



Part 2

Investigators/Investigations

EVIDENCE

Training Topics

- ❖ Pattern and Predation – 20 Minutes to Trained Video
- ❖ Investigations with Pattern Elements
- ❖ Establishing a Pattern through Investigation
- ❖ Predation – The Undetected Rapist (video)
- ❖ Types of Physical and Electronic Evidence
- ❖ Sex and Booze/Blackouts and Consent

3 Types of Investigations

The ATIXA experts tell us that there are 3 types of investigations that we may be working with:

- 1) **Incident** – investigating the behavior of one individual
- 2) **Pattern** – more than one similar behavior by one individual
- 3) **Climate** – when an entity, institution, department, and/or the actions of multiple individuals are being investigated

Within these three investigation categories we will be investigating for pattern and predation.

Evidence of a pattern can affect an investigation in 4 ways:

- 1) As **corroborative evidence** lending credibility to others allegations of similar conduct;
- 2) As **persuasive evidence** increasing the likelihood that the responding party is responsible for policy violation;
- 3) As **evidence indicating need** for enhanced supportive/interim measures; and/or
- 4) As part of an **accumulation of evidence** necessitating heightened sanctions and/or supportive/interim measures.

Accusations in and of themselves are not enough to establish a violation of policy!

Investigations should keep all four of the pattern-based impacts in mind when considering the value of the evidence.

A Closer Look – 4 Areas of Evidence

- 1) Corroborative evidence lends credibility to other allegations of similar conduct. Can be multiple allegations of similar conduct against a single and/or multiple individual(s). AND may add credibility or value related to testimony and other evidence. Corroborative evidence can sway an investigation depending on how many individuals choose to report or are discovered during an investigation.

2) **Persuasive evidence** increases the likelihood that the responding party is responsible for policy violation.

Example:

If a responding party was previously found responsible for a policy violation and a subsequent allegation describes a substantially similar conduct by the same responding party, the nature of the prior allegation may be used in the current investigation. However, in order to use a prior allegation, *a finding must have been determined.*

Investigators should carefully examine the evidence of the present allegation without being overly influenced by previous allegations or findings. Organizational misconduct such as by a team, department, or student organization is often the subject of pattern based on misconduct investigations. Therefore, we have a climate investigation to pursue.

However, a policy or practice affecting just one individual may not be sufficient to show discrimination by the group, but an aggregate of multiple incidents or collusion by members acting in concert may meet the threshold of severe, pervasive and objectively offensive.

Failure to investigate and establish responsibility for multiple incidents will most often result in a failure to establish a violation of discriminatory conduct.

- 3) **Evidence indicates a need for enhanced supportive/interim measures.** This speaks on multiple allegations of multiple incidents involving the same individual(s) or group depending on what is being revealed in the ongoing investigation. As the investigation progresses and dependent upon what is or is not revealed, a review or reevaluation of the supportive/interim measures may be necessary in order to increase steps and restrictions of the individuals involved.
- 4) **Accumulation of evidence** can either add or remove credibility from the individuals involved depending on what is discovered during an investigation.

Evidence does not include character witnesses. And depending on the evidence and if it adds credibility to a reporting party's complaint may also have a significant impact on the disciplinary action toward the responding party(s).

Modifying the Investigation

In the event that a pattern of multiple allegations arise against an individual or group of individuals, the investigation will be modified in order to investigate all of the allegations.

What does this mean? It could mean adding more investigators and advisors in order to provide a thorough investigation.

The evidence gathered in these instances are an accumulation of evidence and would therefore be merged under one report and judiciary process.



ATIXA Tip of the Week January 26th, 2018

**Multiple Reports Against the Same Responding Party
By Brett A. Sokolow, Esq., ATIXA President**

We have two women who came forward and reported two incidents of sexual assault involving the same responding party. The reporting parties were not aware of each other. Reporting Party One's incident occurred in August 2016 and Reporting Party Two's incident occurred in April 2018. After the investigation, there is a potential pattern of behavior. Our student code of conduct says when violations stem from the same incident they can be heard by one panel. Obviously, these are not the same incidents. How are other institutions handling multiple reports against the same responding party when there is a potential pattern?

I think you have at least three choices:

1. Combine the resolutions into one process/panel. This is my preferred approach, and you can do this unless your procedures say you can't.
2. Hold two separate panels, with the same membership for each allegation, but then conjoin the two allegations when it is time to make the finding and impose any sanction. This is not a bad option if you are public.
3. Hold two separate panels with differing membership. Allow each reporting party to be a witness at the panel of the other. Make two findings, and bring together for sanctioning, if appropriate. This isn't my preferred approach because it requires the reporting parties to testify twice.

Predatory/Predation

The “Undetected” Rapist

Dr. David Lisak Interviews “Frank,” a Pre-Law Student

Types of Evidence

- Consent
- Alcohol, Drugs and Blackouts
 - Physical and Electronic

Consent

When beginning an investigation the very first piece of evidence we look for is consent.

There are several things we will look for when interviewing.

- Did the encounter begin with consent?
- What acts was consent given?
- Was consent withdrawn anytime during the encounter?
- How was consent given?
- Was alcohol or drugs involved?

Consent is:

- ✓ Voluntary
- ✓ Enthusiastic/positive
- ✓ Continuous throughout the encounter
(verbal or non-verbal)
- ✓ Clear and knowing
- ✓ Words or actions
- ✓ Gives permission for specific sexual activity

Midland College does not have a specific definition of consent. However in our policies under “sexual violence” it states:

“Sexual violence is a form of sexual harassment. Sexual violence includes physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol or due to an intellectual or other disability.”

The State of Texas

Under Texas law, sexual assault “**without the consent**” of the other person arises when:

- (1) the actor compels the other person to submit or participate by the use of physical force, violence, or coercion;
- (2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat;
- (3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;
- (4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;
- (5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;
- (6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;
- (7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat;
- (8) the actor is a public servant who coerces the other person to submit or participate;
- (9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor;
- (10) the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual adviser;
- (11) the actor is an employee of a facility where the other person is a resident, unless the employee and resident are formally or informally married to each other under the Texas Family Code; or
- (12) the actor is a health care services provider who, in the course of performing an assisted reproduction procedure on the other person, uses human reproductive material from a donor knowing that the other person has not expressly consented to the use of material from that donor.

Texas Code Ann. §22.011(b).

Alcohol, Drugs and Blackouts

Another first we look for is incapacitation. We would need to know if there were any alcohol or drugs used. This includes asking about any type of prescription or OTC drugs that the reporting party may have taken. We do not want to overlook the fact that some medications whether prescribed or not can have a different effect on each individual, especially if alcohol was added later.

Students, (especially the reporting party) are very scared to admit when alcohol or drugs were involved for fear of being disciplined. However, it will be made known to them in the beginning and throughout the investigation, that there will not be any disciplinary action taken against them for use of alcohol or drugs that occurred during the time of the incident.

Witnesses may also have the same fear of being disciplined for alcohol and/or drug use, this same rule will apply to them, but only if it was during the time of incident.

INCAPACITATION

Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional. It also covers “blackout” situations.

A black-out situation is when someone can do anything they normally do, they do not know they are doing it and they do not remember doing it.

This means that someone can consent to sex, but does not know they are having sex. Because during “blackout” stages, the brain does not commit their actions to a memory.

Definition:

- Where someone lacks the ability to make rational, reasonable judgements, as a result of alcohol (or other drug) consumption.
- A sleeping person is also considered incapacitated
- In order to consent effectively to sexual activity, you must be able to understand *Who, What, When, Where, Why and How* with respect to that sexual activity.

More on Incapacity

Anytime sexual activity takes place where the alleged victim did not understand any one of the six conditions, incapacity is at issue.

An awareness of all six conditions must be present.

This is another way of stating the law's expectation that consent be knowing or informed.

An incapacitated person could be stark naked, demanding sex, but if they are incapacitated (black-out stage) at the time, and that is KNOWN or KNOWABLE to the responding party, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is irrelevant.

Hence, the complication of the black-out situation.

INCAPACITY QUESTIONS

- Is there a preponderance of evidence that the reporting party was incapacitated by alcohol, other drugs, or sleep?
- AND did the responding party know as a fact that the reporting party was incapacitated?
- OR should the responding party have known from the circumstances that the reporting party was incapacitated?

EVIDENCE OF INCAPACITY

Evidence of incapacity will come from context clues such as:

- A witness or the responding party may know how much the other party has consumed;
- Slurred speech;
- Bloodshot eyes;
- The smell of alcohol on the breath;
- Shaky equilibrium; vomiting;
- Outrageous or unusual behavior (because alcohol can give a false sense of bravery);
- Unconsciousness (including blackout)

The Drunken Hook-up...from ATIXA Tip of the Week: SEX and BOOZE, April 24, 2014 by Brett Sokolow

Customs and practices adopted by higher ed should be a policy formation such as *“sexual actions with a person the respondent knows to be incapacitated, or should know to be incapacitated by alcohol, drugs, sleep etc., is prohibited.”*

This is the most non-discriminatory way to frame a policy. Because if the policy states that “intoxication creates an inability to consent” then those responding parties who also consumed alcohol or drugs and are accused of sexual misconduct, would also be found as “incapacitated” and therefore charging only the responding party with a possible violation is discriminatory.

A strong policy is the best ally Title IX administrators can have. MC Policy, as noted above, is a good policy to back up investigators findings.

The key to the respondent’s responsibility of possible violation rests on two factors:

1. The incapacitation of the reporting party; and
2. The Responding Party’s knowledge of that incapacitation.

Having sex with a willing, yet intoxicated person is not an offense. But at some point during the event that the respondent does to take it beyond having sex, to turning into a policy violation. The respondent takes advantage of the victim's incapacity, and the taking advantage is the harmful element. The respondent knows the victim is weak, unable to make reasonable decisions and cannot have knowledge of the act.

This cannot be proved by the victim's on assertion of incapacity, blackout, or lack of memory. It is shown by the totality of the evidence gathered of some or all of the following factors that the respondent knew or should have known:

- i. The respondent knew that the complainant was drinking or using drugs and may know how much/what kind;
- ii. The victim was stumbling or otherwise exhibited loss of equilibrium;
- iii. Slurred speech or word confusion;
- iv. Bloodshot, glassy or unfocused eyes;
- v. Any of the signs of alcohol poisoning;
- vi. Being disoriented, or confused as to time, place, etc.; and/or
- vii. Loss of consciousness

When interviewing, you will find that a lot of these factors will be uncovered on their own. However, if you aren't getting the responses that you feel are not fitting either side of the story, it is okay to ask about any of the above. And sometimes it is okay to ask anyway.

Physical and Electronic Evidence

As an investigator, you may need to gather information other than statements from parties and witnesses. Some of this evidence may be identified for you by the parties or witnesses, or you may identify other evidence on your own. Listed below are some examples of information you may identify and seek that may assist you in conducting a thorough investigation:

- Incident Reports
- Copies of text messages; it is best to view the messages directly on the device and then ask for screenshots (Beware of sites like www.ifaketext.com.)
- Old and/or deleted text messages can often be retrieved using software such as Wondershare (www.wondershare.com/data-recovery-mac/mac-iphone-data-recovery.html).
- Occasionally, data can be preserved on smartphone memory cards, depending on which app is used for texting.
- Text records can be obtained from most carriers for up to 90 days (and beyond with a subpoena), but only the records of the text, not the contents, are typically retrievable.
- Copies of phone logs
- Facebook or Instagram postings, saved Snaps, and other social media messaging apps
- Other social media postings
- Medical and/or mental health records
- Medical legal exams/SANE kits or PERK (be aware of the potential need for expert/forensic interpretation if such evidence is to be introduced)
- Court Records
- Protection Orders/Injunctions
- Police reports
- Public safety/security reports/incident reports
- Photographs

- Video recordings
 - Video surveillance
 - Receipts (especially ride-share records)
 - Diaries/Journals/Blog Posts
 - Expert sources (texts, studies, definitive websites, expert witnesses, faculty, etc.).
 - Voicemail messages
 - Digital Evidence – Mobile Devices and Laptops
 - Active and Recovered Messaging Content
 - SMS/MMS
 - Apps
 - Social Media Accounts
- E-mails
 - Website comments
 - Operating System Metadata
 - Internet History
 - Account Log-ins
 - Digital Evidence – Network and Cloud Logs
 - Successful and Unsuccessful Log-In Attempts
 - IP Address Records
 - Internal and External Connection Logs
 - Building Access Logs

I have yet to come across anyone who was unwilling to provide any type of evidence for their case.



QUESTIONS

References & Resources

<https://www.atixa.org/>

<https://pol.tasb.org/Home/Index/885>

<https://www.rainn.org/>

<https://statutes.capitol.texas.gov/?link=PE>

<https://everfi.com/blog/colleges-universities/affirmative-consent-arguments/>

Next area of Training in the Investigator/Investigations:

QUESTIONING

Friday, February 5, 2021

9:00 a.m. via TEAMS