



Evaluating Evidence and Credibility in Title IX Processes

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Meet Our Team



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Investigation goals and philosophy



Investigation Legal Requirements



Regs say the institution must gather evidence “sufficient to reach a determination of responsibility.”

Preamble says institutions must “undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.”



Investigation goals, philosophy, and background info

1. An investigation involves an impartial collection of information aimed at assisting the decision-maker in arriving at a conclusion.



Investigation goals,
philosophy, and
background info

2. Not “sides” of a
“story.”

Instead, we’re doing our
best to understand:
What happened?

(I use the word
“account.”)



Investigation goals, philosophy, and background info

3. I take in and review anything offered (for the most part) unless it is clearly beyond the scope of the investigation or not related.



Investigation goals,
philosophy, and
background info

4. Transparency—I let parties know as I take in evidence and always give them the opportunity to respond.



Investigation goals, philosophy, and background info

5. Evaluating and weighing evidence and determining credibility is up to decision makers.


But investigators need to think about these issues and test evidence during the investigation process.



Investigation goals, philosophy, and background info

6. Because a Title IX investigation is not a criminal investigation, we may not have access to some kinds of information or some witnesses.

Goal is to be thorough, complete within our powers, and fair.



Investigation/evidence collection strategy

Initial Steps



Evaluate intake materials.



Think through types of evidence available.



Think about any time constraints—evidence that may disappear?



Create a list of witnesses.



Think through challenges to evidence collection.



Investigation/evidence
collection strategy

Prepare a file that allows easy tracking, including evidence log, witness list with contact info and dates, etc.




Investigation/ evidence collection strategy

Identify the likely issues in the case, e.g. incapacitation, coercion, consent.

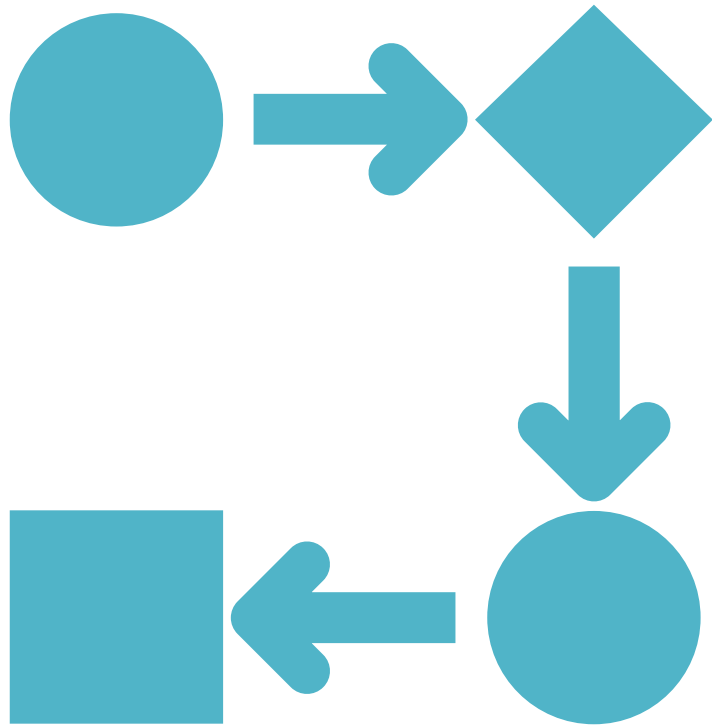
Think through the information needed to make good decisions about those issues, then draft questions for each witness focused on eliciting that information.

For example: Consent

What clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place?



Collect information that will help decision makers arrive at a conclusion in the context of the Policy's definition.



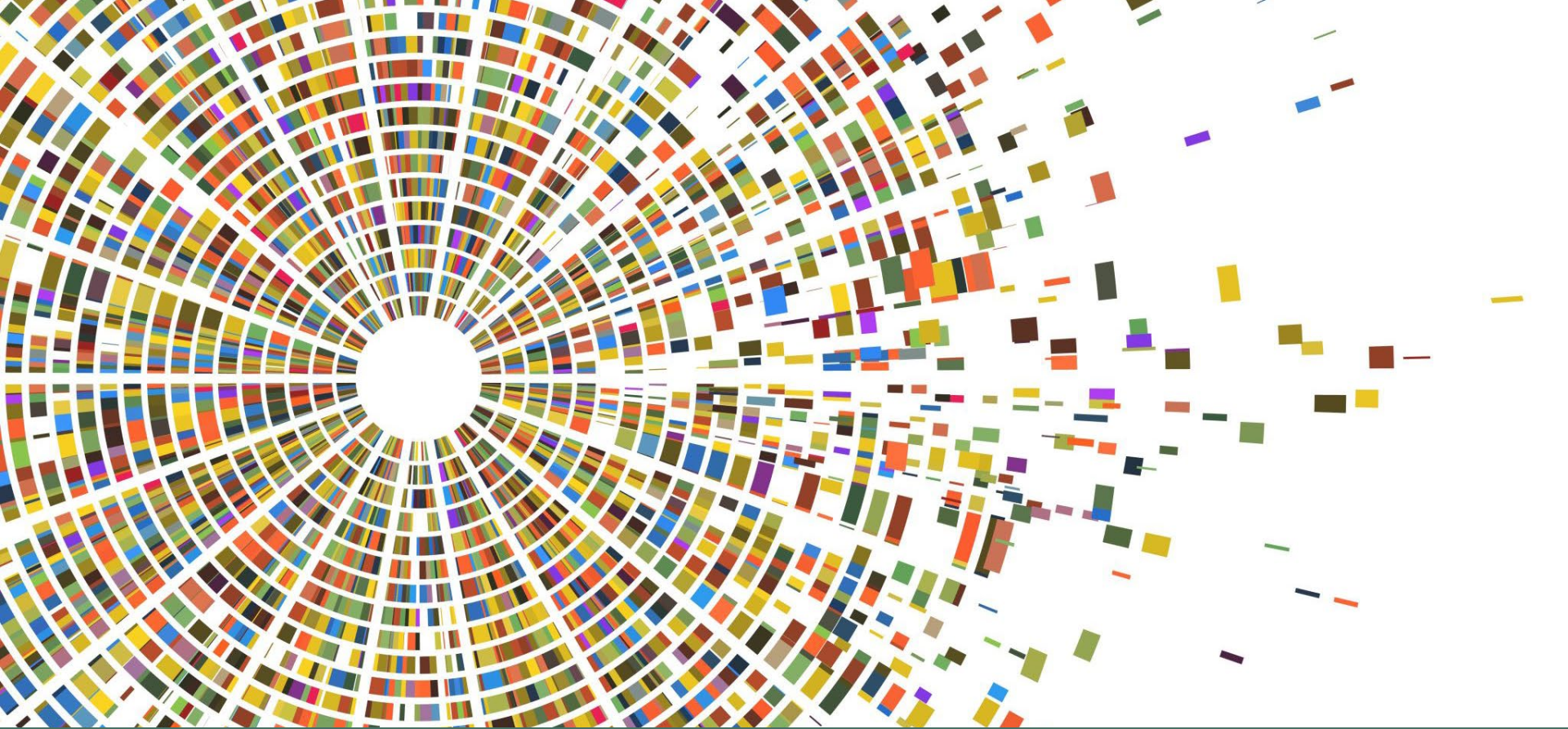
Loop through
this process
as many
times as
needed
during the
investigation.



Consult with others who may have knowledge

Public safety officers can be a big help.

Who are your go-to people that help you think through evidence?



Thinking about Evidence



Overview of taking in evidence

Remember that taking in evidence/information does not mean that the evidence must or will be used in the Investigation Report or in the decision-making process.



Overview of taking in evidence

Throughout the process, including at the decision-making stage, the evidence will be evaluated for

- Reliability
- Relevance
- Weight

No General
Rules of
Evidence
Apply in
Title IX
Processes

“A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” (Regs Preamble)

(But be aware of limitations set out in the Regs.)



Under the Regs, a school must exclude

- A party's treatment records (unless the party gives prior written consent)
- Information protected by a legally recognized privilege
- Questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior, **unless** offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent

Under the Regs, a school must accept

Expert witness testimony, reports, or findings.

Evidence related to character.

Evidence related to the findings of a polygraph examination.

Evidence gathered by law enforcement during a concurrent criminal investigation, if available.



BUT admissibility of relevant evidence is different from weight, reliability, and/or persuasiveness of that evidence.

No rules on how relevant evidence must be evaluated for weight or reliability.

School may adopt rules on weight, reliability, credibility if rules do not conflict with the Regs and apply to both parties.

Example

A school MAY adopt a rule regarding the weight (but not the admissibility) of polygraph evidence, as long as the rule applies to complainants and respondents equally.

Relevant v. Related Evidence

(not defined in Title IX regs)

Evidence is considered **relevant** “if it has the tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”

Federal Rules of Evidence 401

Directly related evidence “includes evidence that the institution does not intend to rely upon in reaching a determination regarding responsibility, including inculpatory and exculpatory evidence, whether obtained from a party or other source.”

34 C.F.R. § 106.45(b)(5)(vi)

Relevant Evidence

Tends to prove a fact at issue in the hearing, such as

- whether a disputed incident occurred;
- witness credibility;
- the impact of any misconduct on the complainant (e.g. mental or emotional distress, physical injury, or academic difficulty); and
- what sanctions or remedies might be appropriate.

Relevant Evidence

In summary:

Does the evidence tend to prove or disprove the allegations?

A determination regarding relevancy can rely on logic, experience, or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401

Directly Related Evidence

No given definition.

Common sense evaluation.

Arguably, a very wide net.



Examples: relevant or related?

What the Complainant
had for dinner

Fact that the parties
are in the same math
class

Witness statement that
the skies were clear on
the night of the
incident

Kinds of Evidence (generally)

Direct or
testimonial
evidence

Documentary
evidence

Real evidence

Circumstantial
evidence

Hearsay
evidence

Character
evidence

Direct or testimonial evidence: personal observation or experience



- Interviews or statements
- Generally, a primary source of information in a Title IX investigation

Questions
about
Direct or
Testimonial
Evidence

Accept written
statement instead
of interview?

What about
uncooperative
witnesses?



Documentary
evidence:
supportive writings
or documents

List here is long:

Texts, emails,
social media posts,
journals, videos,
public safety
reports, expert
reports, medical
reports, keycard
swipes, wifi pings,
polygraph results,
phone records.

Documentary Evidence: Thoughts and Questions

Can often be especially persuasive.

Think about evidence here that might be time sensitive and act accordingly (security videos, card swipes, texts, social media).

Validate certain types of documents, like journals and texts.

Documentary Evidence: Thoughts and Questions



Can I get social
media info?



Do I have to read
through all these
texts?

Documentary Evidence: Thoughts and Questions

Should I seek out experts?



Do I have to take things in?



What do I do with objects I'm given?



Work with the Title IX Coordinator on a storage solution for the institution.

Real Evidence: Thoughts and Questions



Hearsay Evidence

Definition: Testimony given by a witness who relates not what they know personally, but what others have told them, or what they have heard said by others. (Black's Law Dictionary)

Hearsay Evidence: Thoughts and Questions



No prohibition against accepting it in Title IX processes.



Fact that it is hearsay can be taken into account in weighing the evidence.



Character Evidence

Character Evidence: Thoughts and Questions



Under current Regs, must take character evidence in if it is offered.



Should be weighed accordingly.



I would not independently pursue character evidence.

A few words about Circumstantial Evidence

Circumstantial evidence is

Indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical **inference** that the fact exists.

Another way to think about it:

Evidence not drawn from direct observation of a fact in issue.

Circumstantial Evidence

Anything that is not direct evidence—direct observation—is circumstantial.

Circumstantial evidence can be powerful—think card swipes, videos, text conversations.

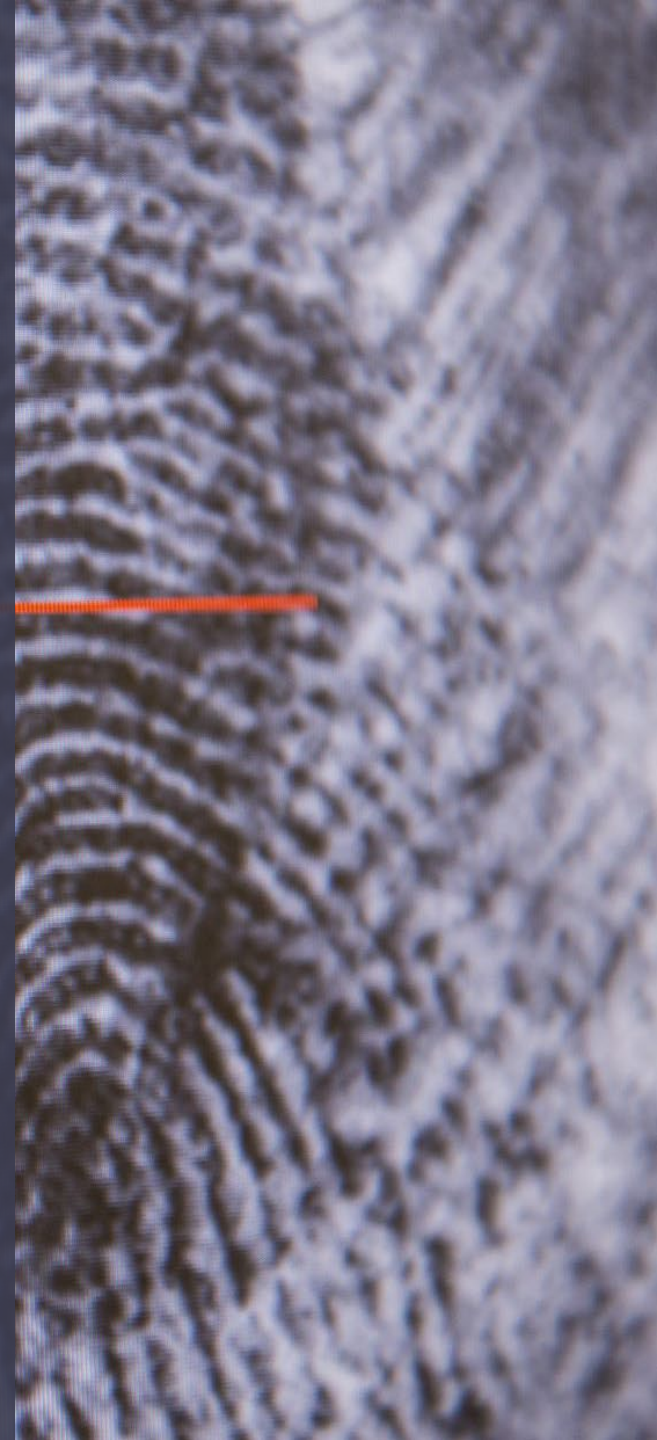
Circumstantial Evidence Examples

Security videos

Fingerprints

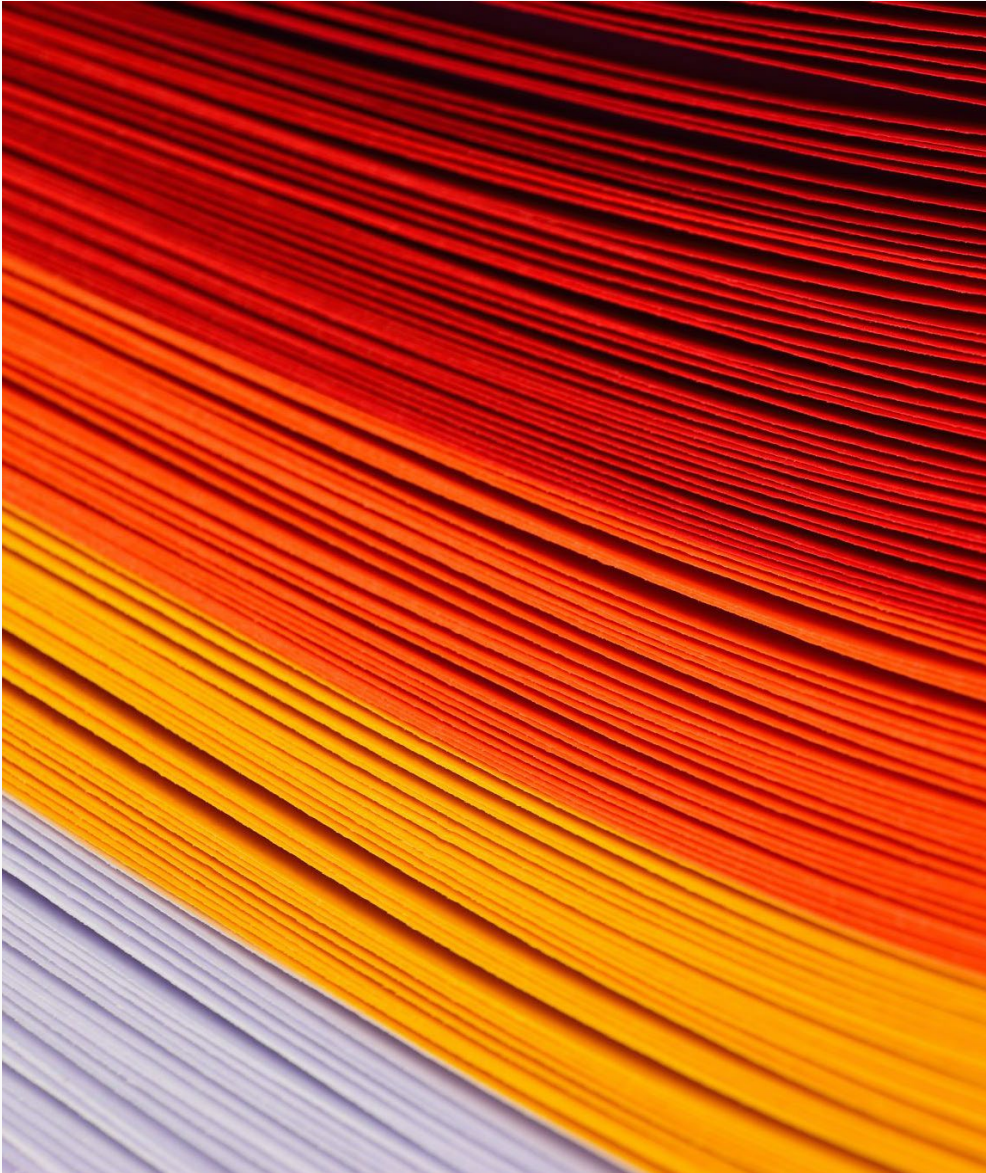
Weapon at the scene

“I saw her go into the room at midnight,
and I saw her come out an hour later with
her clothes all messed up.”

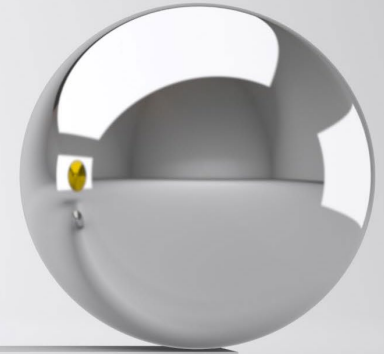
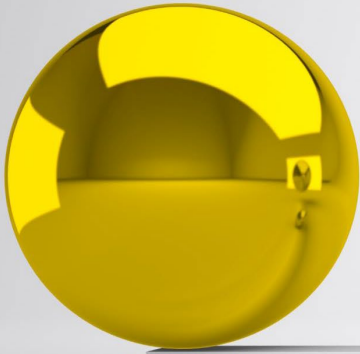


Circumstantial Evidence

In the legal context, there is no distinction between circumstantial evidence and direct evidence in terms of weight or importance.



Assessing Weight of Evidence



Weight of Evidence

Weight of evidence is the believability or persuasiveness of evidence in probative value, not the quantity or amount of evidence. Weight of evidence is not determined by mathematics but depends on its effect in inducing belief.

Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/wex/weight_of_evidence

Examples:

- Polygraphs
- Character evidence

Schools can make rules about how much weight decision makers should afford certain kinds of evidence.



Parties may argue about the weight of certain evidence during the hearing or in written statement.

Which
kinds of
evidence
carry the
most
weight?

Direct or testimonial
evidence

Documentary evidence

Real evidence

Hearsay evidence

Character evidence



Assessing Credibility

Credibility: The extent to which the decision maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.

EEOC Statement on credibility in Sexual Harassment Cases (1999)

Inherent plausibility: Is the testimony believable on its face? Does it make sense?

Demeanor: Did the person seem to be telling the truth or lying?

Motive to falsify: Did the person have a reason to lie?

Corroboration: Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?

Past record: Did the alleged harasser have a history of similar behavior in the past?

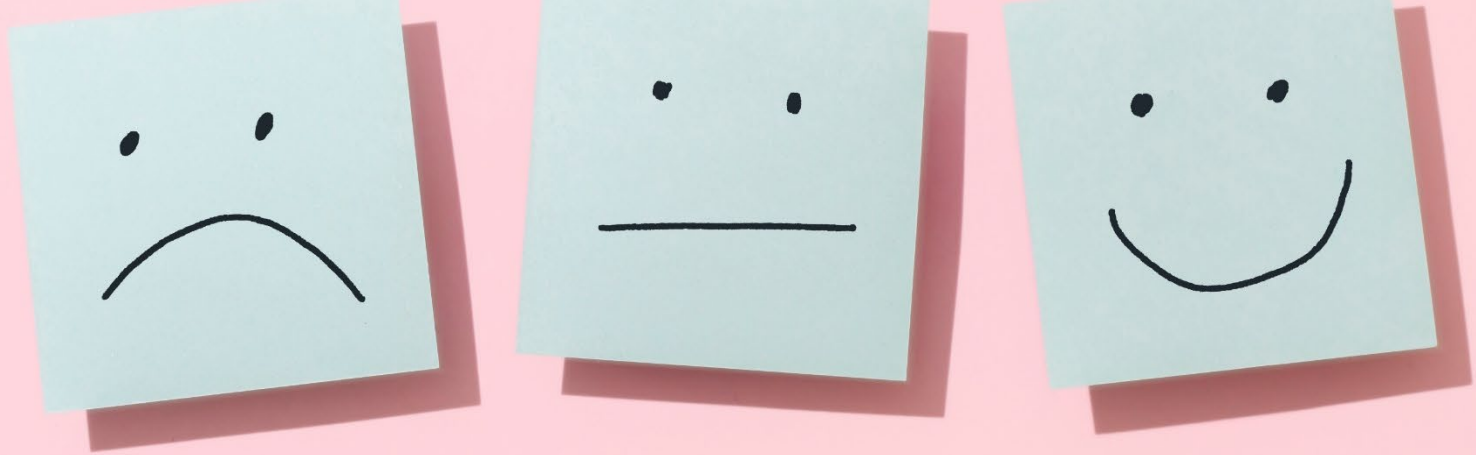
None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.



Assessing Credibility

Possible Factors:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information— substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)



Credibility: Demeanor

Be careful about relying on **demeanor**.

Much of what you hear about “how to tell if someone is lying” is not based on actual research and has been debunked or is considered pseudoscience.

It's not easy to spot a liar

✔ Associated with lying
✘ No significant relationship
✔ Associated with truth-telling

CUES	ASSUMED RELATIONSHIP	ACTUAL RELATIONSHIP
VOCAL		
Hesitations (use of speech fillers, e.g., “ah,” “um,” “er,” “uh,” and “hmmm”)	✔	✘
Speech errors (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	✔	✘
High-pitched voice	✔	✔
Speech rate (number of spoken words in a certain period of time)	✘	✘
Latency period (period of silence between question and answer)	✘	✘
Pauses (silent, filled, or mixed)	✔	✘
VISUAL		
Gaze aversion (looking away from the conversation partner)	✔	✘
Smiles (smiling and laughing)	✘	✘
Facial fidgeting (face touching or rubbing hair)	✔	✘
Self-fidgeting (touching, rubbing, or scratching body or face)	✔	✘
Fidgeting (undifferentiated)	✔	✔
Illustrators (hand and arm movements designed to modify or supplement what is being said verbally)	✘	✔
Leg and foot movements	✔	✘
Posture shifts (movements made to change seating position)	✔	✘
Head movements (head nods and head shakes)	✔	✘
Eye blinks (blinking of the eyes)	✔	✘



<https://www.smithsonianmag.com/science-nature/why-you-cant-spot-liar-just-looking-180977359/>



Credibility: Past Record

Also be careful about relying on a party's past record.

Determinations should be made (mostly) based on the evidence in front of you.



Credibility: Memory

Memory errors do not necessarily destroy credibility.

Most people's memories are not that great.

Trauma affects memory.

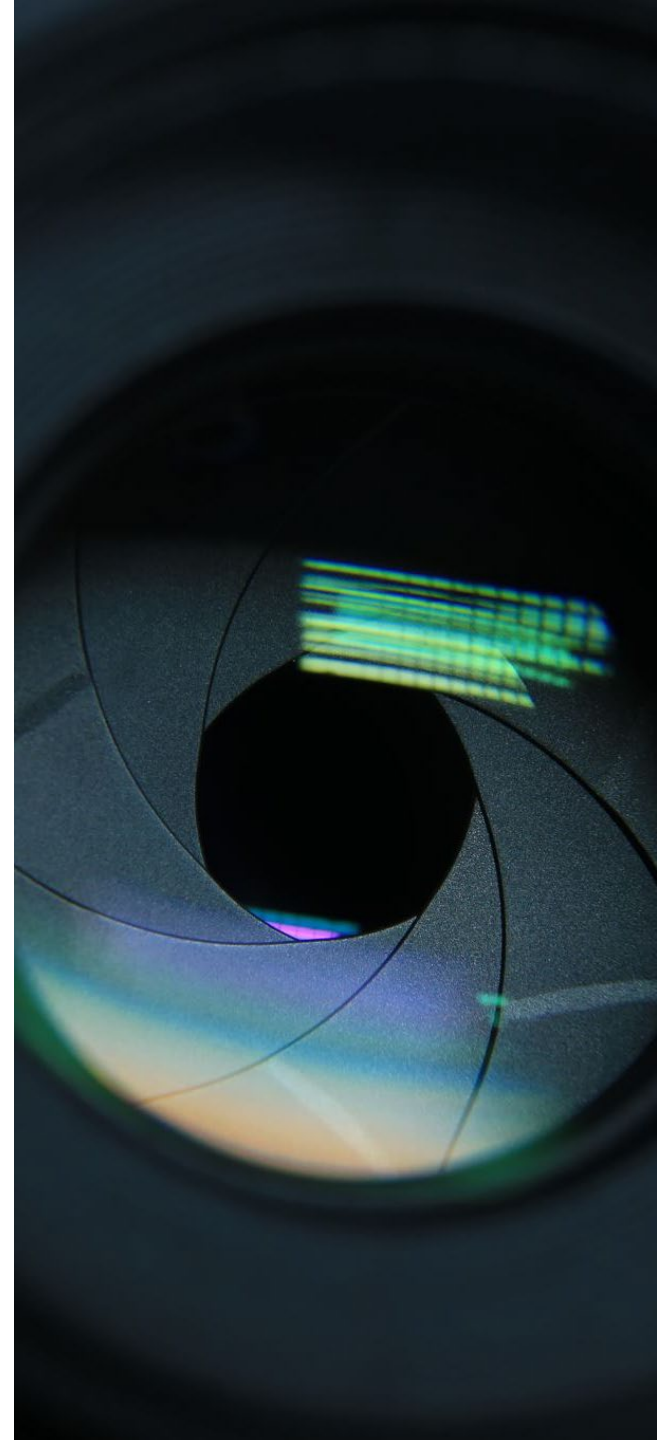
Credibility: Eye Witness Accounts

Can be powerful.

But

Well-intentioned eyewitness testimony can be problematic because our brains are not always great at accurately interpreting and remembering what we see.

And eyewitness testimony can be “contaminated.”



Factors That Influence an Eyewitness Testimony



Memory contamination



Stress



Suspect lineups



How investigators phrase questions



Witness's poor eyesight



Cross-race effect



Witness bias

verywell

<https://www.verywellmind.com/can-you-trust-eyewitness-testimony-4579757>



Assessing Credibility: Thoughts

Important to have reasons supporting credibility determinations.

Remember that unlikeable is not the same as not credible.

Final Notes

Need to reach conclusions based on the evidence/information provided, not based on speculation, rumors, character assessment, etc.



Final Notes

Take time out to check biases.

Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.





Case Studies and Discussion



Questions?

In the first interview, the Complainant, Jessica, tells you that she and the Respondent, Max, went to her room after a party. Jessica also shares that the incident occurred in her room, and she was blacked out during much of the night. During a second interview, Jessica tells you she now thinks the incident occurred in Max's room. Jessica and Max live in the same residence hall.

Jessica's roommate, Chelsea, tells you Jessica and Max came to Jessica and Chelsea's room for about 30 minutes around 11 p.m., then left. Chelsea does not know where they went after that. Chelsea also tells you that Jessica went to another male student's room earlier in the evening. Chelsea says Jessica told her that she intended to hook up with that male student that night. Chelsea says she stayed in her room all evening studying and did not drink that night. She tells you Jessica came home around 1 a.m., "stumbled" into the room, and got into bed. She did not talk to her until late the following day.

In your interview with her, Jessica did not mention going to the other student's room earlier in the evening. In the second interview, you ask her about this. She denies that she went to the other student's room and denies telling Chelsea that she planned to hook up with that student.


In your interview with Max, he tells you he and Jessica left a party around 11 p.m. and went directly to his room, where they had consensual sex. He tells you Jessica was drunk, but she was talking coherently and did not have any trouble walking to the residence hall from the party.

The incident occurred in September and it is now May of the following year.

The Complainant, Alex, tells you he vaguely remembers kissing the Respondent, Justin, in the yard outside a campus house where a party was occurring on the night in question. Alex says he thinks he initiated and consented to the kissing. He says he did not consent to Justin unzipping his pants and touching his penis, and he remembers that when Justin did this, he pushed Justin away. He says Justin was quite intoxicated and fell to the ground at that point, but was uninjured. He says Justin swore at him, then got up and walked away. Alex says he does not remember much about the evening, including how he got to the party, but he remembers this interaction because it was so upsetting to him and “sobered him up” for a few minutes. He does not remember how he got home from the party.

Justin tells you they (Justin) were drunk but “functional” at the party. They tell you they talked with Alex at the party inside the house for a few minutes, but did not meet up with Alex outside the house and denies kissing Alex or touching his penis. Justin says they left the party on their own around midnight and walked home.

After you had initial interviews with each party, another student who lives in the house where the party occurred comes to see you. She tells you she heard through the campus rumor mill about the incident between Alex and Justin. She gives you Justin’s key ring, which includes his campus ID card, which she says she found in the side yard of the house the next day. You determine that she found the key ring in the general area that Alex described as the location of the incident.



Thanks for the work you do!

It's not easy, but it's really
important.

Questions? Comments?