias

Definition:

- A psychological phenomenon that explains why people tend to seek out information that...
  - Confirms their existing opinions
  - Overlooks or ignores information that refutes their beliefs



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I will look at any additional evidence to confirm the opinion to which I have already come."

-- Lord Molson, British Politician (1903-1991)

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## Confirmation Bias

• Politics and the media



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## Two Possible Scenarios for Confirmation Bias

You just spent three hours interviewing a sympathetic complainant who has emotionally reported a incident of violent sexual abuse. You have an initial sense that she is highly credible.

- Thirty minutes later, the respondent and his lawyer walk in.



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## Two Possible Scenarios for Confirmation Bias

It is Friday at 4:30 pm. Your report is due Monday morning. It is 80 percent written, and you have your conclusion written.

- The phone rings and an unexpected witness becomes available with info that could change your conclusion.



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## General Campus Investigator Biases

- Likeable/sympathetic student
- ***Not*** likeable or sympathetic
- “I’ve seen this before” bias
- Delayed reporting bias



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## Campus Investigator-Specific

What one bias do we all have?

A bias towards *anything* that makes our job *easier*.



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## How Biases Affect Our Investigations

### Observer Effect

- When a researcher's cognitive bias causes them to unconsciously influence the participants of an experiment.



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## Investigative Perspective

- When you conduct an interview...
  - You become a **participant** in the events you are investigating
  - Who you are and how you act **impacts** what you learn



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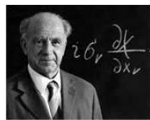
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## Quantum Physics and the Observer Effect

### Heisenberg Principle

- Measurements of certain systems cannot be made without affecting the systems
- *The act of observing an object **changes** the object being observed*



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## Our Biases Can Affect Witnesses

- The brain is not a hard drive
- Memory is malleable
- Examples:
  - **Transience**: Loss of memory over time
  - **Shift of Attention**: Brings a loss of memory
  - **Blocking**: Proactive or reactive interference of memories
  - **Suggestibility**: Misinformation because of leading questions, deception
  - **Misattribution**: Remembering differently from what happened because of unrelated stimuli



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## Questions Can Shape Answers

- Do you get headaches **occasionally**, and if so, how frequently?
  - Average response:
    - **0.7 headaches per week**
- Do you get headaches **often**, and if so, how frequently?
  - Average response:
    - **2.2 headaches per week**



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## Different Verbs, Different Answers

- What speed were the cars going when they \_\_\_\_\_ each other?



- "Contacted" = 31.8 mph
- "Hit" = 34.0 mph
- "Bumped" = 38.1 mph
- "Collided" = 39.3 mph
- "Smashed" = 40.8 mph



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## Different Verbs, Different Answers

- What were you doing when he \_\_\_\_\_ you?
  - “Touched”
  - “Grabbed”
  - “Groped”
  - “Put his hand on”
  - “Reached for you”



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## Different Verbs, Different Answers

- Loftus calls this the “misinformation effect.”
- A small change in language can produce a consequential change in what is remembered.



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**Title IX Biases- The Unique Quality  
of Title IX Investigations:**

**Involves conduct you may  
have had intimate personal  
experiences with.**



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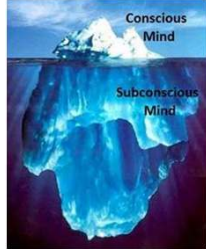
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## Title IX-Specific Issues

- Highly personal and very intimate issues
- Conscious beliefs and unconscious feelings
- Requires higher level of self-awareness



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## Title IX Bias Problem Areas

- Your own sexual experiences
- Moral or religious views about sex
- Young people having sex
- Comfort level in talking about:
  - Penis, Vagina, Anus, Orgasm, Ejaculation, etc.



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## Cases involving LGBTQ individuals

- *Lots* of different scenarios



- Transgender and gender non-conforming individuals



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### Knowledge and Comfort with Different Sex Practices:

- Oral sex
- Anal sex
- Polyamory
- Sex toys
- BDSM
- Rough play sex
- Group sex
- Pornography
- Multiple sex partners
- Etc., etc., etc.



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### Alcohol and Drug Use

- Views about
  - Alcohol use
  - Drug use
  - Binge drinking
- Have I ever made mistakes while intoxicated?
- Experienced substance abuse in those close to us



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### Secondary Trauma

- Trauma is contagious.
  - This influences how we react to evidence.
  - Can impact our functioning and judgment as investigators



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## Combat Conditions:

- The phone rings.



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## Combat Conditions:

- High emotion on both sides
- Increased conflict/polarization
- Title IX Coordinator turn-over
- Increased use of attorneys



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## Other Potential Bias Issues

- College age children/relatives
- Student athletes
- Views about fraternities and sororities



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## The Toughest Bias in Title IX:

- **Fear of *The Feather***

- Preponderance of the evidence
- “50 percent plus a feather.”

- Grey area cases:

- One or more sympathetic parties *coupled with a very close call* on the facts

- One of the parties – and maybe both – will be unhappy.



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## Techniques for Managing Unconscious Bias

- Remember: “**I think, therefore I am (biased).**”
- Have compassion and understanding for yourself
- There is no perfect investigation and no perfect investigator



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## Techniques for Managing Unconscious Bias

### M.A.T.E.

- **M**ONITOR your feelings
- **A**CKNOWLEDGE your feelings
- **T**RAUMA – Understand Secondary Trauma
- **E**XPRESS your feelings



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## Techniques for Managing Unconscious Bias

### **Monitor your feelings**

- Key point:
  - *Be aware and pay attention to your biases!*
- Pre-investigation: emotional inventory
- Does this fact pattern trigger emotions?
- Do these specific players trigger emotions?



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## Techniques for Managing Unconscious Bias

### • **Monitor your feelings** (cont.)

- As the facts unfold, are new emotions triggered?
  - Anger/resentment/frustration?
- Step by step during investigation:
  - After each interview
  - On walk/drive back
  - Before drafting factual analysis
- Some of us are survivors



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## Techniques for Managing Unconscious Bias

### • **Acknowledge your feelings**

- Moving from unconscious reaction to conscious awareness
  - Sit with your feelings

### • **Understand Secondary Trauma**



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## Techniques for Managing Unconscious Bias

- **E**xpress your feelings
  - Self-reflection
  - Talking with colleagues
    - Co-workers
    - Small office/small campus problem
  - Therapy
  - Prayer
  - Other ideas?



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## Techniques for Managing Bias

### M.A.T.E.

- **M**ONITOR your feelings
- **A**CKNOWLEDGE your feelings
- **T**RAUMA – Understand Secondary Trauma
- **E**XPRESS your feelings



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## Consent



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### Always start with the policy

#### Meadows College Policy

- Affirmative Consent: **Affirmative, conscious, and voluntary** agreement to engage in sexual activity. Consent to sexual activity requires of both persons an affirmative, conscious, and voluntary agreement to engage in sexual activity.



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### Biggest Challenges in Discussing Consent

- Inherent nature of most sexual interactions
- Understanding escalation
- Ongoing consensual relationships
- Incapacitation



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### Some Consensual Sexual Activity

- What specifically was consensual v. non-consensual?
- At what moment did things become non-consensual?
- When and how did things escalate? And what were the parties communicating through words and actions?



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### Some Consensual Sexual Activity

- How was consent communicated?
- Did either of you say anything?
- Non-verbal communication?

**Remember policy language:**

*It is not anyone's burden to say "No" or "Stop" or "I don't want to do that."*

The burden is to **establish consent before acting.**



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### Incapacitation Due to Drugs and Alcohol

**INTOXICATION  
≠  
INCAPACITATION**



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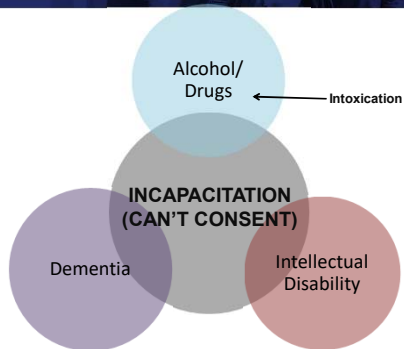
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### Incapacitation Due to Drugs and Alcohol



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## Incapacitation

- **Incapacitation** is a high bar.



- You can be very intoxicated, and still not incapacitated.
- Investigator must collect sufficient facts to support a finding of capacity or incapacity.



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## Always start with the policy

### Meadows College Policy

- **Incapacitation:** A person is unable to consent to sexual activity because of incapacitation, if:
  - The person was asleep or unconscious;
  - The person was incapacitated due to the influence of drugs, alcohol, or medication so that the person **could not understand the fact, nature, or extent of the sexual activity.**
  - Whether an intoxicated person (as a result of using alcohol or other drugs) is incapacitated depends on the extent to which the alcohol or other drugs **impact the person's decision-making ability, awareness of consequences, and ability to make informed judgments.**



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## Three Steps in Incapacitation Analysis

1. What is the evidence that the complainant was under the influence of alcohol or drugs?
2. Did the alcohol or drugs render the complainant incapacitated? If so, what is the evidence showing the incapacitation?
3. Did respondent know or should have known that complainant was incapacitated?



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### Incapacitation Questions

- Food in stomach is the key factor affecting rate of absorption.  
– Ask: *What did they eat and when?*
- Peak BACs generally within 30 – 60 minutes of the cessation of drinking.  
– Ask: *Timing of drinking relative to sex?*
- Size matters  
– Ask: *Height and weight?*



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### Signs on Intoxication

- We are not chemists or physicians or police officers.  
– *Strong caution:*
  - » *Avoid discussing rates of intoxication or anything related to human biology*
  - » *Focus on behaviors and actions.*



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### Signs of Intoxication

- Decreased inhibitions
- Psychomotor impairment
- Cognitive impairment

*All of these items can be used in questioning.*



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## Signs of Intoxication

### Decreased inhibitions

- Doing or saying things not normally done when sober
- Boisterousness or bravado
- Argumentative or confrontational
- Obnoxious
- Hanging on to people or intruding on their personal space
- Animated or exaggerated actions
- Rapid drinking
- Acting silly or "cutesy"

### Psychomotor impairment

- Slurred, mumbled, or slow speech
- Swaying while sitting, standing, or walking
- Staggering, stumbling, holding onto objects for balance
- Difficulty reaching for and picking up objects
- Inability to maintain eye contact
- Spilling food or drinks
- Falling down or loss of balance

### Cognitive impairment

- Loss of concentration or train of thought
- Delayed response to questions
- Illogical comments
- Impaired short- or long-term memory
- Lighting the wrong end of a cigarette
- Excessively quiet, sullen
- Trouble counting money or doing basic math
- Difficulty following directions



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## Understanding the who/what/when/where why or how?

- Thoughts about what they did or did not want to do
- Thoughts about the consequences of the sexual activity
- Stops to use or request birth control
- Stops to do things to prepare for sexual activity
  - Brushes teeth, going to restroom, removing tampon



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## Decision-Making Abilities?

- **Not oriented to time, place and actions**
- **Unable to carry on a conversation?**
  - Delayed answers or illogical comments
  - Can't communicate
- **Unable to handle simple cognitive or motor tasks**
  - Counting out change
  - Unlocking a door
- **Risky or unusual behaviors**
  - Walking along edge of roof on a dare
- **Confused about where they are, or who they are with**



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**Always remember this final step in an incapacitation analysis:**

If the complainant was incapacitated, investigator must also evaluate **respondent's knowledge** of the level of incapacitation.



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**Respondent's Knowledge**

Potential evidence that respondent **knew**:

- Saw complainant ingest alcohol or drugs
- Saw complainant's physical and verbal behaviors
- Told about amount of alcohol or drugs used by complainant
- Respondent's actions, like assisting the complainant after she threw up
- Respondent's comments to others about the complainant's intoxication



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**Respondent's Knowledge**

Was there a **failure by respondent to take reasonable steps** to determine the complainant was unable to consent due to complainant's incapacitation?

- Respondent's **own intoxication or recklessness** does not act as a valid excuse.



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### Review: Three steps in Incapacitation Analysis

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

**APPLY THE FACTS TO YOUR POLICY!**



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The Hearing:  
What to  
Expect &  
How to  
Prepare



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### The Hearing

- Now required under the new regulations for post-secondary institutions
- Plan on testifying
- The Adjudicator is the final fact-finder in the case. They will reach factual and policy conclusions. Sometimes they will issue sanctions.



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## The Hearing: What Does It Look Like?

- The Room
  - Layout
  - Parties
- The Process
  - How questioning works
- The Adjudicator's role



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## Your Role in the Hearing

- What does the Adjudicator need to hear?
    - Both parties were given the chance to present evidence and witnesses;
    - Both parties were given the opportunity to respond to allegations;
    - Reasons you did or did not interview certain witnesses; and,
    - How you managed the Evidence Review Process
- IN SHORT:** That you conducted a thorough, fair and impartial investigation.



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## Hearing Dos and Don'ts

### DO:

- Review your report beforehand and keep it accessible.
- Stay in your lane – answer what is asked.
- Anticipate being asked why you made certain choices and be prepared to defend your decision.

### DON'T:

- Offer your opinions on credibility and findings.
- Testify beyond the four walls of your report.
- Get defensive (although easier said than done).



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