

# **Civil Rights Investigations Training for the Texas A&M University System**

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David Halpern, Office of General Counsel  
August 2020



## **NOTICE:**

This training material is provided for public review in accordance with federal law. The material may be utilized only for non-commercial educational and training purposes with the user assuming all risk for utilization of any content herein. Commercial utilization of this material is prohibited.



## NOTICE:

This is a **supplemental training program** designed for civil rights investigators in The Texas A&M University System who have already received full skills training in investigations. This material will review changes to investigatory processes as a result of changes to System Regulation 08.01.01. A **pre-requisite** for this program is completion of the System Training on Title IX and System Regulation 08.01.01 which was offered on August 5, 2020 through Webex as well as through TrainTraq.



## **For this training...**

1. Aubrey Craft of SECO will keep members muted throughout today's training; questions may be asked in the "Chat" box; Aubrey will keep track of comments and ensure they are asked during the program.
2. If you have questions after the completion of this program, please direct those questions to your Title IX Coordinator (TIXC) by the end of the day tomorrow (Friday). We ask that the TIXCs collect and submit questions to Rick Olshak by the end of next Monday so that SECO can issue any necessary guidance to all System members.
3. TrainTraq: We will follow up with members on completing the post-test via TrainTraq once this material is posted; this will include the opportunity for people to complete the program who are unable to attend today.



## **For this training...**

4. Presentation is text heavy and intended to serve as a reference document after the training
5. The presenter is not providing legal advice; the presenter is a compliance officer and is offering compliance guidance
6. Please note that the material being addressed in this program may involve explicit descriptions or details that some may find offensive, while others may find these materials triggering. Nothing is being done today simply for “shock value” but will be consistent with the real-world language and details that we are confronted with in this work. If you find yourself triggered, please step away to the degree that you need to, and please seek appropriate assistance if necessary.



## Agenda

1. Pre-Test
2. Changes to Investigative Process:
  - a) Evidence Collection and Record Keeping
  - b) Report Template
  - c) Report-writing Process
  - d) Role at Live Hearing
3. Revisit Pre-Test
4. Final Questions



## Pre-Test

Here are 6 questions that we will address today through the material. These questions will also serve as your post-test.

1. True or False – The role of the investigator is to aid the university/agency with sufficient evidence to be able to find the respondent in violation of the allegations.
2. Choose One – Which type of evidence is the least helpful in understanding what took place at the event(s) being investigated?
  - a) Exculpatory Evidence
  - b) Character Witnesses
  - c) Direct Witnesses
  - d) Circumstantial Evidence
3. Choose One – Which role will the investigator not serve at a formal live hearing?
  - a) Explain the investigations process
  - b) Answer questions from panel
  - c) Ask questions of parties with respect to consistency of statements made
  - d) Ask questions of panel



## Pre-Test

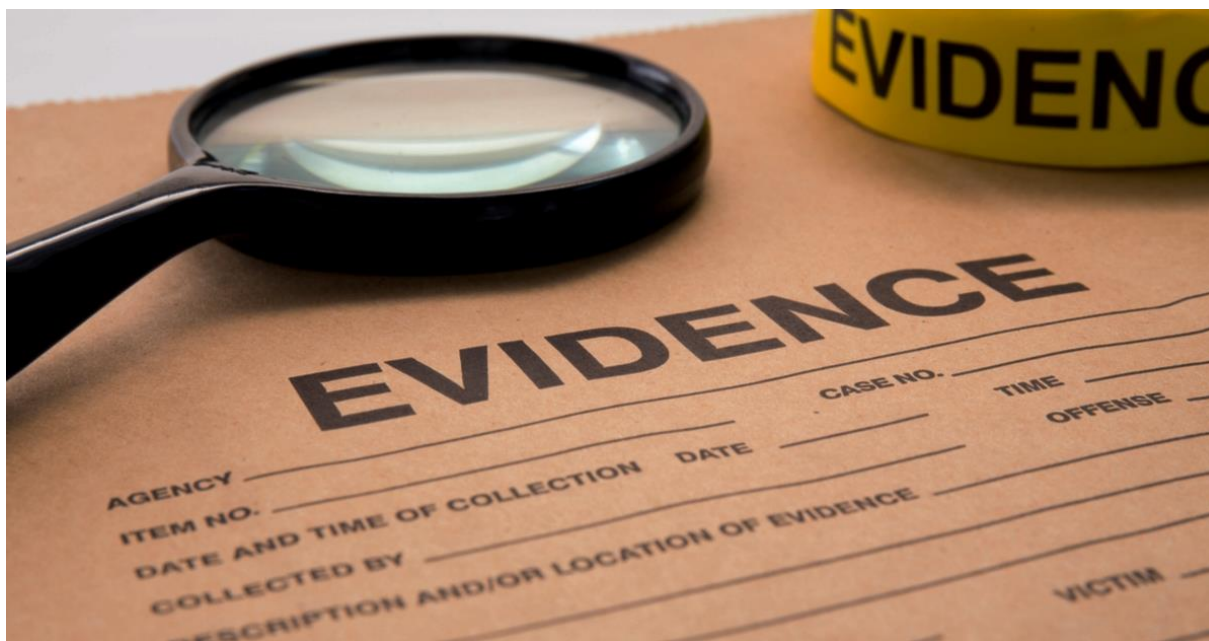
Here are 6 questions that we will address today through the material. These questions will also serve as your post-test.

4. True or False – In sex-based cases, the investigators will offer their conclusion on whether or not the alleged behavior took place, as well as whether or not the behavior violates System Regulation 08.01.01.
5. True or False – Once the final report has been developed, it does not need to be re-reviewed by SECO and OGC but can simply be directed to the parties.
6. True or False – The final report will now include all information collected by the investigators, independent of relevance.





Evidence Collection and Record Keeping



## Record Keeping

### Investigatory Records:

- a) Interview Notes (free style notes and interview summaries)
- b) Interview Recordings (audio/video)
- c) Emails and text messages to/from investigator
- d) Exhibits

Unless a preservation hold has already been put in place by OGC, “a” through “c” above exist solely for the purpose of creating exhibits and writing an investigative report. Once the case has been resolved (withdrawn, adjudicated, or appealed) these materials are to be securely disposed of. An Interview Summary form is being created to provide a pre-formatted exhibit for each interview conducted.



## Evidence Collection

All evidence that is directly related to the complaint will be maintained electronically. This includes, but is not limited to:

- The Investigative Report
- Exhibits, including party responses to the Final Draft Report
- Documentary Evidence (police reports, witness statements, text messages, social media posts, photos, videos, etc.)
- All case-related correspondence (official letters, substantive party communications) beginning with the initial complaint up through the final investigative report and its communication to the designated administrator (we strongly encourage you to communicate electronically whenever possible; when conversations about the process occur in person (outside of interviews) or on the phone, you should memorialize that communication with a memorandum to the file.



## Evidence Collection: What goes in the report and exhibits?

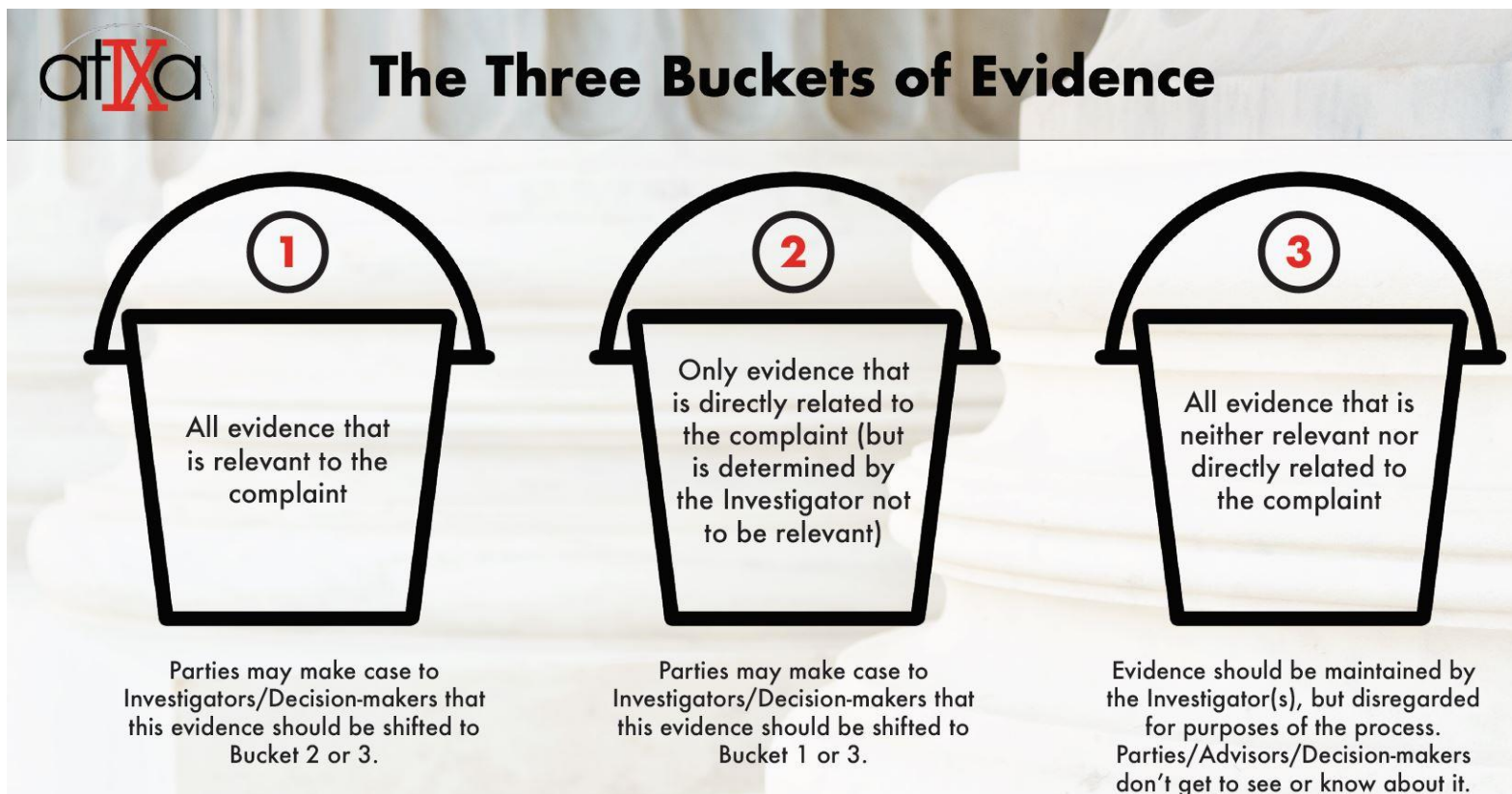
**REPORT** will contain: ALL evidence relevant to the complaint (inculpatory and exculpatory)

**EXHIBITS** will contain: ALL EVIDENCE relevant to the complaint and ALL EVIDENCE directly related to the complaint that the investigator(s) determines is not relevant

**NOTES** will contain: ALL information collected, including evidence that is neither relevant nor directly related to the complaint – information deemed by investigators to be not related and not relevant will not be included on the Interview Summary form completed for each interview



When Parties Provide Feedback on Final Draft Report:



Adapted from ATIXA



*It's time for everyone's favorite game show...*



**Which Bucket Does the Evidence Go In?**

## Evidence Collection: What goes in the report and exhibits?

### **WHICH BUCKET?**

A respondent in a sexual assault case provides photos taken on his phone to seek to establish that at the time of the alleged incident he was actually several blocks away drinking with some friends.

Which “bucket” does it go in?

**BUCKET #1:** The investigators determine that the evidence is relevant to the allegations in the complaint and if corroborated would tend to be exculpatory. The material is attached to the Interview Summary and included in the investigation report.



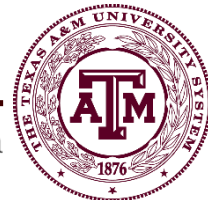
## Evidence Collection: What goes in the report and exhibits?

### **WHICH BUCKET?**

A complainant in a dating violence submits emails written by the respondent months before the alleged incidents that speak to the respondent's family history, including information about a controlling and manipulative parent. In the email the respondent indicates a concern about becoming "like" that parent and tells the complainant that they are going to get counseling.

Which "bucket" does it go in?

**BUCKET #2:** In this case, the investigators decide that although the emails might relate to the allegations, as they spoke to behaviors similar to what the complainant alleges, the material is not directly related to the allegations as they do not make the allegations any more or less likely to be true. They are included with the Interview Summary form (which is an exhibit) but not referred to in the investigation report.





## Evidence Collection: What goes in the report and exhibits?

### **WHICH BUCKET?**

A witness in a stalking complaint details an interaction that they had with the respondent, in which the respondent acted in a manner that they describe as “creepy.” There is no direct connection to the incidents under investigation, nor are the behaviors described related to the behaviors described in the complaint.

Which “bucket” does it go in?

**BUCKET #3:** In this case, the investigators decide that the behavior is completely unrelated to the complaint and that its inclusion would only serve as unfairly prejudicial against the respondent. The information is recorded in the investigator’s notes, but not included in the Interview Summary (exhibit).

Evidence Collection: What goes in the report and exhibits?

## **BONUS BUCKET – ASK THE ATTORNEY!**

### **WHICH BUCKET?**

A complainant in a sexual assault case states that after the incident they became severely depressed, stopped leaving their room to attend class, and contemplated suicide. The complainant notes one attempt to take their own life which resulted in hospitalization. This led to a diagnosis of “Persistent Depressive Disorder” as they had already been struggling with anxiety and depression for several years. The complainant reports now being medicated, which helps them be able to function and has negated any further thoughts of self-harm.

**Which “bucket” does it go in? Can/should the information be parsed out, or must it all be included in the same bucket?**



Questions about Evidence and Record Keeping?



## Report Template

**PRIVILEGED AND CONFIDENTIAL  
ATTORNEY CLIENT COMMUNICATION  
ATTORNEY WORK PRODUCT**

**Initial Draft Report  
11-5-20**

**MEMORANDUM**

**TO:**

**FROM:**

**RE:**

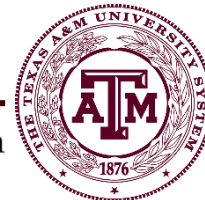
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**COMPLAINANT**

Name  
Undergraduate Student

**RESPONDENT**

Name  
Undergraduate Student



## Report Template

The new report template for all complaints filed on or after August 14, 2020 is now being developed. It will be available by the end of next week. The following changes are a preview of the new template for sex-based cases:

- Removal of investigator's conclusion on whether or not the events alleged took place
- Addition of undisputed facts section
- Addition of summary sections for inculpatory and exculpatory evidence for each allegation
- Addition of credibility assessment for each allegation

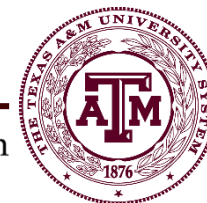


Report Writing Process



# Civil Rights Investigation Training - Supplemental

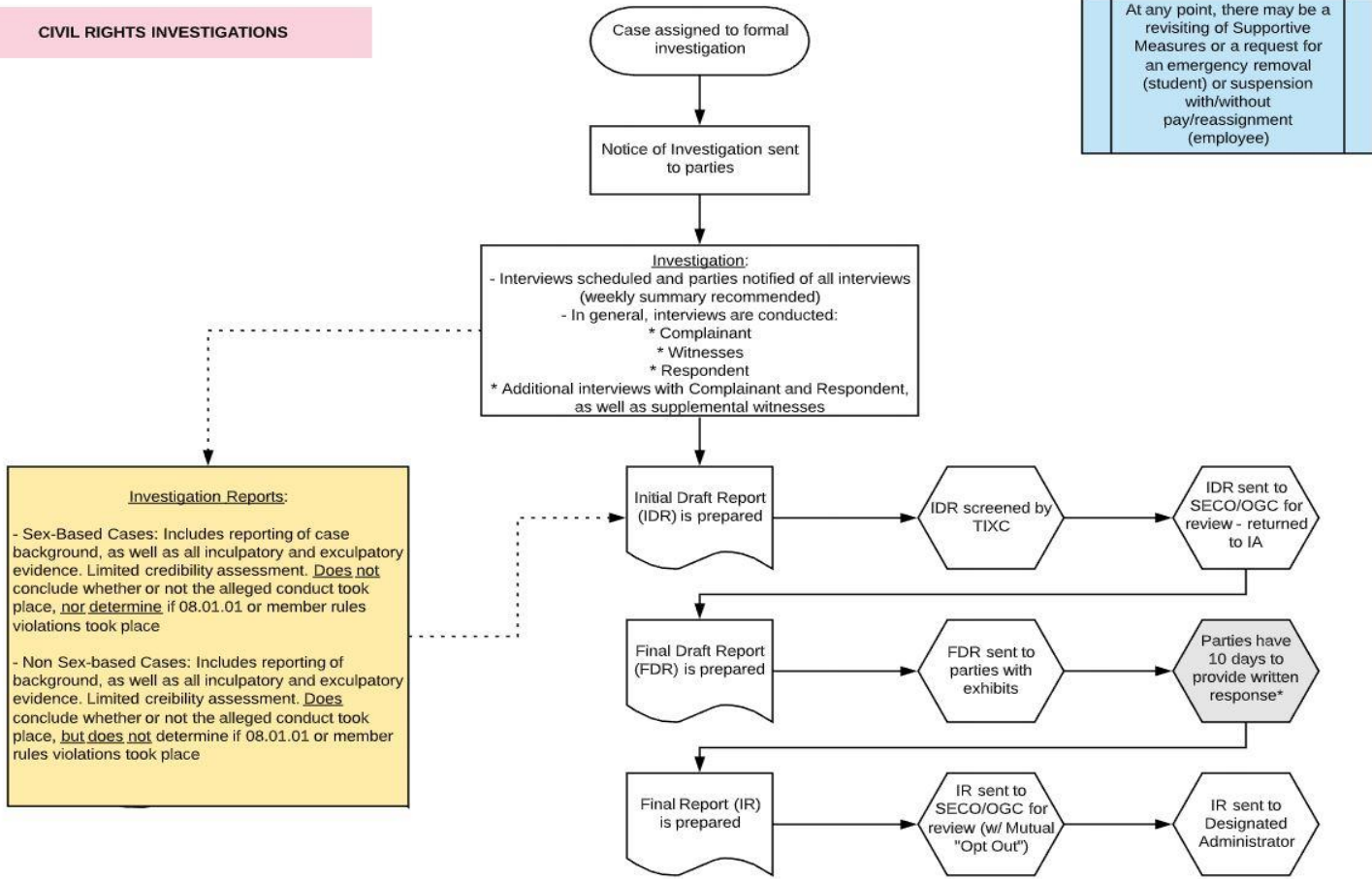
	<u>TITLE IX (4.2.10)</u>	<u>SEX-BASED MISCONDUCT (4.2.11)</u>	<u>OTHER CIVIL RIGHTS (4.2.12)</u>	<u>STUDENT CONDUCT / EMPLOYEE PROFESSIONALISM</u>
Supportive Measures	Yes	Yes	Yes	Yes
Requires	Formal Complaint	Report/Complaint	Report/Complaint	Awareness and Evidence
Standard of Evidence	Preponderance	Preponderance	Preponderance	Preponderance
Informal Resolution Allowed?	Yes – with SECO approval	Yes – with SECO approval	Yes – with SECO approval	Yes
Role of Investigative Authority	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence; conclude if allegations are substantiated but not if 08.01.01 or member rules were violated	Refer to Member Rules and appropriate System Regulation
Adjudication	Formal (Live) Hearing	Formal (Live) Hearing	Written Review	Refer to Member Rules and appropriate System Regulation
Adjudicator	Hearing Officer or Hearing Panel (in role of DA)	Hearing Officer or Hearing Panel (in role of DA)	Designated Administrator	Refer to Member Rules and appropriate System Regulation
Allowed an Advisor?	Yes – provided by Member for formal hearing if no advisor is present	Yes – provided by member for formal hearing if no advisor is present	Yes	Yes
Role of Advisor	Cross-examination and Support	Cross-examination and Support	Support	Support
For a Finding...	Severe <u>and</u> Pervasive <u>and</u> Objectively Offensive (SPOO) <b>OR</b> Quid Pro Quo (employee respondents only)	Severe <u>or</u> Persistent <u>or</u> Pervasive <u>and</u> Objectively Offensive (hostile environment) <b>OR</b> Quid Pro Quo	Severe <u>or</u> Persistent <u>or</u> Pervasive <u>and</u> Objectively Offensive	Did it take place? Does it violate the published rule/expectation?
Appeal?	Yes	Yes	No	Refer to Member Rules and appropriate System Regulation



# Civil Rights Investigation Training - Supplemental

## CIVIL RIGHTS INVESTIGATIONS

At any point, there may be a revisiting of Supportive Measures or a request for an emergency removal (student) or suspension with/without pay/reassignment (employee)



\* For sex-based cases, written responses are taken from parties; in non sex-based cases, questions for parties and/or witnesses are taken from the parties





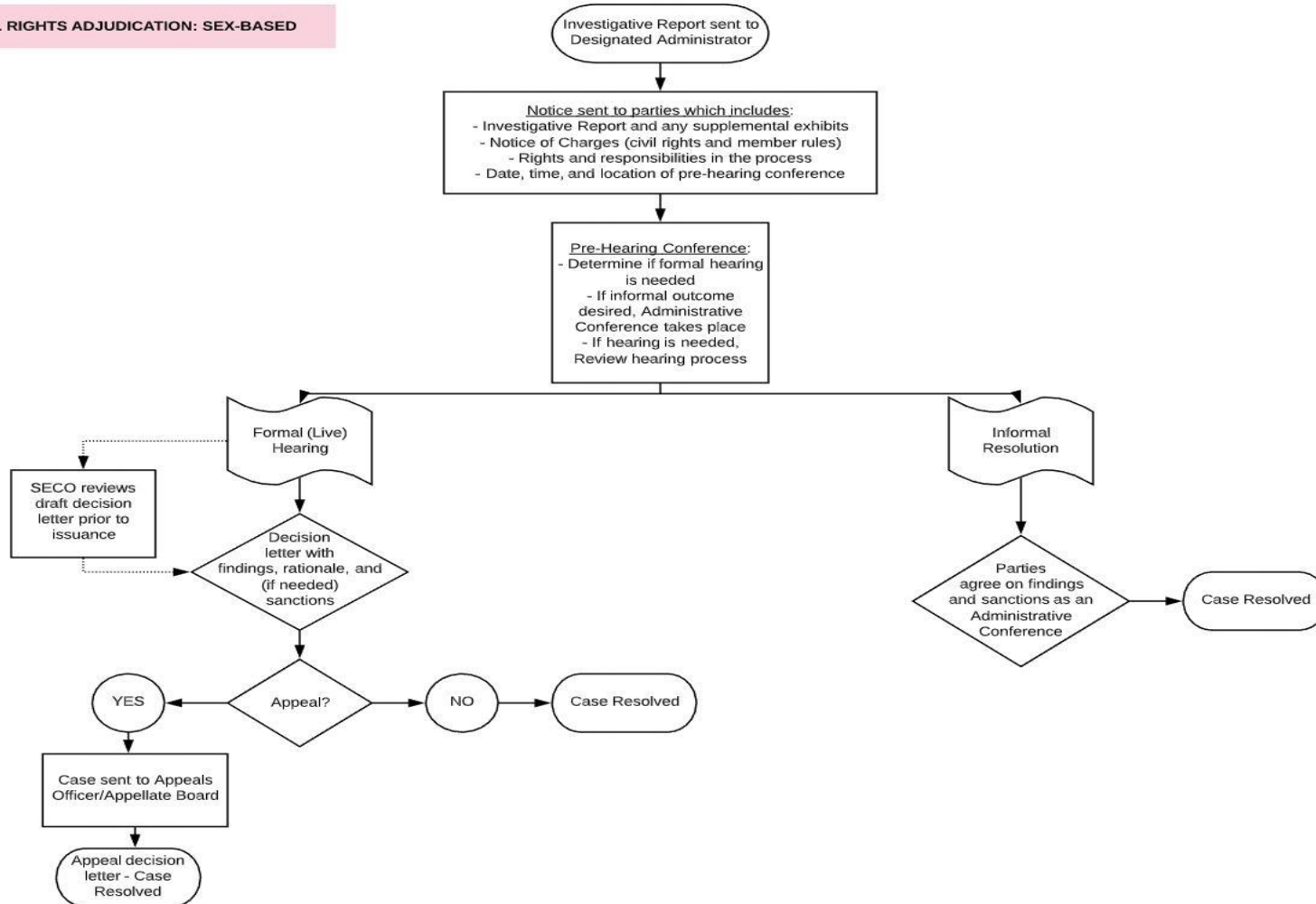
Questions about Report Writing?



Role at Live Hearing



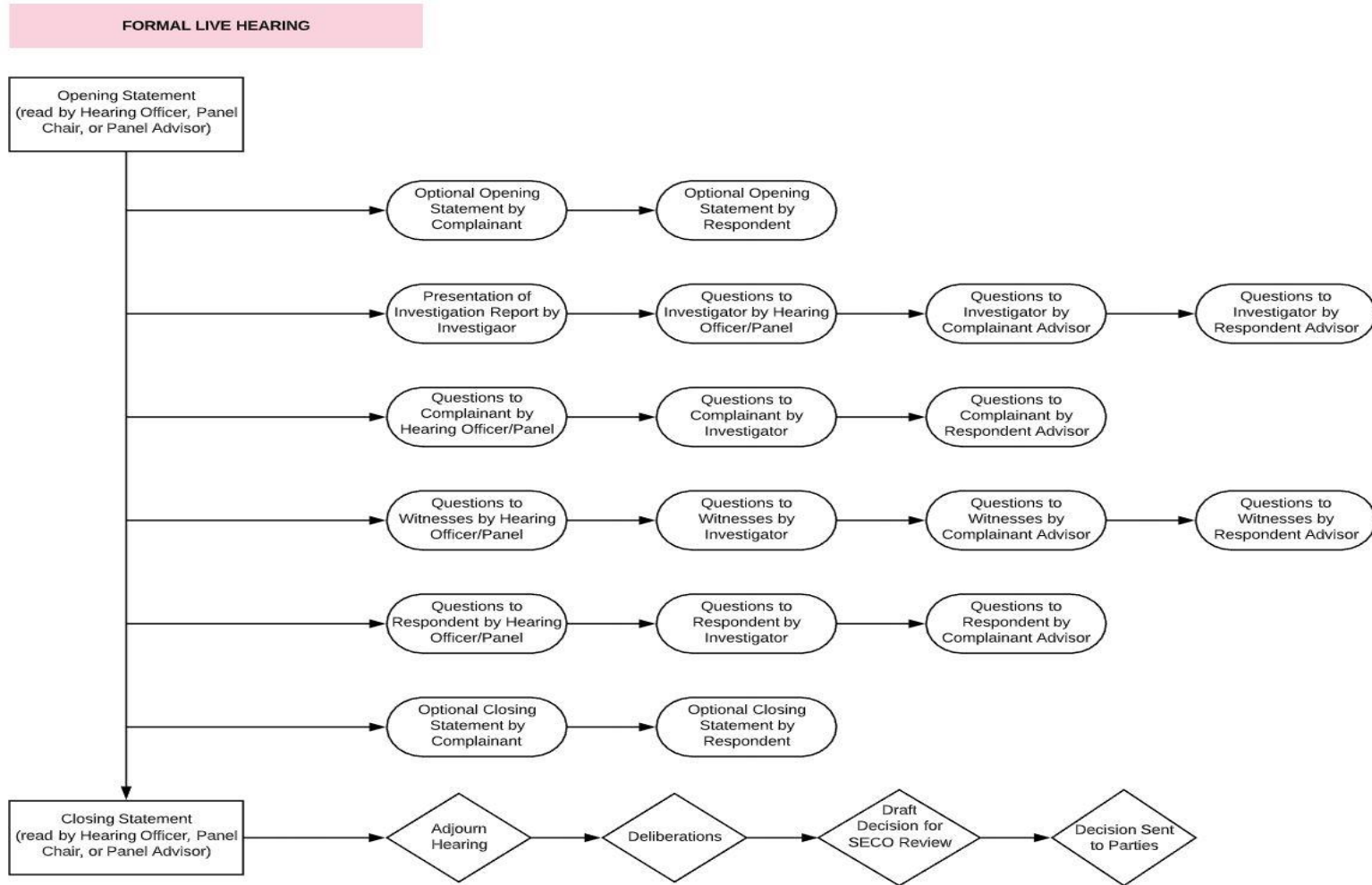
## CIVIL RIGHTS ADJUDICATION: SEX-BASED



## Role at Live Hearing

1. The investigator is now expected to attend the hearing and provide information on the investigations process and evidence collected. The investigator will answer questions from the panel, then from the complainant's advisor, followed by the respondent's advisor.
2. The investigator then remains in the room to listen to the statements provided and to compare them to the statements provided to the investigator during the interview and evidence collection process. When the investigator notes that a party is providing information that is substantively different than what was provided during the investigation, the investigator should use their questioning time to ask the party about the deviation in the statement. The investigator should not take any other role in questioning parties or witnesses, as the panel is now acting as a final investigator in order to reach a determination. This protects the investigator from appearing to have a vested interest in the outcome.





Questions about Your Role at a Live Hearing?



## Pre-Test Revisited

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## Additional Notes

1. We will send out a note (via Aubrey) when this course (and other subsequent trainings are available on TrainTraq, along with completion deadlines
2. I will be delivering the Title IX resources to Coordinators early next week; I apologize the day, but the amount of material is voluminous
3. If you have any remaining questions following this program, please submit them to your Title IX Coordinator by the end of the day Friday so that your Coordinator can send them to me on Monday – we will send out System-wide responses for each batch of questions submitted
4. Finally, I am including supplemental material for you to review – this includes updated information on Consent and Predation, Alcohol and other Drugs, and Trauma. Please review this information prior to conducting any further investigations.



Final Questions?



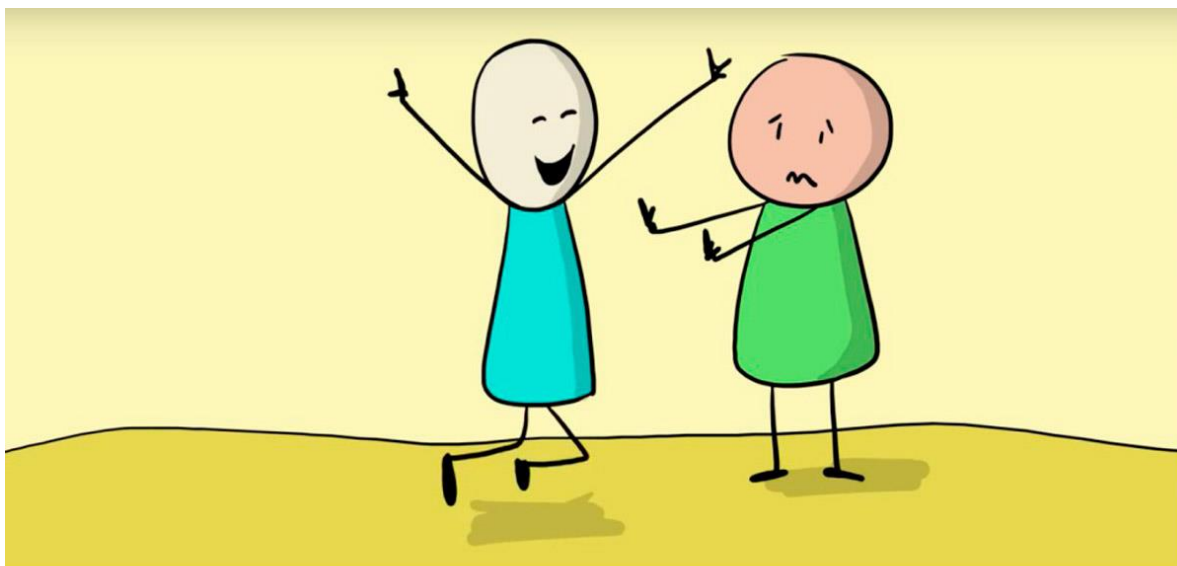
*Thank  
you*



... for your participation in today's training program. We hope that the information provided today better equips you to fulfill your role as a civil rights investigator.

Special thanks to [Aubrey Craft](#) for setting up this meeting, providing technical support, and facilitating our conversation.

## Consent and Predation



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

## Consent and Predation

What is consent?

Under System Regulation 08.01.01...

Consent – **clear, voluntary and ongoing agreement** to engage in a **specific sexual act**. Persons **need not verbalize their consent** to engage in a sexual act for there to be permission. Permission to engage in a sexual act may be indicated through physical actions rather than words. A person who is asleep or mentally or physically **incapacitated**, either through the effect of drugs or alcohol or for any other reason, or whose agreement was made by threat, coercion, or force, cannot give consent. Consent may be **revoked** by any party at any time.

## Consent and Predation

### Three types of sexual interactions

1. Wanted and consensual sex
2. Unwanted but consensual sex
3. Unwanted and nonconsensual sex

Of these, only the **last** represents a violation of regulations/rules



## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

1. Force – was force use by the respondent to obtain sexual access?
2. Incapacity – did the respondent know, or should the respondent have known, that the complainant was incapacitated?
3. Consent – what clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place (how did you know that you had consent)?

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 1. Force – 4 types

- a) Physical Violence (hitting, restraining, pushing, etc.)
- b) Threats (anything that gets person to do something they would not absent the threat)
- c) Intimidation (implied threat that causes reasonable fear)
- d) Coercion (act, process, or power of compelling a person to take an action, make a choice, or allow an act to happen that they would otherwise not choose or give consent to)

For Coercion, consider unreasonable actions that seek to deprive someone of the ability to withhold consent (consider Isolation, Frequency, Intensity, Duration, Ability to control environment, Ability to clearly state one's choices); Small "c" versus capital "C"





## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

a state in which a person, due to a disability, the use of alcohol or drugs, being asleep, or for any other reason, is not capable of making rational decisions about consent to sexual activity and recognizing the consequences of their decision.

Incapacity is fact dependent. When dealing with potential incapacity due to the consumption of alcohol, we compare an approximated blood alcohol level (when available) with the behaviors presented as described by all of the parties and witnesses. Blackouts (no memory of who, what, when, where, why, or how for a designated time) and partial blackouts (brownouts, “spotty” or fragmented memories) are frequently indicators of a lack of capacity.

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

Forms of incapacity:

- Alcohol or other drugs
- Mental/Cognitive impairment
- Asleep or unconscious
- Injury

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

Questions:

- Was the person incapacitated at the time of sex?
  - Could they make rational choices?
  - Could they appreciate the consequences of their actions?
  - Could they know who, what, when, where, how, and why?
- Did the respondent know of the incapacity?
- Or – Should the respondent have known of the incapacity based on all the circumstances (reasonable person)?

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

Evidence of Incapacity:

- Slurred speech
- Impaired motor functions
- Shaky equilibrium, stumbling
- Passing out
- Throwing up
- Appearing disoriented
- Unconscious
- Known Blackout

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

“Should have known” – Did the respondent:

- Use alcohol and/or drugs with the complainant?
- Provide alcohol and/or drugs to the complainant?
- Have awareness of a complainant’s incapacity?
- Have a familiarity with the complainant from previous interactions? If so, how was this event similar or different from previous events?

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 3. Consent

- a) What clear words or actions by the complainant gave the respondent permission for each sexual act that took place? If words and actions are established, the interaction was consensual. If there are no words or actions established, the interaction was nonconsensual.
- b) Yes means yes. No means no. Nothing means no. Silence or inactivity does not equal consent.
- c) Consent cannot be inferred from the manner in which a complainant dresses, from purchasing items, for conducting favors, or from using alcohol and/or drugs.



## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 3. Consent

- d) Consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- e) Consent can be withdrawn at any time, as long as the withdrawal is clearly communicated – verbally or nonverbally – by the person withdrawing it.
- f) The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

## Consent and Predation

### Consent Complications

- Lack of relationships and understood norms of behavior
- Past interactions with one another that may be transposed onto the current encounter
- Past interactions with others that get transposed onto a new partner
- Influence of alcohol and/or drugs
- Alternative Lifestyles and Power Exchanges (BDSM, con noncon, etc.)



## Consent and Predation

Predation: an intent to engage in acts of misconduct prior to their occurrence demonstrating premeditation, planning or forethought, and is reflected in communicated intent (physical, verbal, visual, or written), threats directed at a party, attempts to incapacitate a party, attempts to isolate a party, utilizing physical force or violence, or other actions that a reasonable person would construe as a pre-meditation to engage in actions that are unwanted by/against the recipient. Committing any of these actions with an individual under the age of consent is also considered predatory.

Typically, predation is identified through the use of force, threats, coercion, and behaviors designed to isolate a party. Consider any evidence of planning, the use of pressure, creating an environment encouraging the over-consumption of alcohol, and other factors indicating that the respondent created an environment where consent could not be meaningfully withheld (see previous section on Force).



## Alcohol and other Drugs



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

Alcohol and other Drugs

Can two adults who are both “drunk” engage in consensual sex with one another? (poll)



## Alcohol and other Drugs

Can two adults who are both “drunk” engage in consensual sex with one another?

**YES** – our standard for lack of consent is not “drunk” (otherwise defined as inebriated/intoxicated), but incapacitated.



## Alcohol and other Drugs

Tolerance is established by biology – can be raised lowered over time by drinking beyond the point of impairment (lowered by not doing so)

What is a drink? ([niaa.nih.gov](http://niaa.nih.gov))

12 oz. of beer (5% alcohol)

5 oz. of wine (12% alcohol)

1.5 oz. distilled spirits (40% alcohol)

One drink often equates to a .025 BAL

Metabolism rate is generally .015 per hour (average, depending on age, sex, height, weight, medications, genetics, experience with drinking, etc.)

## Alcohol and other Drugs

### Factors that effect our body's reaction to alcohol

sex

body mass

illness

stomach contents

water consumption

type of alcohol consumed

amount of alcohol consumed

prescription medications

allergies

age

tolerance

race

method of drinking

duration of drinking

carbonation

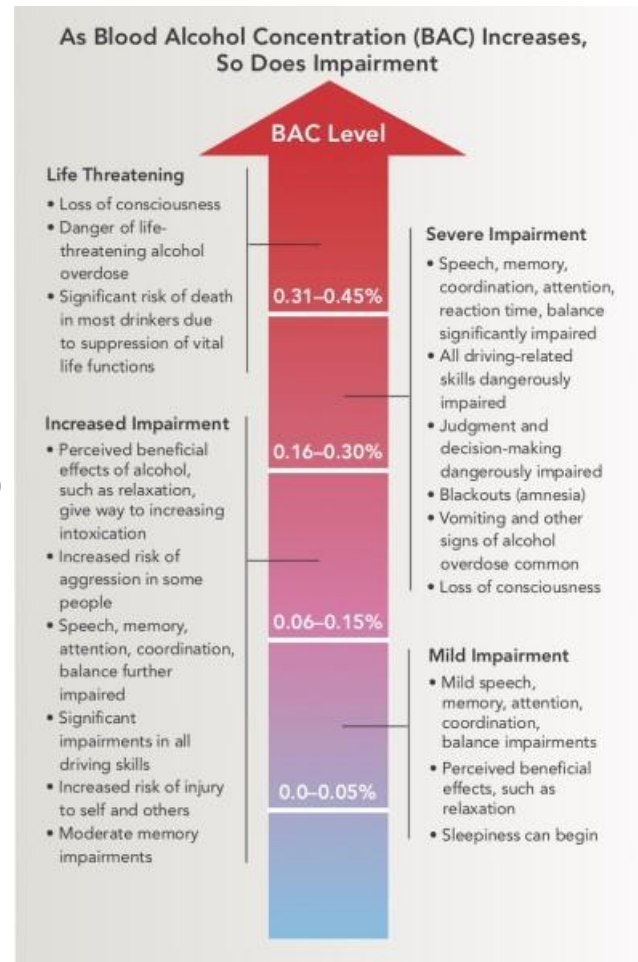
menstrual cycle

non-prescription medications

## Alcohol

- .31-up Coma / Risk of Death
- .25-.30 Stupor (Incapacitation certain)  
Mental, physical, and sensory functions shutting down
- .20-.24 Severe Intoxication (Incapacitation likely)  
Severe Disorientation, Blackouts, Vomiting, Shutdown of motor skills
- .16-.19 Heavily Intoxicated (Incapacitation possible)  
Depression, Nausea, Disorientation, Blackouts
- .11-.15 Intoxication/Inebriation  
Heightened impairment, Risk of aggression, Risk of injury
- .05-.10 Impairment  
Speech, Coordination, Balance, Reactions, Memory
- .02-.05 Influence  
Mild relaxation, lightheadedness, warmth

Sources: NIH.gov and UWEC.edu



## Alcohol and other Drugs

What about Mutual Incapacity?

POLL: If an investigator discovers that mutual incapacity exists, and that this is confirmed by the hearing officer/panel which of the following statements is most likely to be true?

- A. Neither party is in violation
- B. Both parties are in violation
- C. Only the original respondent is in violation





## Alcohol and other Drugs

What about Mutual Incapacity?

If an investigator discovers that mutual incapacity exists, and that this is confirmed by the hearing officer/panel which of the following statements is most likely to be true?

- A. Neither party is in violation
- B. Both parties are in violation
- C. Only the original respondent is in violation

ANSWER: B

The investigator would bring this to the attention of the Title IX Coordinator, who would then visit with the parties to determine the future direction of the complaint.



## Alcohol and other Drugs

### Marijuana –

THC creates a dopamine “high” that serves as a stimulant, depression, and sometimes triggers hallucinogenic effects

Short-term: alters senses and experiences; triggers emotions such as happiness, relaxation, anxiety relief, creativity and euphoria; alters sense of time, creates difficulty thinking and problem solving, impairs memory, impedes motivation

Physically: reddening of the eyes, fast heartbeat, increased blood pressure, dry mouth, dizziness, increased appetite, calming sensations, relief from pain, “feathery” feelings of relaxation throughout the body, increased sensitivity, and other potential remedies to physical ailments

## Alcohol and other Drugs

### Marijuana –

Standard recreational use generally equates to that of .08 level of impairment; this is cumulative when coupled with alcohol or other substances

In general for all illicit drugs –

- By design, illicit drugs cause impairment
- Quality control for illicit drugs is problematic
- When combined with alcohol, effects are cumulative

# Trauma



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

## Trauma

### Trauma –

Trauma is exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.

Trauma results from war, natural disasters, physical violence (non-sexual and sexual), relationship violence, stalking, and child abuse. Trauma is different than stress in how it activates certain parts of the brain and shuts down others.

## Trauma

What is trauma?

The Brain:

Cortex (thinking)

Limbic (emotions)

Brain Stem (survival)

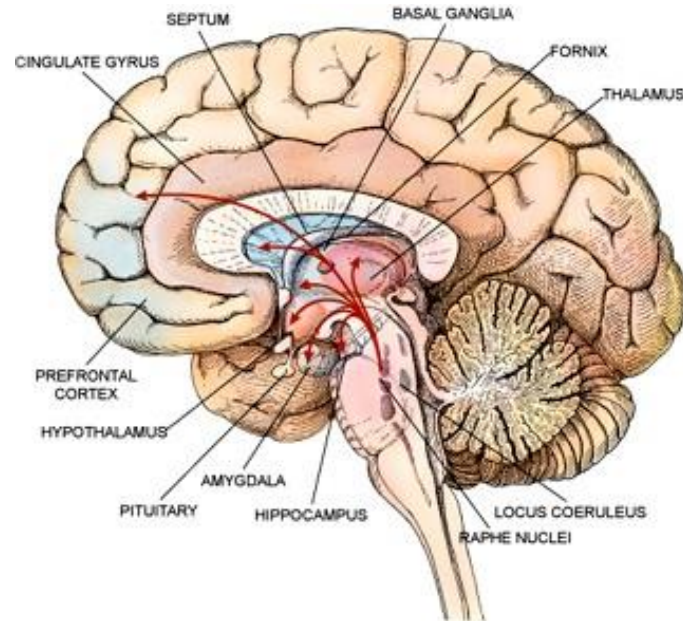
The Brain and Trauma (activated):

Hypothalamus

Pituitary

Hippocampus

Amygdala



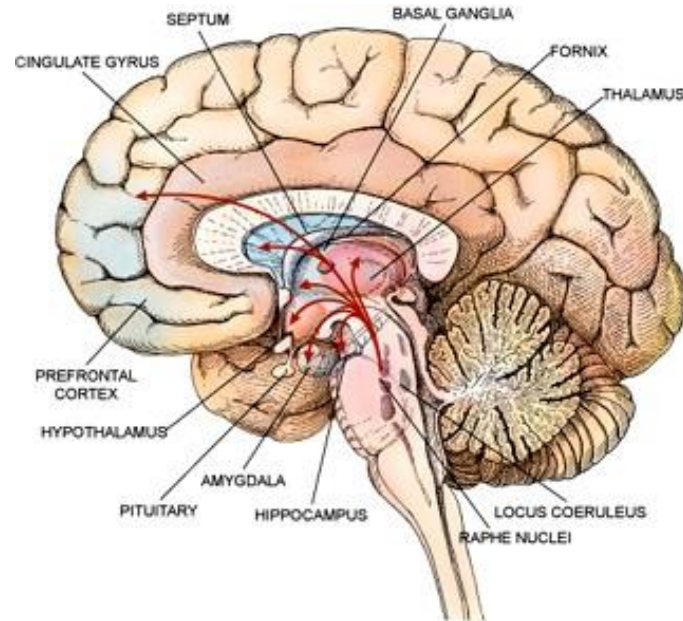
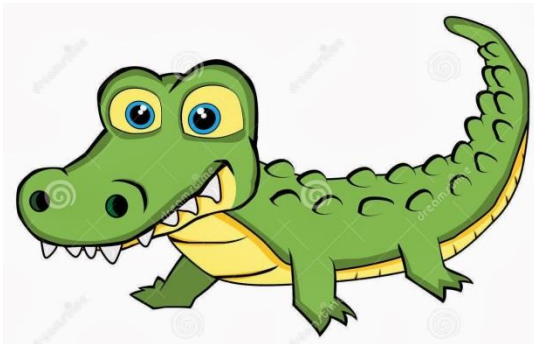
## Trauma

What is trauma?

The Brain:

“Alligator Brain” controls:

- Fight (approach)
- Flight (avoidance)
- Freeze (submission)



## Trauma

### Trauma triggers:

- Fight, Flight, Freeze response (not a choice)
- Incapacitation of frontal lobe through the release of a hormonal flood, which can last for up to 4 days and may be reactivated by a triggering event
- Up to half of those experiencing a sexual assault experience a tonic immobility which is described as a paralysis – this is a biological response
- Hippocampus (Memory Maker) can still accept sensory data and encode it, but cannot consolidate memories and store (think of a card catalog); memory recall tends to be fragmented and recall can be slow and difficult





## Trauma

### Trauma and Investigations –

- a) Don't diagnose whether or not trauma exists; respect that it may exist
- b) Expect a non-linear account; the important issue is whether or not the accumulation of stories is coherent and consistent and not contradictory
- c) Use open-ended questions and be patient in allowing for responses; don't bombard someone with multiple questions or multi-part questions
- d) Allow time
- h) Never impose your expected reactions to an event on to someone else; how people react in a traumatic situation (and following it) may seem counter-intuitive
- i) Use non-judgmental and non-blaming language; avoid "Why" questions
- j) Emphasize transparency and predictability