



Investigator & Adjudicator Under St. Olaf's Title IX Process

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Agenda

- Introduction and Legal Landscape
 - Avoiding Bias / Trauma Informed
 - Investigation and St. Olaf's Formal Resolution Process
 - Drafting Investigation Report
 - Adjudication / Notice of Determination
 - Appeals / Sanctions
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Legal Overview



Title IX

- Prohibits gender discrimination in programs
- Students / Employees / Others
- Includes Sexual Harassment
 - Quid pro quo
 - Hostile Environment



More Prescriptive than Title VII

- Publish Notice of Nondiscrimination
 - Designate Title IX Coordinator
 - Disseminate Policy
 - Investigate Complaints
 - Adopt and Publish Fair and Equitable Grievance Procedures
 - Train Individuals with Heightened Responsibilities
 - Train Students and Employees
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Clery Act

- Reporting Incidents to Community
 - Who / What / Where / When
 - WHY you care?
 - Overlapping obligations when allegations of sexual misconduct
 - VAWA Amendments to Clery
 - Added Domestic Violence, Dating Violence & Stalking
 - Requires Annual Reporting on Policies (Promoting Awareness / Responding to Complaints)
 - Codified Much of 2011 Dear Colleague Letter (But NOT Standard of Proof)
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Training: VAWA's Reporting Requirements

Investigators and adjudicators must be trained on:

- College's policy and procedures
- Applicable laws
- Issues relating to sexual assault, domestic violence, dating violence and stalking*
- How to conduct investigation that protects safety of reporting parties and promotes accountability*
- Types of Prohibited Conduct*
- Preponderance of Evidence Standard of Review

*** ANNUAL TRAINING REQUIREMENT**

Training Requirements Continued

- Consent and the role of alcohol and drugs can play
 - Importance of accountability for Responding Parties found to have committed Prohibited Conduct
 - Need for remedial measures for Responding Parties found to have committed Prohibited Conduct
 - How to evaluate credibility
 - How to weigh evidence impartially
 - Confidentiality
 - Effects of trauma, including neurobiology
 - Cultural awareness
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Student Privacy and FERPA

- Right to know what records exist
 - Right to dispute accuracy
 - Right to control access
 - Legitimate educational interest
 - Reporting Party can know determination
 - Disciplinary sanctions when found responsible for sexual misconduct
 - VAWA trumps FERPA
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Avoiding Bias / Trauma Informed Investigations



Reporting Parties, Credibility and Neurobiology of Rape Trauma



Responses to Rape Trauma

- Act rationally and irrationally
 - Want to maintain relationship and want nothing to do with perpetrator
 - Laugh, get angry, cry, respond with high emotion and have no emotional response
 - Certain of what happened and not certain of what happened
 - Do not recall many details and have surprising ability to recall details
 - Report immediately and delay reporting many months
 - Fight, flee, freeze
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Considerations When Interviewing Parties

- Take your time
 - Make parties feel comfortable – establish rapport
 - Consider timing and location of interview
 - Explain process and how you fit in as neutral fact-finder (and what is NOT your role)
 - Be flexible with chronology of events
 - Build in opportunity for follow-up
 - Offer opportunity to ask questions
 - Be prepared to normalize responses to events
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More Considerations When Interviewing Parties

- Keep in mind may be recalling events for first time
 - Avoid charged/offensive language – “story”
“allegations” “made love”
 - Allow support person to provide support without interference
 - Minimize process revictimization
 - Be clear about recording and how information will be used
 - Remind/Warn about retaliation
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Potential Impact of Cultural Issues

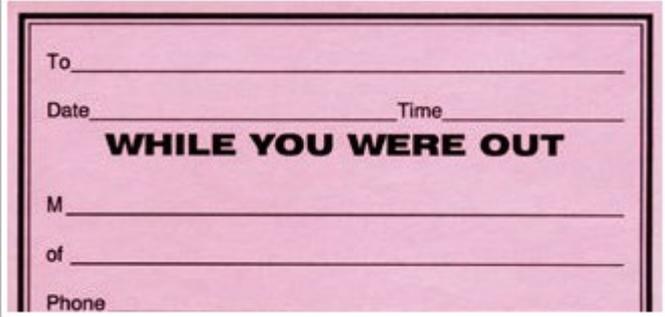


Investigation & St. Olaf's Formal Resolution Process



What Went On Prior to Investigation

- Intake Conference
 - No Contact
 - Interim Support
 - Law Enforcement Option
 - Consent to Formal/Informal Process
- CORE Team Review
- Conference with Responding Party
- Provide Complaint Detailing All Allegations
- Notify Parties of Investigator / Advisor(s)
- Conversation Regarding Evidence Preservation



To _____
Date _____ Time _____
WHILE YOU WERE OUT
M _____
of _____
Phone _____



Duties of Investigator

- College's Burden – Collect sufficient evidence to make determination whether it is more likely than not that Responding Party committed Prohibited Conduct
 - Identify factual issues
 - Provide parties opportunity to submit evidence
 - Consider other sources of evidence
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Preliminary Investigation Blueprint

- Review Complaint
 - Consider sources of evidence
 - Identify witnesses and gather information about them
 - Other evidence – dorm access data; internet access points; security cameras; social media posts; text/voicemail/email messages; medical records
 - Physical inspection of key locations
 - Review policy definitions / identify elements charge
 - Identify what is at issue / what is not in dispute
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Preliminary Steps Continued

- Begin creating chronology
 - Strategize order of witnesses
 - Prepare outline of each interview
 - Standard opening and closing statement
 - Identify topics (not questions) to cover
 - Remain open to other relevant topics
 - Ask about other witnesses / physical evidence
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Witness Interviews

Opening Statement

- Inform recording and obtain consent (what if object?)
 - Explain your role
 - Explain the process
 - Minimize revictimization by explaining why all the questions
 - Amnesty policy
 - Retaliation (warn and reassure)
 - Confidentiality
 - Any questions?
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“Do You Know Why I Was Given Your Name...”

Highway

Download

Don't Be Myopic

Probe Other Topics

Scenic Route

“Did anything unusual happen...?”

“Did anything happen that made you feel uncomfortable...?”

Worth sharing info?

Witness Interviews Continued

- Who / What / Where / When / ~~Why~~
 - Careful about what you are communicating
 - Sharing information
 - Roll with surprise answers
 - Taking notes
 - Summarize “chapters” before moving on
 - Distinguish between personal and hearsay information
 - Stay “trauma-informed” when interviewing Reporting Parties
 - Don’t insist on tight chronology
 - Prior sexual history questions
 - “Why...?” “... your story ...”
 - Don’t avoid obvious or personal questions
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Witness Interviews Continued

Concluding Interview

- Identify all witnesses / evidence for follow-up
 - Plan for forwarding information/documents
 - “Is there anything else that you think I should know?”
 - Invite follow-up
 - Remind regarding confidentiality and retaliation
 - Prepare summary / Begin drafting investigation report
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Almost Done?

- Assess gaps in investigation
 - No information about events?
 - Conflicting information?
 - Further witness interviews?
 - Necessary or duplicative?
 - Suggested by parties?
 - Subsequent information require re-interviewing any witnesses
-

Working with Kari & Carl

Title IX Coordinator

- Resource for parties and witnesses (e.g. interim protective measures, new allegations, scheduling)
- Weekly updates to parties / upcoming events & delays
- Notice of all meetings with parties
- Simultaneous notification Investigation Report & Notice of Determination

General Counsel

- Role is to ensure policy is followed
 - No privilege / no input on investigation or decision
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Advisors / Attorneys / Private Investigators

- All parties entitled to AN advisor
 - Changing advisors
 - May not share information with others
 - Advisor provides support - NOT an advocate
 - No direct communication
 - May have attorney (same or different) and other representatives (e.g. private investigators)
 - Cannot interfere with investigation
 - Cannot harass or intimidate other party/witnesses
-

Preparing the Investigation Report



Process After Investigation Concludes

- Parties notified of close of evidence
 - Investigator prepares notice of investigation
 - Parties review investigation report
 - Opportunity to prepare a response
 - Usually treated as additional information for consideration
 - May result in revision of investigation report (which could trigger additional comment)
 - May result in further investigation
 - Adjudication and Notice of Determination
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Investigation Report – Why We Do This

- Summary of investigation process and synopsis of relevant evidence
 - NOT assessing credibility or weighing evidence
 - For Sexual Assault/VAWA – Parties must have “timely and equal” access to information used by investigator
 - Redact any prior sexual history information
 - Prior bad acts / dishonesty information ???
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Investigation Report Components

- Brief introduction*
- Summary of matter – parties, dates, general allegations
- List of documents and evidence reviewed *
- Witnesses interviewed*
- Methodology*
 - Dates/location of interviews
 - Whether advisors present
 - Recorded (if not, why)
 - Whether interviewed all suggested (if not, why)
 - Approach to interviews
 - Summarize script intro and conclusion

* Can be largely boilerplate

Investigation Report Components Continued

- Summarize facts gathered from witnesses
 - Usually best to summarize by events chronologically
 - Provide each witness account
 - Highlight points of dispute and facts agreed upon
 - Summarize information that may impact credibility
 - Goal – thorough but concise
 - Conclusion
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Adjudication / Notice of Decision



Investigator's Role

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You will then apply those facts to the definitions provided in the St. Olaf Policy Prohibiting Discrimination, Harassment and Related Misconduct. You are the sole judge of the facts; but you must follow the Policy, whether you agree with it or not.

Burden of Proof

The Investigator has the burden to collect sufficient evidence to ascertain whether a preponderance of evidence proves that the Responding Party committed the alleged Prohibited Conduct. The Reporting Party does not have the burden to prove Prohibited Conduct occurred, and the Responding Party does not have the burden to prove that Responding Party did not commit Prohibited Conduct. To prove something by a preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in this matter, the evidence is equally balanced, you cannot find that issue has been proved. The preponderance of the evidence is not necessarily determined by the greater number of witnesses or other evidence a party has presented.

Assessing Credibility

In deciding what the facts are, you may have to decide what witnesses you believe and what witnesses you do not believe. You may believe all of what a witness says, or only part of it, or none of it. In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, their level of intoxication, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony and the extent to which their testimony is consistent with other evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

Do not allow sympathy or prejudice to influence you. The Policy demands of you a fair and impartial decision, unaffected by anything except the evidence, your common sense, and the Policy definitions.

Direct vs. Circumstantial Evidence

Generally speaking, there are two types of evidence— direct evidence and circumstantial evidence. “Direct evidence” is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. “Indirect or circumstantial” evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact. As a general rule, there is no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Notice of Determination

- Written notice of investigator's determination
 - Indicates whether believe evidence establishes Prohibited Conduct
 - State standard of review
 - Weigh evidence and make credibility decisions
 - Provide rationale –
 - Discuss each element of alleged Prohibited Conduct
 - Outline evidence that investigator found persuasive
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Appeals / Sanctions



What Happens Next?

- Adjudication Panel determines any appeals / sanctions
 - Appeal
 - Only grounds = Clearly Erroneous
 - Only process = written
 - Sanctions
 - Parties have option to write and/or meet with panel
 - Sanctions are listed in Policy
 - Parties simultaneously notified of sanctions & rationale
 - Reporting Party also notified of remedies
 - Indicate that process is concluded / final determination
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Questions?
