

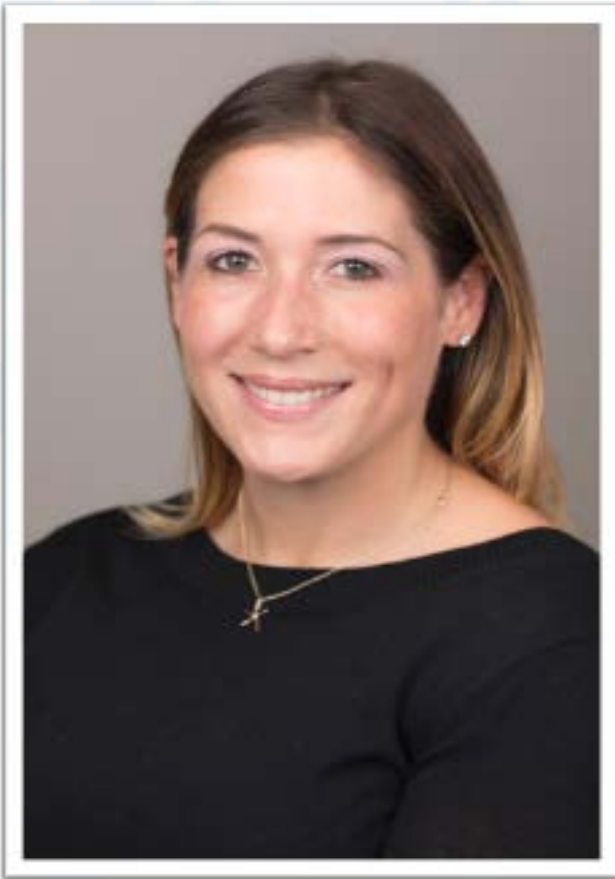


GRAND RIVER | SOLUTIONS

Introduction to Fair, Thorough, and Trauma Informed Sexual Violence Investigations

Chantelle Cleary, J.D.
June 2021

Meet Your Facilitator



Chantelle Cleary, J.D.

Director of Strategic Partnerships
and Client Relations

Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.





Vision

We exist to help create safe and equitable work and educational environments.



Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity

Day One Agenda

01

Title IX's Requirements

02

The Proper Application of Trauma Informed Practices

03

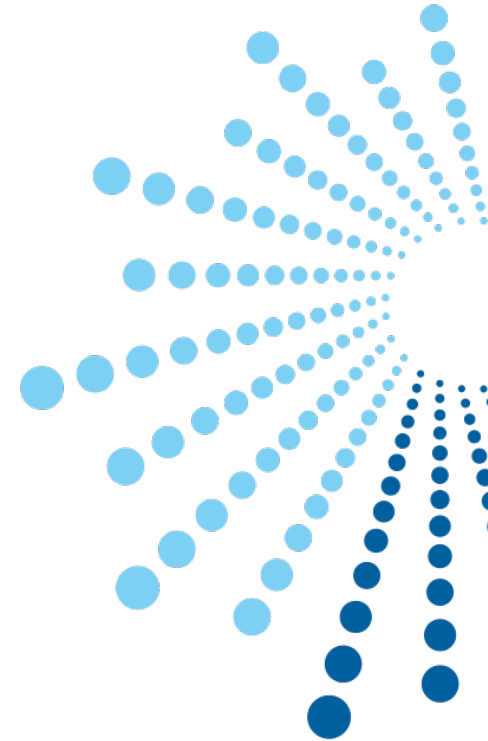
The Importance of Understanding the Potential Impact of Trauma

04

Developing an Investigative Strategy

05

Investigative Interview





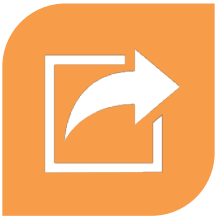
Title IX's Requirements

01

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Procedural Requirements for Investigations



Notice TO BOTH
PARTIES



Equal opportunity
to present evidence



An advisor of
choice



Written notification
of meetings, etc.,
and sufficient time
to prepare



Opportunity to
review ALL
evidence, and 10
days to submit a
written response to
the evidence prior
to completion of
the report



Report
summarizing
relevant evidence
and 10 day review
of report prior to
hearing



Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

the identities of the parties involved in the incident, if known,

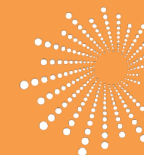
the conduct allegedly constituting sexual harassment under § 106.30,

and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



Advisor of Choice During the Investigation

The advisor can be anyone, including an attorney or a witness.

Institutions cannot place restrictions on who can serve.

Institutions can create rules and guidelines for participation in the investigation

No specific training required.



Written Notification of Meetings and Sufficient Time to Prepare

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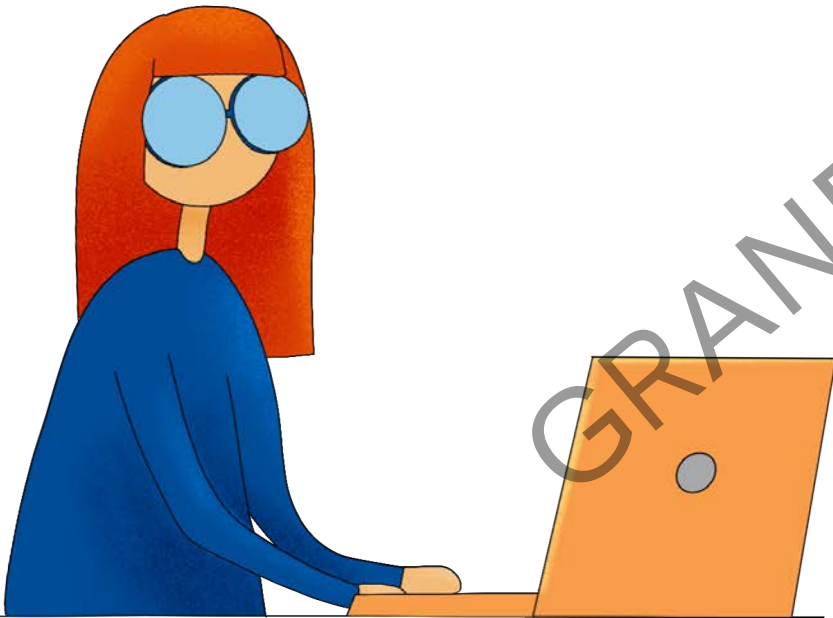
Equal Opportunity to Present Evidence

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Evidence Review

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint

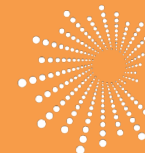
10 days to provide a written response



Investigative Report and Review

After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

That report will be shared with the parties and they will have 10 more days to comment



Procedural Requirements for Hearings

Must be live, but can be conducted remotely

You may not compel participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction



“Directly
Related” and
“Relevant
Evidence”

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Directly Related Evidence

Regulations do not define “Directly Related” Evidence

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

“Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401
Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.



The Investigator



Can be the Title IX Coordinator, although that is disfavored



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

The Requirement of Impartiality

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Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

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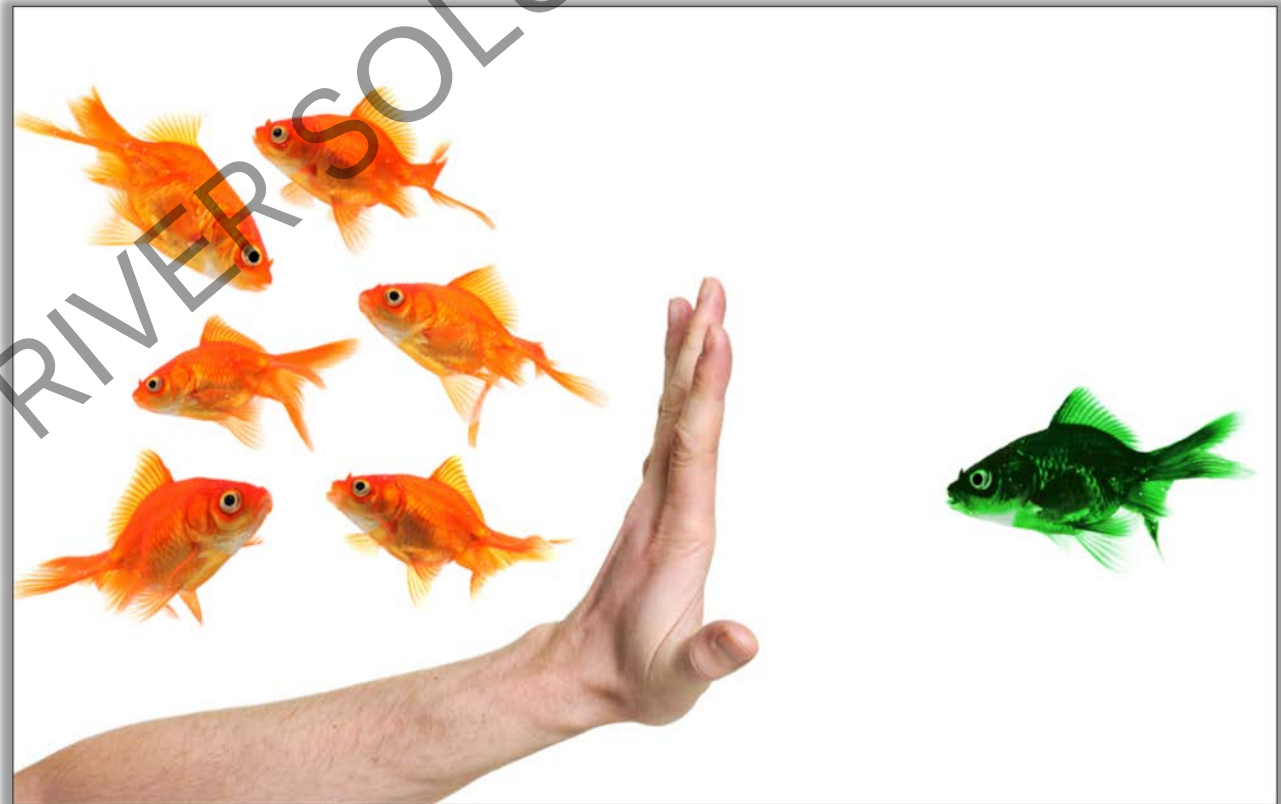
STOPS

What Constitutes Bias?

Conduct a fact specific, objective inquiry based in common sense, to determine bias

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts



Conflict of Interest

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A black silhouette of a person's head and hand in profile, facing right. The person's index finger is pressed against their lips in a 'shh' or 'thinking' gesture.

Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

An Impartial Investigation is...

Not influenced by bias or conflict of interest

Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve

Truth seeking, not "your truth" confirming

Trauma Informed Practices

In the preamble, the Department permits the use of trauma informed practices and recognizes that trauma informed practices can be used in an impartial and non-biased manner.

Trauma informed practices must be applied equally to all genders.



The Proper Application of Trauma Informed Practices

02

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Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Interview



Format of Questions



Approach to Clarification

Trauma Informed Practices are Designed to:

01

Encourage thorough and complete investigations

02

Assist with recollection

03

Assist with recounting

04

Reduce potential for false information

05

Minimize unnecessary re-traumatization

06

Reduce Bias

Misapplication of Trauma Informed Practices

It is a misapplication of trauma informed principles to allow potential evidence of trauma to:

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.



The Importance of Understanding the Potential Impact of Trauma

03

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Trauma

An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.

Examples of Events that Might Trigger a Traumatic Response

Sexual Assault

Physical Assault
by a Stranger

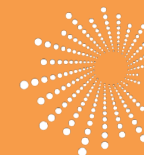
Physical Assault
by an Intimate
Partner

A Car Accident

Accident that
causes serious
injury or death

Robbery

Medical Event?



When trauma occurs, there are very real changes in brain function that may affect a person's ability to make memory and to recount their experience.

Common Characteristics of Disclosures by a Trauma Brain

Inconsistent

Non-linear

Fragmented

Lack of detail

New information

Affect is unexpected

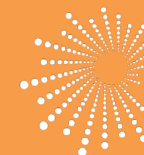
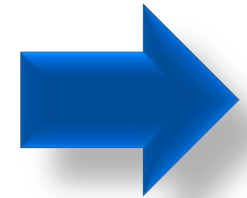


Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.

Inconsistencies
Lack of Detail
Non-Linear
Fragmented
New Information



Not Credible

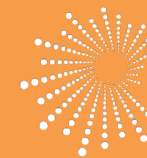


The Historical Conclusion...

False Report
Regretted Sex
Not Provable



CASE CLOSED



When an investigator uses “trauma informed” tools, they are less likely to:



CONCLUDE,
WITHOUT
CONDUCTING A
THOROUGH
INVESTIGATION,
THAT THE
REPORTING
INDIVIDUAL IS NOT
CREDIBLE



PREMATURELY
CONCLUDE THE
INVESTIGATION



ASK QUESTIONS OR
MAKE
DECISIONS FOUNDED
IN BIAS



CAUSE
ADDITIONAL
HARM



JEOPARDIZE
FUTURE
REPORTING



The Future...

An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.



The Investigation Continues....



Developing an Investigative Strategy

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Essential Steps of an Investigation



Notice of Formal Investigation



Initial Interviews



Evidence Collection



Evidence Review

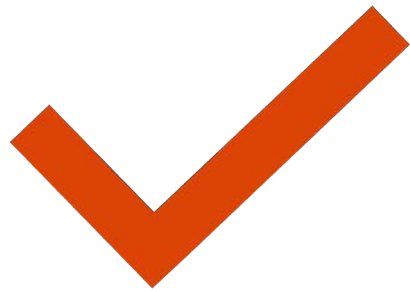


Additional Evidence Collection/Follow Up Interviews



Report Writing

Understand the Scope of the Investigation



Review the formal complaint



Ask questions if unsure

The Process

Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties
- Of the Parties

Incident

- Consent
- Type of Contact
- Injuries

Pre-Incident

- Communications
- Interactions
- Conduct

Post Incident

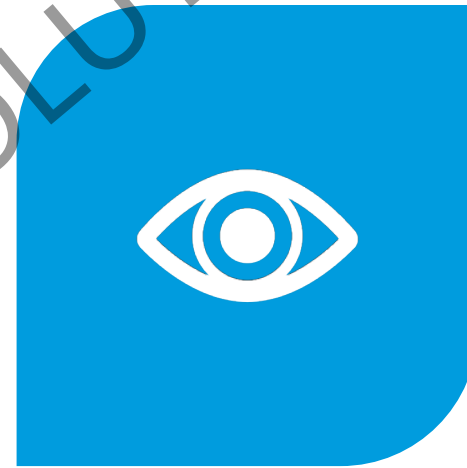
- Behaviors
- Communications

Title IX Hearing Requirements:

The Impact on Investigations



EVIDENCE COLLECTION



INVESTIGATE THE EVIDENCE

Considerations for Evidence Collection in a Post-Regulatory World

Testimony

Text
Messages

Social Media
Posts

Medical
Records

Public
Safety/Police
Records



The Importance of Organization



Investigative Interviews

05

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Interview Objectives



Connect

Build rapport
Build trust
Empower



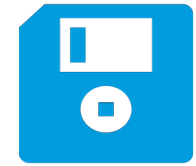
Listen

Allow interviewee to
share their experience



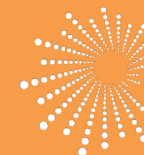
Clarify

Understand what you
have heard
Seek additional
information



Evidence Preservation

Text Messages
Photographs
Names and contact info
for witnesses



Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



If interviewing a party, inform them of their right to have an advisor present.



Prepare for the meeting

Areas of focus?

Other evidence?

Go back review what you have



Provide Written Notice of the Meeting

Advise the parties/witnesses that you will be collecting evidence

Set Expectations

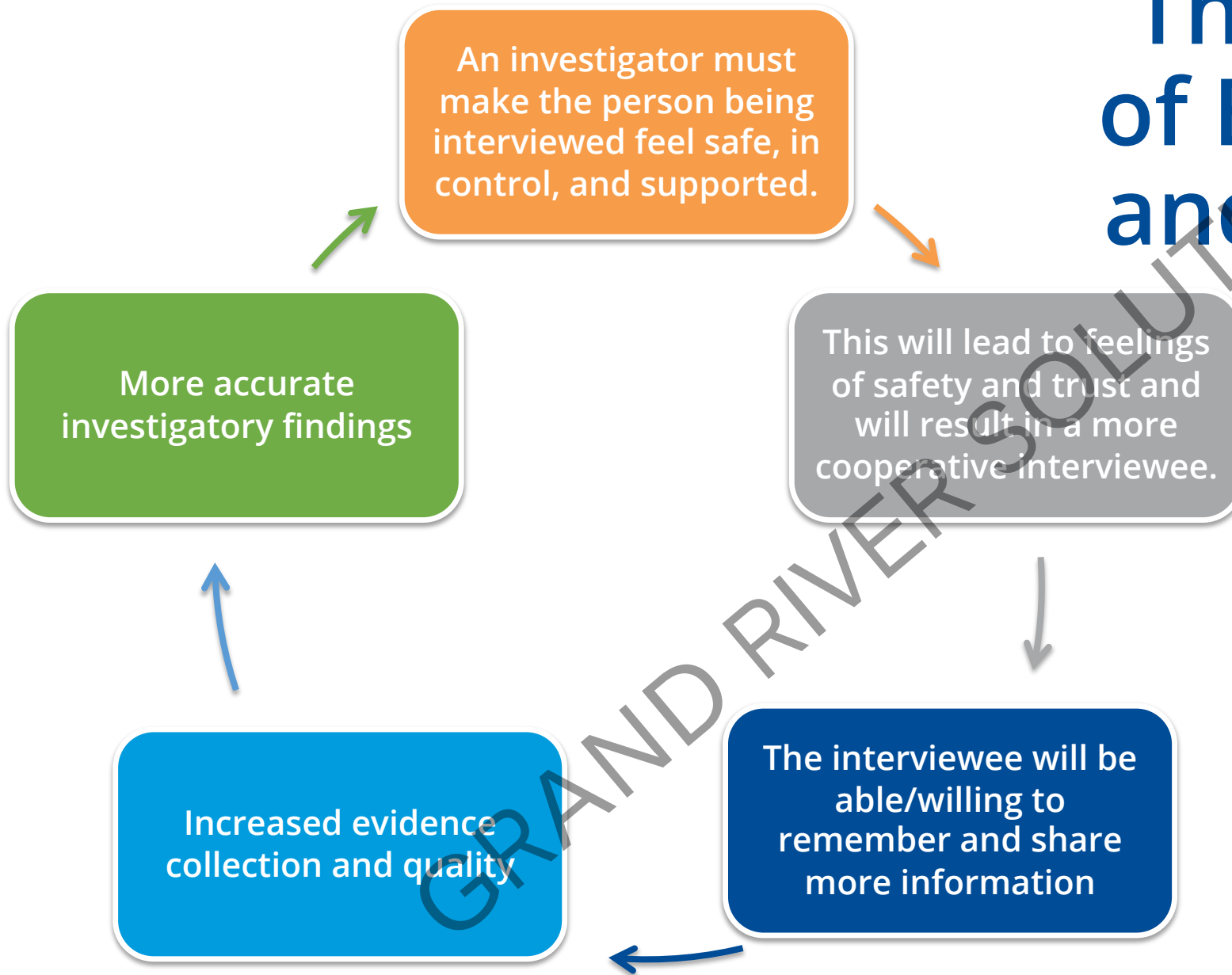
What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you

What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

The Importance of Empowerment and the Power of Empathy



How do we...



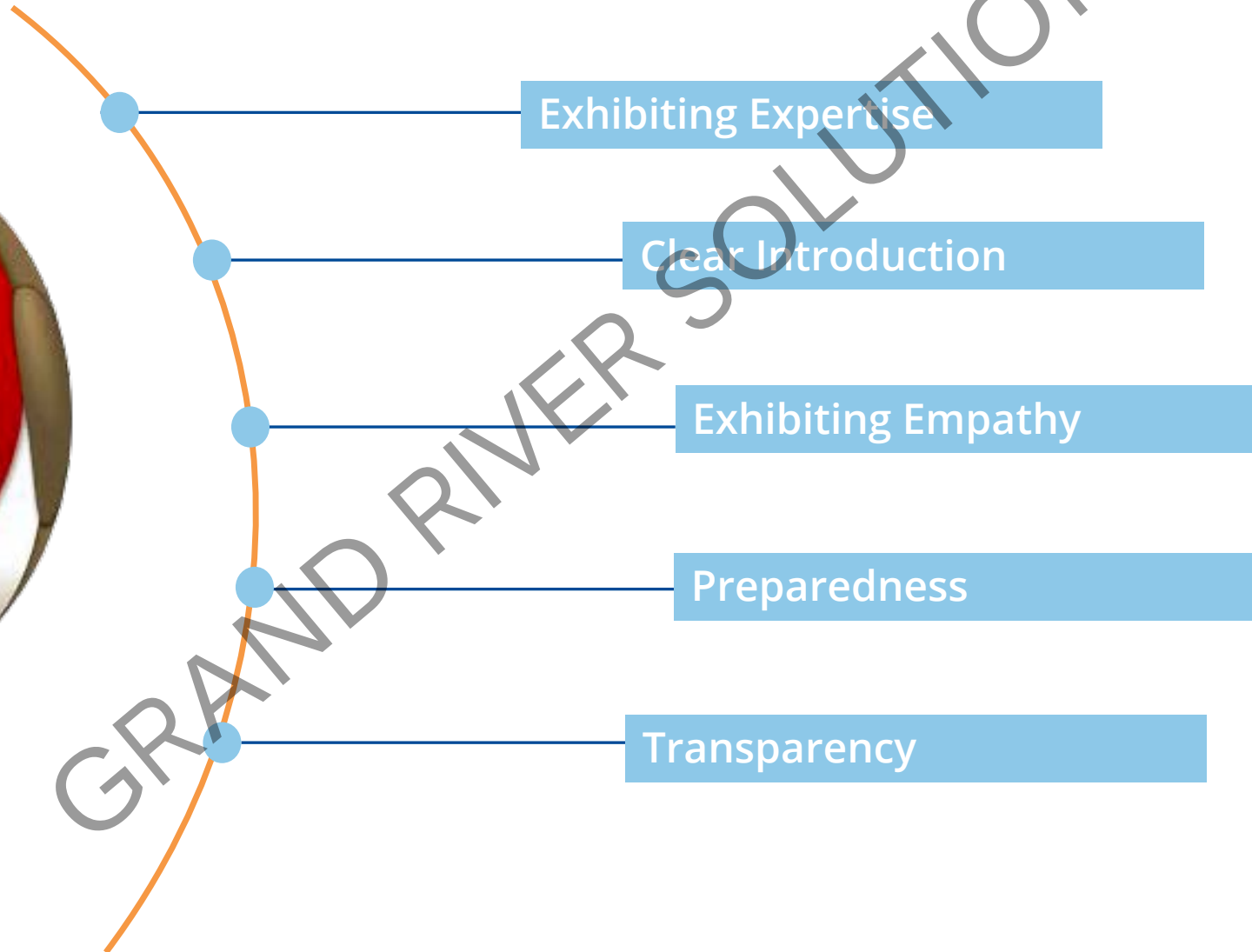
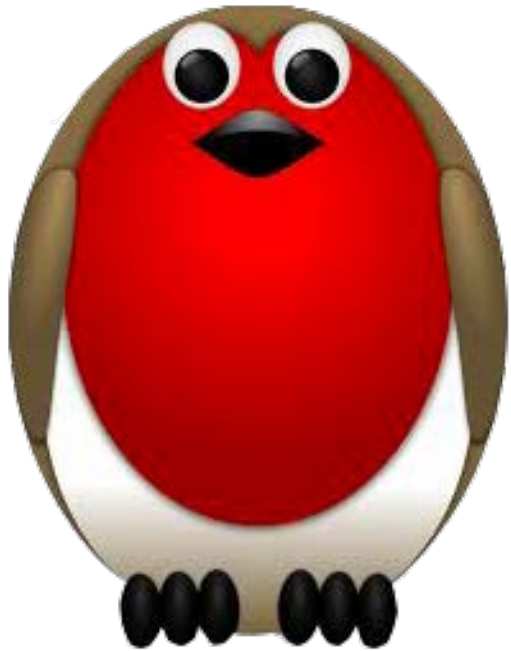
Build Rapport
and Trust?



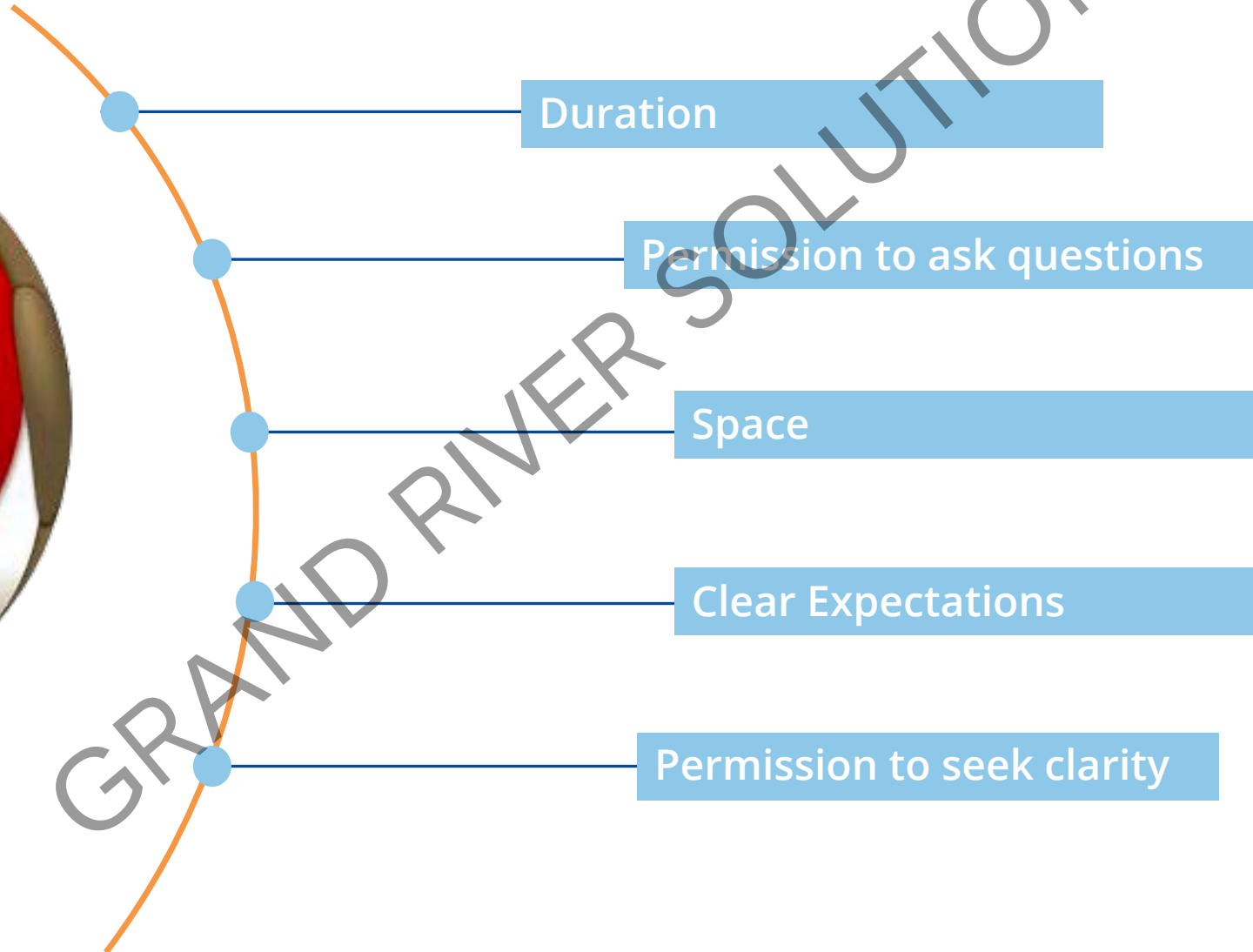
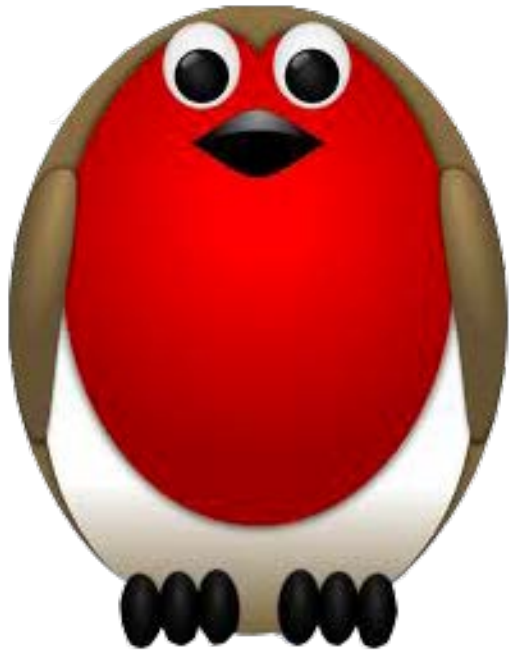
Empower?



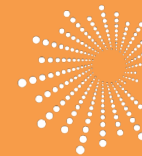
Rapport and Trust



Empowerment



Investigative Interviews



Start the interview by eliciting a narrative...

Where would you like to begin?

Start where you are comfortable and share what you are able to remember.

What are you able to tell me about your experience?

Allow the person to speak uninterrupted. This takes patience.



Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

Do Ask:

- Interview for clarification
- Help me understand
- Can you tell me more about...?
- Is there anything else you can share about...?

Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions

Explore implicit memories by asking questions about the sensory experience and peripheral details.

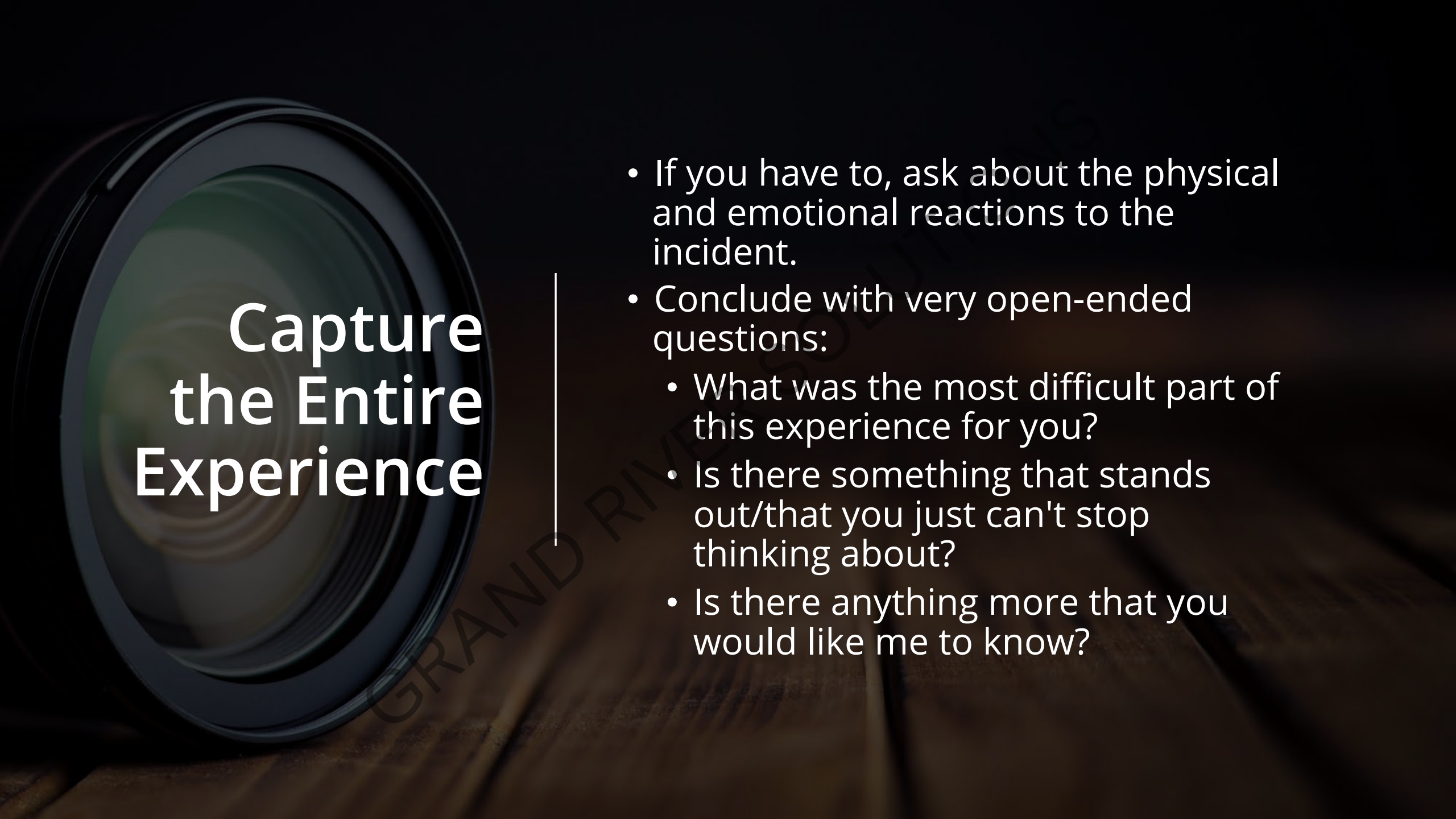
- What are you able to tell me about:
 - What you saw?
 - What you heard?
 - What you smelled?
 - What you felt?
 - What you tasted?
- What are you able to tell me about any images, smells, or sounds that keep coming back to you?



"I felt an animal. I think it was dead. I was terrified that he hurt it. I thought he would do the same to me."



"Help me understand why you keep rubbing your wrists like that?"

A close-up photograph of a camera lens resting on a wooden surface. The lens is dark and reflective, with concentric circles visible on its glass element. The background is a blurred wooden texture.

Capture the Entire Experience

- If you have to, ask about the physical and emotional reactions to the incident.
- Conclude with very open-ended questions:
 - What was the most difficult part of this experience for you?
 - Is there something that stands out/that you just can't stop thinking about?
 - Is there anything more that you would like me to know?

The Before

At some point during the interview, it is also important to explore the prior history, if any, between the reporting individual and the accused.

And The After

It is also important to explore the events following the incident. Oftentimes, the best evidence is produced after the incident.

- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction
 - "Has anyone expressed concern about you since the assault?"
- Communication/contact between the victim and perpetrator

Throughout the Interview



Explain your questions,
especially the difficult ones.

How much did you drink? What they
hear: this is your fault because you were
drinking.



Do not ask leading questions.



Watch your tone.



Do not rush.



LISTEN!!!!!!!!!!



Pay attention to and document information that might lead to
additional evidence.



Document questions asked. Especially when a response is not
provided.

After the Interview: Actions



Memorialize the
Interview in writing

Notes
Summary
Transcript



Provide Opportunity for the party
or witness to review it



Provide opportunity for party or
witness to provide a response



Incorporate the response

After the Interview: Reflection



Reflect.



Is there something you missed or forgot to ask?



Do you need clarity on any of the information shared?



Has this interview revealed additional evidence that you want to explore or collect?



Has evidence of additional policy violations been shared?

Questions?

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Chantelle@grandriversolutions.com

info@grandriversolutions.com



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Day Two Agenda

01

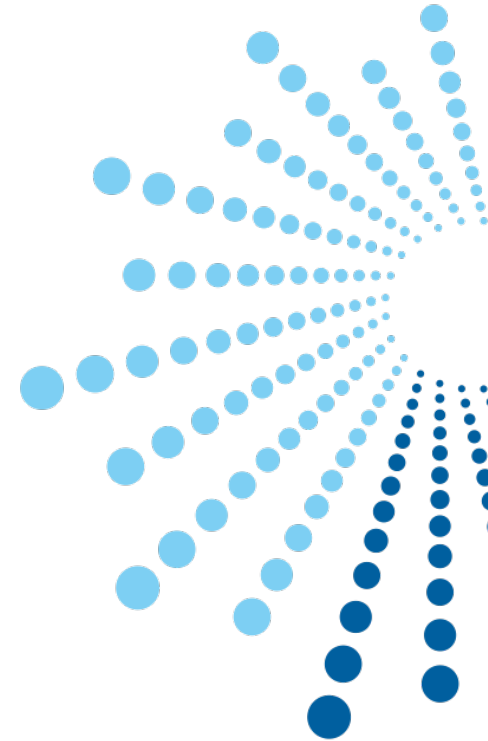
Evidence Collection and Assessment

02

Practice

03

The Investigative Report and Record





Quick Review!

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Follow Up Interviews

Seek clarification

Explore inconsistencies

Explore contradictory evidence

Explore difficult issues

Opportunity to respond

Follow Up Interview Approach

1

Explain the purpose of the follow up

2

Set the stage for the topics you will be covering

3

Do not avoid asking the hard questions

The “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...



Evidence Collection and Assessment

01

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Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary

Types of Evidence

Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows

Evidence

Testimony

Text Messages

Social Media
Posts and
messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera
Footage

Swipe Records

Medical
Records

Phone Records

Audio
Recordings

Evidence Collection



Identify the items of evidence that you would like to obtain



Develop an intentional strategy for obtaining that evidence



Overcome barriers to evidence collection



Considerations about collecting certain types of evidence

A Thorough Investigation

is more than evidence collection

Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

A Thorough Investigation Permits the Decision Maker to Assess



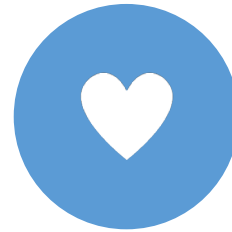
Relevance



Credibility



Reliability



Authenticity



Weight

“Relevant” Evidence

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See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

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“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

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Assessing Relevance

Why Does it Matter?

Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.

Character Evidence

Polygraph evidence

Opinion Evidence



Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Opinion Evidence: Try it!

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

“I got to the party pretty late, and Taylor was already lit.”

“Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex”



Assessing Authenticity

Investigating the products of the Investigation



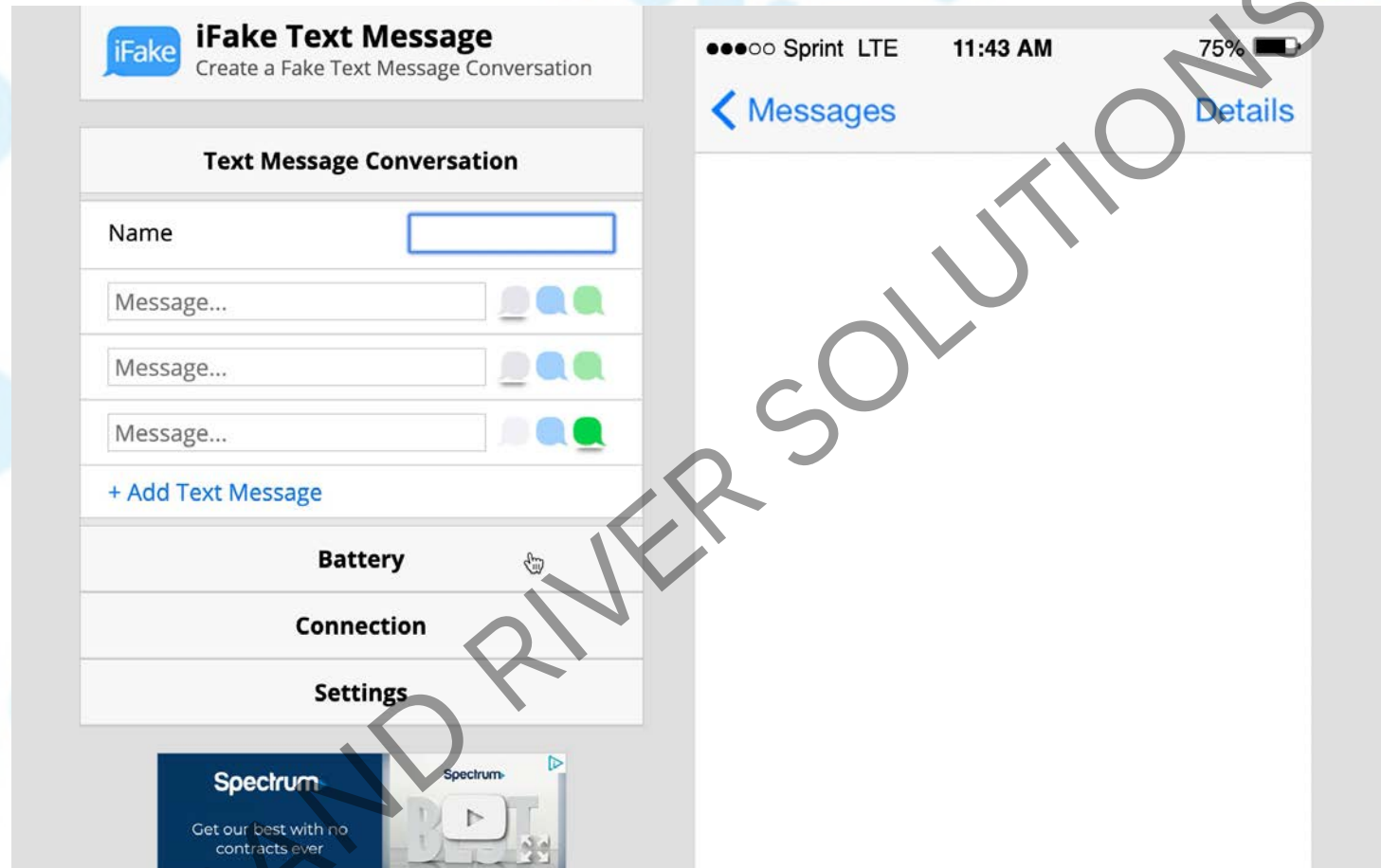
Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.



Is it authentic?



QUESTION THE
PERSON WHO
OFFERED THE
EVIDENCE



REQUEST
ORIGINALS



OBTAIN
ORIGINALS FROM
THE SOURCE



HAVE OTHERS
REVIEW AND
COMMENT ON
AUTHENTICITY



ARE THERE OTHER
RECORDS THAT
WOULD
CORROBORATE?

Assessing Credibility and Reliability

No formula exists, but consider the following:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Character, background, experience, and training

Coaching

Bias

Barriers to Evidence Collection

Non-Participating Parties

Uncooperative Witnesses

Uncooperative Advisors

Identity of party or witness unknown

Refusal to share materials

Materials lost or no longer accessible

Difficult topics



Barriers to Evidence Assessment

- Authenticity/Technology
- Colluding witnesses
- Colluding parties
- Totally different versions

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Practice

02

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The Case of Mary and John





The Investigative Report and Record

03

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At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.



Relevancy Standard

Relevant Evidence

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions
- Legally recognized and un-waived privilege.
- Records related to medical, psychiatric, psychological treatment

Who Decides?

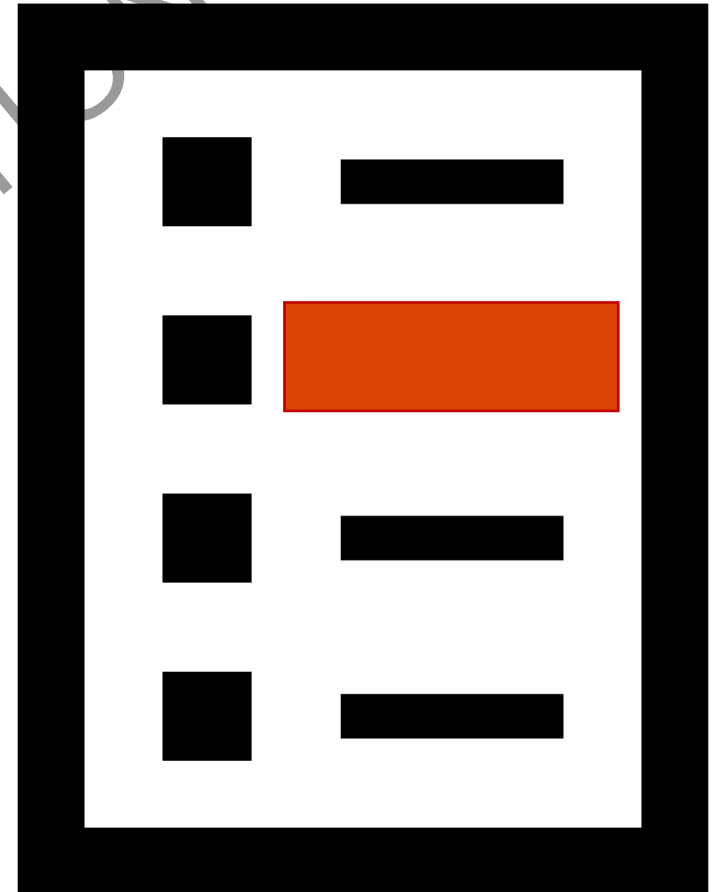
Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage

Redactions



Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



At least 10 days prior to the hearing

The Purpose of the Report

To allow for advance Review

To allow for advance Preparation

- By the Decision Maker
- By the Parties

Reduce likelihood of bias in final outcome

Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

Other Recipients?

Friends of
the parties

Parents

Law
enforcement

Attorneys

Judges

Media

Social media

Essential Elements

Intentionally organized to enhance comprehension

Factually accurate

Concise

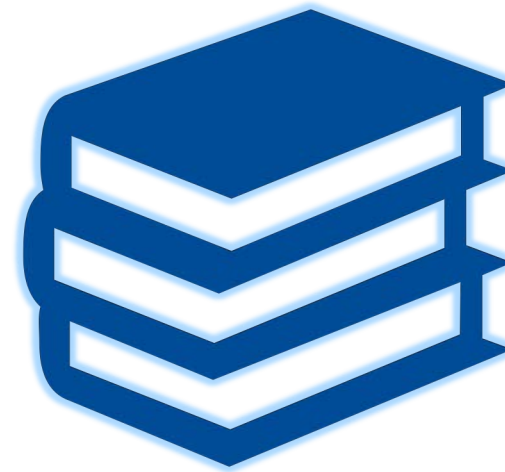
Without editorial or opinion

Consistent format

Report and Record

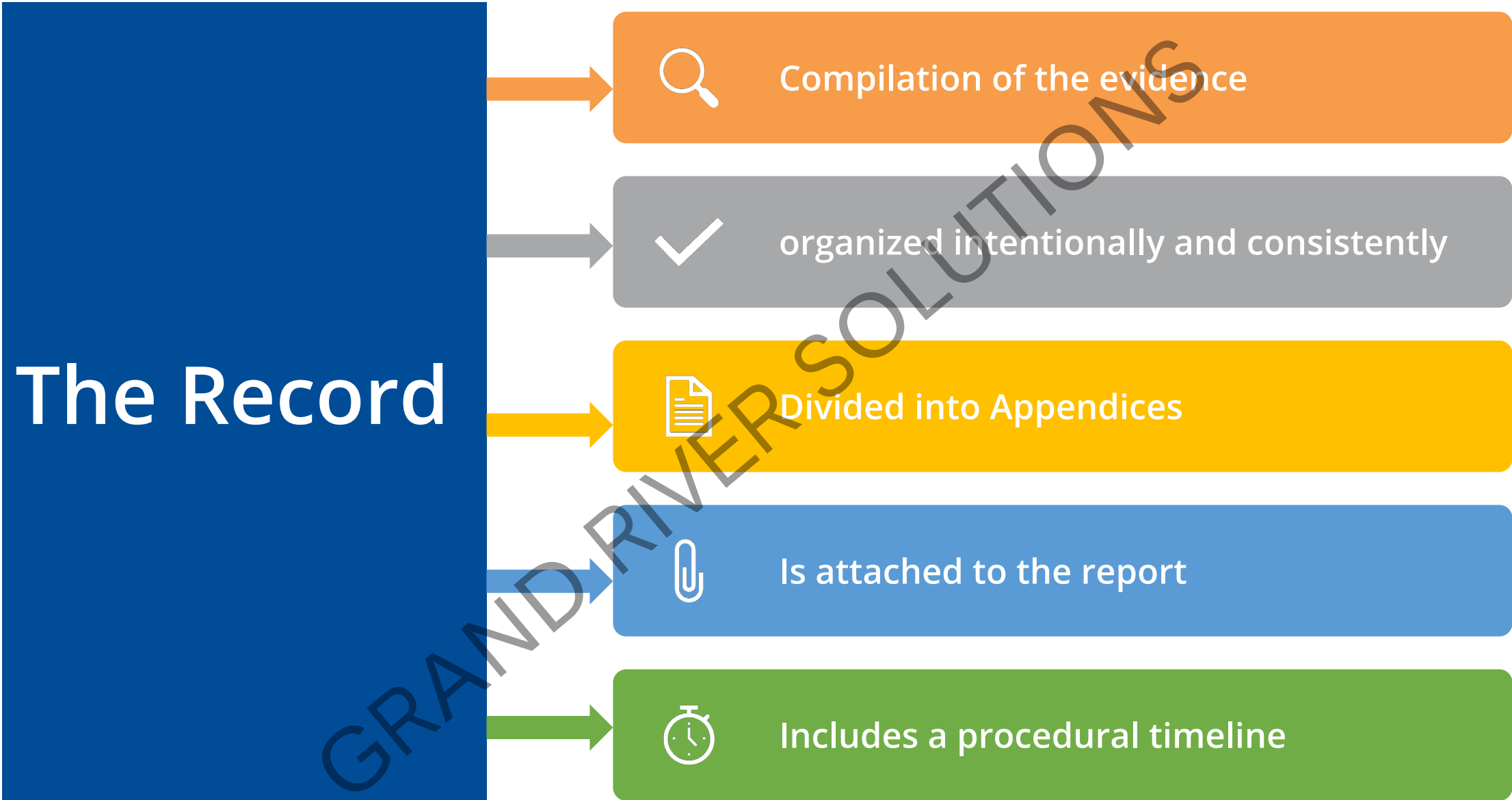


Summary of the
Evidence



Compilation of the
Evidence

The Record



```
graph LR; A[The Record] --> B[Compilation of the evidence]; A --> C[organized intentionally and consistently]; A --> D[Divided into Appendices]; A --> E[Is attached to the report]; A --> F[Includes a procedural timeline];
```



Compilation of the evidence



organized intentionally and consistently



Divided into Appendices



Is attached to the report



Includes a procedural timeline

Examples of Appendices

Appendix A:

witness testimony only (e.g., transcripts, statements summaries, etc.)

Appendix B:

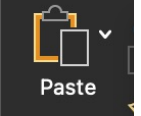
relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.)

Appendix C:

the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint

Appendix D:

the procedural timeline



Structure of the Report



Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

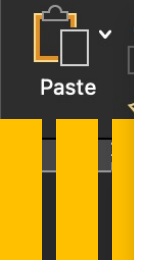
Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

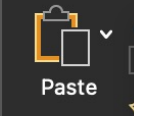
Conclusion



Report Structure Overview

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct

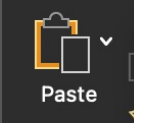


Report Structure

Statement of Jurisdiction

1. Cite Jurisdictional Elements

2. State all grounds for Jurisdiction



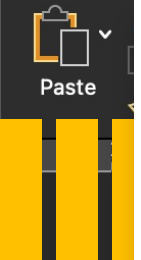
Report Structure

Identify Investigators

1. Identify the investigators by name

2. State that they have been properly trained

3. List trainings, or cite documents in the record that detail investigators prior training



Report Structure

Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.



Report Structure

Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.

2. Include definitions of prohibited conduct from institution's policy/procedures.

Report Structure

List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List

Example of a Detailed List

Witness Name	Witness identified by:	Information offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.

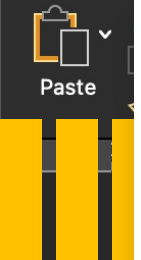


Report Structure

Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

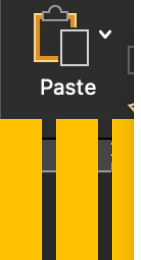
In this section, list the Evidence or Refer to Appendices



Report Structure

Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.



Report Structure

Conclusion

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.

Questions?



Email Us:

Chantelle@grandriversolutions.com
info@grandriversolutions.com

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