

## Advanced Investigator Training

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- Curriculum developer and faculty member of Virginia-funded program on fair, trauma-informed investigations
- Curriculum development team and faculty member of U.S. DOJ trauma-informed investigation program
- Author and co-author of nationally-distributed book chapters, papers and articles on Title IX/Clery Act, fair, trauma-informed investigations and/or campus threat assessment
- Member of American Council on Education Title IX Task Force
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## NACUA NOTES

### **J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”**

- National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
  - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

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Impartiality:  
Avoiding Prejudgment,  
Conflicts of Interest, and Bias

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## Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

» “the Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

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## Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

» Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims.”

» Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that “rely” on sex stereotypes in training Title IX personnel on how to serve in those roles impartially and without prejudgment of the facts at issue, meaning that research and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment.”

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## Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations:
  - Do not rely on cultural “rape myths” that essentially blame complainants
  - Do not rely on cultural stereotypes about how men or women purportedly behave
  - Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

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## Impartiality: Avoiding Prejudgment and Bias

- » Practical application of these concepts in investigations:
  - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
  - Avoid any perception of bias in favor of or against complainants or respondents generally
  - Employ interview and investigation approaches that demonstrate a commitment to impartiality

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## Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

### » Bottom line:

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party

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## Introduction to Witness-Centered Interview Concepts

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## Traditional Interview Techniques

- Often focus on “who, what, when, where, why”
- Often focus on what questioner thinks they need, e.g.:
  - Developing a chronology
  - Fitting facts into policy violation elements framework
- Questioner’s determinations and (worse yet) pre-determinations of what is relevant, and what is not, can be controlling
  - Questioner often interrupts witness to seek immediate clarification
- Common questioning techniques:
  - Leading questions
  - Yes/no or choice questions
  - Paraphrasing for “clarification”
- “Why did you/why didn’t you” questions that can discourage participation

## Putting Discussion of Potential Neurobiological Effects of Trauma in Context

- Focus should be on potential effects of trauma that some people may experience in some situations
- Discussion of potential effects should not be misunderstood to suggest that all individuals will experience trauma, emotionally or physically, in a certain, “dose-dependent” way
- Scientific theories about the potential effects of trauma should never be used to determine responsibility for alleged misconduct in a specific investigation

## Potential Effects of Trauma on Memory

- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-traumatic event
- Central details may be remembered very well, but peripheral details less so

## Potential Effects of Trauma on Memory

- Be thoughtful about how much, if any, weight to place on witness's affect and other presentation given potential effects of trauma, stress, alcohol, cultural factors, etc.
  - Recognize that presentation may not necessarily be “evidence”

## Interviewing for Clarification

- It is crucial to interview and question witnesses for clarification (sometimes in initial, and definitely in follow up, interviews)
  - Promotes accuracy and fairness
  - If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

## Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

## Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
  - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on “presentation as evidence”

## Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Similar cues can be used
- Sensory information can be gathered from respondents
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Goal: Neutral, open-ended questioning approach should be used with both parties

## Summary and Questions

Thank You!



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