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Office of Equity and Inclusion

Title IX & Sexual Violence Investigations

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Minnesota State

Outline of Today's Presentation

- Review System Procedure 1B.3.1
- Forms of Discrimination
- Sexual Violence Background
- Pre-Investigation Planning
- Conducting Interviews
- Trauma and Trauma Informed Interviewing
- Affirmative Consent and Intoxication verses Incapacitation
- Resources
- Questions/Discussion



What Is Title IX?

- Title IX is a federal civil rights law prohibiting sex discrimination in all facets of the educational setting
- By accepting federal funds, institutions agree not to discriminate on the basis of sex or allow the separation of the sexes in curriculum and extracurricular activities, unless permitted by the statute
- Failure to comply may result in liability on the part of the institution

Title IX

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
 - *20 U.S.C. §1681 (1972)*

Timeline

- November 16, 2018 US Department Of Education (DOE) Notice of Proposed Rule-making.
- Final Rule published on May 6, 2020 -- effective on August 14, 2020.
- Revised System Procedure 1B.3.1 finalized on August 14, 2020.
- Biden administration releases proposed new regulations on June 23, 2022.
- Comment period closed on September 12, 2022 (approximately 240,000 comments).

Overall Process Map

- Old 1B.3.1 Procedure.
 - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- New 1B.3.1 Procedure.
 - Formal Complaint, Investigation (with enhanced requirements), Ch. 14, Decision-maker, internal appeal.
- Also consider Policy 1B.1 and student conduct processes for non-Title IX sexual harassment and jurisdiction.
- Basic legal responsibility = deliberately indifferent standard.

Three Quick Deliverables (or To Do's)

- Update your web-sites and information to the new System Procedure 1B.3.1.
- Notice of Title IX Coordinator.
- Notice of Non-Discrimination.

Notice of Title IX Coordinator

- Each college and university must notify applicants for admission and employment, students, employees, and all unions holding collective bargaining agreements with the college or university of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.

Notice of Non-Discrimination

- Each college and university must notify applicants for admission and employment, students, employees and all unions holding collective bargaining agreements with the college and university that the college or university does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. Inquiries about the application of Title IX may be referred to the Title IX Coordinator and/or the United States Department of Education.

Key Elements of the New Procedure

Definition of Title IX Sexual Harassment

- Conduct based on sex that occurs in a college or university's program or activity in the United States that satisfies on or more of the following:
 - An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the college or university's education program or activity; or
 - Sexual assault, dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3.

Formal Complaint

- Defined as
 - Document filed by a complainant or signed by the Title IX Coordinator alleging Title IX sexual harassment against a respondent and requesting investigation.
 - At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- See template.

Educational Program or Activity

Includes locations, events, or circumstances over which the college or university exercised substantial control over both the respondent and the context in which the Title IX sexual harassment occurred, and also includes any building owned or controlled by any officially recognized student organization of the college or university.

Title IX Coordinator

- Employee designated by the president to coordinate the college or university's efforts to comply with its Title IX responsibilities and Board Policies 1B.1 and 1B.3.
- This does not have to be one person – can have deputy Title IX Coordinators, Investigators, etc.

Supportive Measures

- Designed to preserve or restore a student’s access to the education program or activity, with or without a formal complaint (“non-disciplinary, non-punitive individualized services” available to both complainant and respondent).
- Examples
 - Academic course adjustments.
 - Counseling.
 - No-contact orders.
 - Dorm room reassignments.
 - Leaves of absences.
 - Class Schedule changes.

Reporting

- Internal Reporting = New Procedure is the same as Old Procedure (3 buckets).
 - Required Reporters.
 - Confidential Resources (not required to internally report).
 - Encouraged Reporters.
- Clarifies that reporting is to Title IX Coordinator.
- New Information on External Mandatory Reporting.

Investigation and Resolution

- Title IX Coordinator.
 - Discuss options with complainant – supportive measures, referral to law enforcement, filing a formal complaint, pursuing other policy processes (1B1, student conduct, etc.)
 - If formal complaint.
 - Determines Jurisdiction.
 - Conflicts.
 - Information to complainant and respondent (see form notice of allegations).

Conflict of Interest

- Title IX Coordinator to identify any real or perceived conflict of interest in proceeding as the Title IX Coordinator, for the decision-maker, and/or for any person designated to facilitate an informal resolution.
- Assign new person.

Informal Resolution

- School may facilitate an informal resolution process at any time before reaching a determination regarding responsibility provided that each party provides their voluntary, written consent to the process.
- Any party may withdraw from informal resolution process and return to formal complaint process.
- Informal resolution shall not be used to resolve allegations that an employee sexually harassed or assaulted a student.

Interim Actions

- Employee reassignment or administrative leave.
 - Discuss with HR/LR.
- Student summary suspension.
- No real change to prior practice = note that the regulations use the term “emergency removal.”

No Basis to Proceed Determinations: Title IX Sexual Harassment

- Must dismiss formal complaint if:
 - The conduct would not constitute Title IX Sexual Harassment, even if proved;
 - The conduct alleged did not occur in the college or university's educational program or activity;
 - The conduct did not occur against a person in the United States
- May dismiss formal complaint if:
 - The complainant, at any time, notifies the Title IX Coordinator that they would like to withdraw the formal complaint;
 - The respondent is no longer enrolled or employed by the institution; or
 - Specific circumstances prevent the college or university from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- And Remember -- At the time of filing a formal complaint of Title IX sexual harassment, a complainant must be participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.

Dismissals, continued

- Must promptly notify both the complainant and the respondent of any dismissal.
- May consider other policy avenues (1B.1, student conduct, etc.).

Investigatory Process

- Essentially the same as the 1B.1.1 investigatory process. **BUT**
 - Required presumption of innocence notice in notice of allegations (see template).
 - Consider both inculpatory and exculpatory evidence.
 - Not use questions or evidence that involve a legally recognized privilege.
 - Before completing investigation report – send to both the complainant and respondent and their advisors, if any, the evidence subject for inspection and review. Both parties must have at least 10 calendar days to submit a written response to the evidence, which must be considered before completing the report.

Timely Completion

- Timely completion after a complaint = no strict timeline.
- Reasonable cause for delay includes considerations such as
 - Absence of a party, an advisor, or a witness;
 - Concurrent law enforcement activity;
 - The need for language assistance or accommodation of disabilities.

Formal Hearing

- If complaint not resolved then:
 - Prepare investigation report; and
 - Refer the matter for a formal hearing.
 - At least ten (10) days prior to formal hearing, parties and advisors, receive the investigation report for their review and response (consult AAG as this should be done through the Ch. 14 process).
- Formal Hearings for Title IX sexual harassment complaints conducted by the Office of Administrative Hearings.
 - Notify assigned Assistant Attorney General or OGC that Ch. 14 required.
 - Assigned Assistant Attorney General will initiate and arrange for the Ch. 14.
 - See information sheet on Ch. 14 hearings.
 - Costs.

Standard of Evidence

- Remains preponderance of the evidence.

Decision-maker

- ALJ prepares report and recommendation.
- Decision-maker receives report and recommendation and decides
 - Whether the policy has been violated; and
 - On appropriate sanctions if the policy has been violated.
 - Issues a written determination that includes:
 - Identification of allegations;
 - Description of procedural steps;
 - Findings of fact supporting the determination;
 - Conclusions as to responsibility and any sanctions
 - Procedures for appeal.
 - The required elements may be satisfied by adopting all or portions of the report and recommendation.

Appeals

- Within ten (10) calendar days.
- Both parties may appeal final decision and an appeal of a dismissal of a formal complaint.
- Grounds for appeal
 - Procedural irregularity;
 - New evidence;
 - Conflict of interest.

When Student Discipline Final

- Either
 - Date of written determination on appeal; or
 - If no appeal, the date on which the appeal would no longer be timely.

Advisors

- Process Advisors
 - Both complainant and respondent may have an advisor of their choice;
 - Campus will provide if either party does not have their own.
- Advisors at the Ch. 14 Hearing.
 - Both complainant and respondent may have an advisor of their choice.
 - Campus will provide if either party does not have their own.

Education and Training

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must be made publically available on the college or university's website.

Document Retention

- 7 years.



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LAWS AND POLICIES

Title IX of Educational Amendments

- **Title IX:** Title IX responsibilities to address allegations of sexual harassment, how to conduct Title IX investigations, information on the link between alcohol and drug abuse and sexual harassment and violence and best practices to address those concerns

VAWA

Name of the Law: Violence Against Women Act (VAWA)

Why it matters: The Violence Against Women Act creates and supports comprehensive, cost effective responses to domestic violence, sexual assault, dating violence and stalking. Up for renewal every five years, each VAWA reauthorization builds on existing protections and programs to better meet survivors needs.

When it passed: 1994, reauthorized last 2022

-NNEDV

THE CLERY ACT

Name of the law: Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (Clery) Act

Why it matters: The *Clery Act* requires greater transparency and timely warnings from colleges and universities about crimes that are committed on campus, including crimes of sexual violence.

When it passed: 1990; most recently amended by Campus SaVE Act in 2013.

The *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act*, or the *Clery Act*, requires public and private colleges and universities to disclose information about certain crimes that occur on or near campus. The Act applies to all colleges and universities that receive any federal funding, including student financial aid.

RAINN

AMENDMENTS TO THE CLERY ACT:

Campus SaVE ACT

On October 20, 2014 the Department of Education published the VAWA regulations which imposed expanded obligations on colleges and universities, effective July 1, 2015:

- Additional crimes of domestic violence, dating violence and stalking are added to the Clery Act
- Institutions must adopt policy statements regarding sexual assault, domestic violence, dating violence and stalking which must include: educational programs for new students and employees, ongoing prevention programs, reporting procedures, institutional disciplinary procedures
- Institutions must address how they complete publicly available record-keeping while still maintaining the confidentiality of those who choose to report a violation
- Updates to reporting obligations

Minn. Stat. 135A.15

- Requires colleges and universities to have an online reporting system (must accommodate anonymous complaints)
- Requires **annual training** for campus administrators responsible for investigating or adjudicating complaints on sexual assault or persons responsible for responding to reports of sexual assault—including investigators and decisionmakers

Minnesota State Colleges & Universities

- 1B.1 – Covers Sexual Harassment and Other Protected Class Harassment and Discrimination
- 1B.1.1 – Includes the procedures for investigating and adjudicating 1B.1 and 1B.3 cases
- 1B.3 – Covers Sexual Violence and other forms of sexual discrimination
- 1B.3.1 – Includes procedures for investigating and adjudicating Title IX sexual harassment cases

Minnesota State's 1B.1 Policy on Equal Opportunity & Nondiscrimination in Employment & Education

The 1B.1 Policy addresses:

- Equal opportunity for students and staff
- Nondiscrimination
- Harassment
- Discrimination
- Protected Class
- Sexual harassment
- Retaliation

Minnesota State's 1B.3 Policy on Sexual Violence

The 1B.3 Sexual Violence Policy addresses:

- Affirmative Consent
- Sexual Violence
 - Dating, intimate partner, and relationship violence
 - Non-forcible sex acts
 - Sexual Assault
 - Stalking



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FORMS OF SEXUAL DISCRIMINATION

Title IX Sexual Harassment

- An employee of the college or university conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the college or university's education program or activity; or
- Sexual assault; dating, intimate partner, and relationship violence; and stalking as defined in Board Policy 1B.3

Sexual Harassment

- **Quid Pro Quo**
 - Can only be carried out by a teacher, administrator, or staff member
- **Two factors:**
 1. Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; and
 2. Submission to, or rejection of, such conduct results in adverse educational or employment action

Sexual Harassment

TO CONSTITUTE SEXUAL HARASSMENT, THE CONDUCT:

- DOES NOT have to include an intent to harm
- DOES NOT need to involve repeated incidents
- DOES NOT need to be directed at a specific target
- DOES NOT have to be by a member of the opposite sex

Sexual Harassment

Hostile Environment

- Occurs when harassment is sufficiently severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the college's or university's education program or activity
- Can be created by instructors/faculty, administrators, staff members, other students
- Can occur off campus

Stalking

- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E-mails
- Social media use
- Showing up at a location

Relationship/Dating Violence

- Physical harm or abuse
- Threats of physical harm or abuse

Retaliation

- Occurs when an adverse educational action is taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct

Know the Policies

Why is this important to an investigation?

-It helps you determine if an investigation is appropriate

- *Who does the policy apply to?

- *What do the terms refer to?

-It helps you frame the ultimate investigative questions in issue

-You understand the elements of a claim

-You have time to seek guidance, if needed

-You prepare for and conduct thorough interviews and minimize any unnecessary re-interviews

-You provide the decisionmaker with necessary information to make a decision

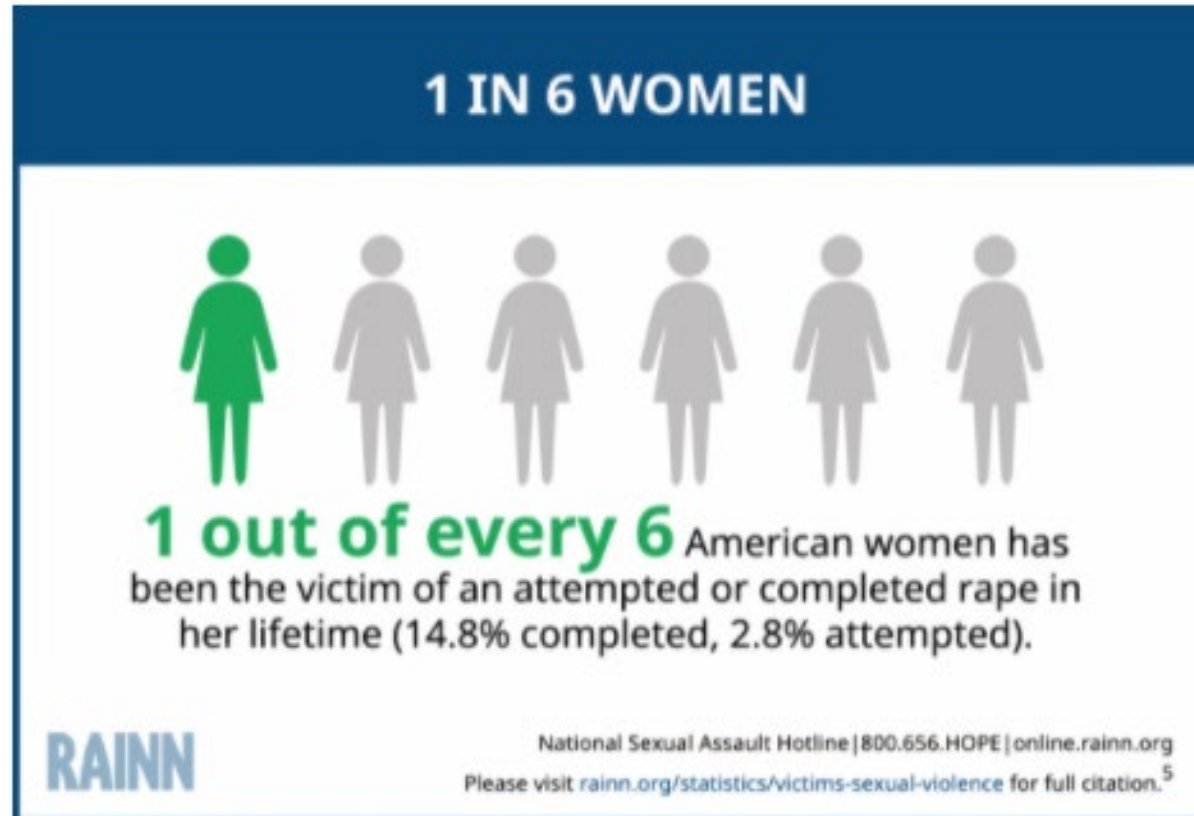




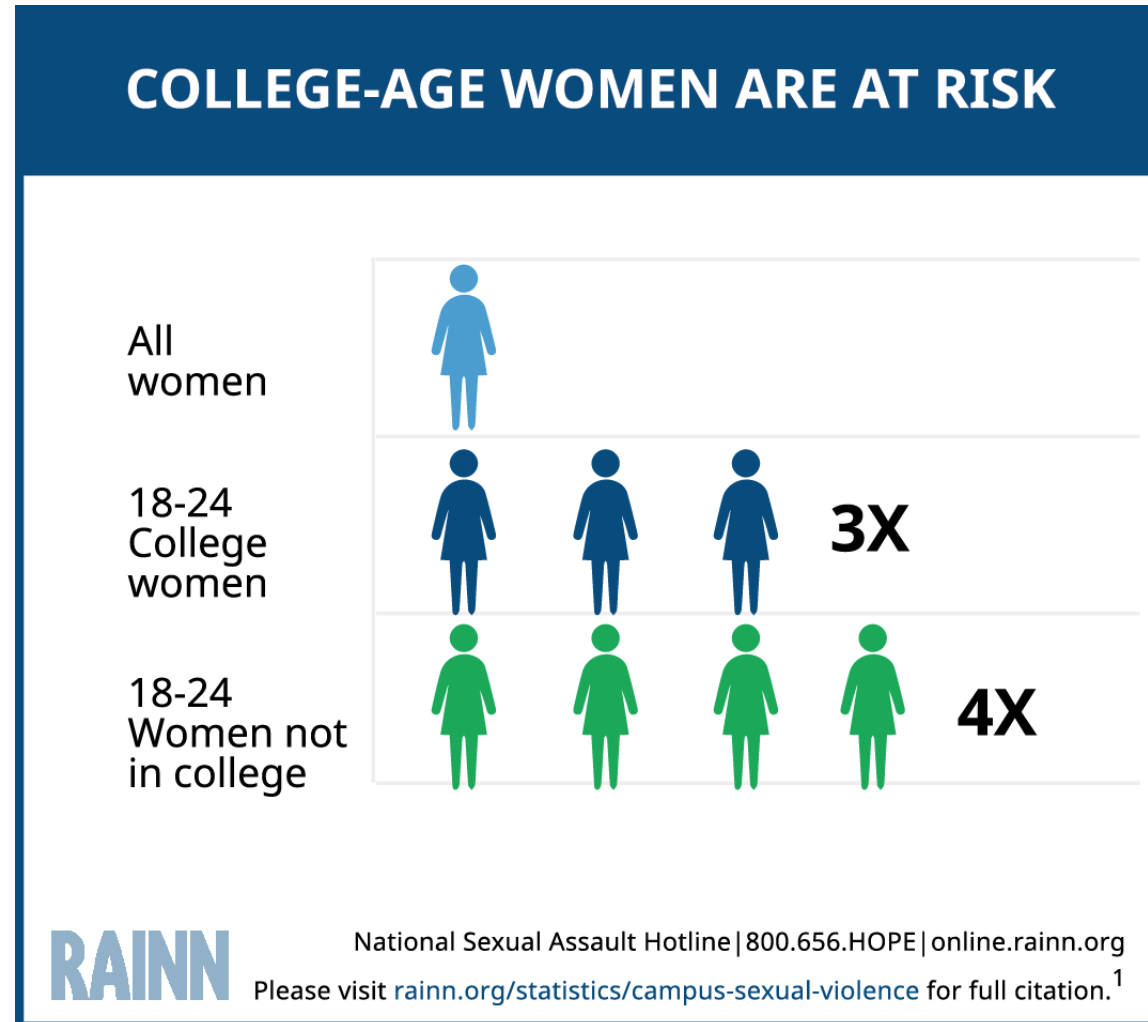
MINNESOTA STATE

Prevalence of Sexual Violence

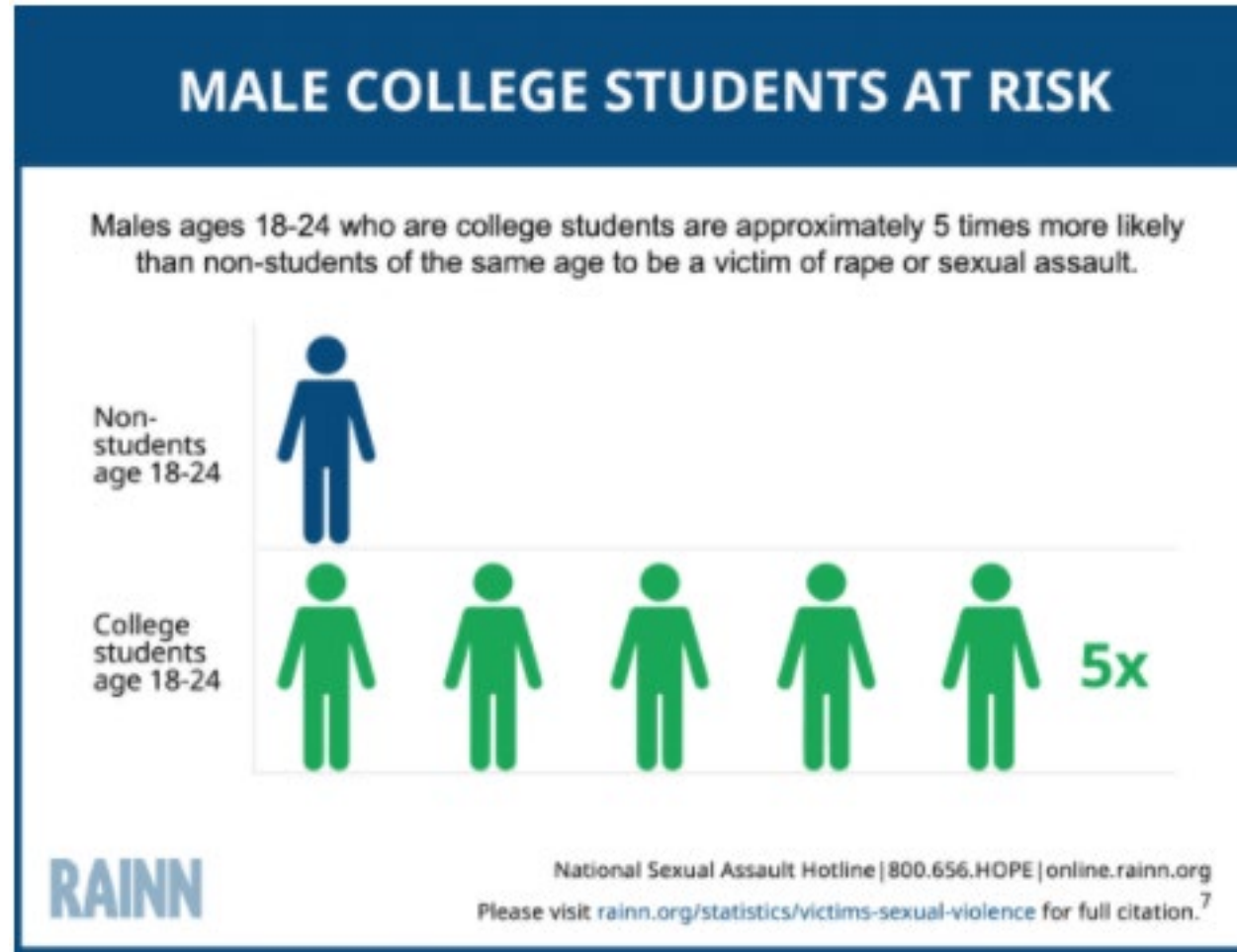
THE ISSUE OF SEXUAL ASSAULT: women



THE ISSUE OF SEXUAL ASSAULT: college-age women



THE ISSUE OF SEXUAL ASSAULT: college men



THE ISSUE OF SEXUAL ASSAULT: students

- 13% of all students experience rape or sexual assault through physical force, violence, or incapacitation (among all graduate and undergraduate students).
- 21% of TGQN (transgender, genderqueer, nonconforming) college students have been sexually assaulted, compared to 18% of non-TGQN females, and 4% of non-TGQN males.
- Among graduate and professional students, 9.7% of females and 2.5% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- Among undergraduate students, 26.4% of females and 6.8% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- 5.8% of students have experienced stalking since entering college.

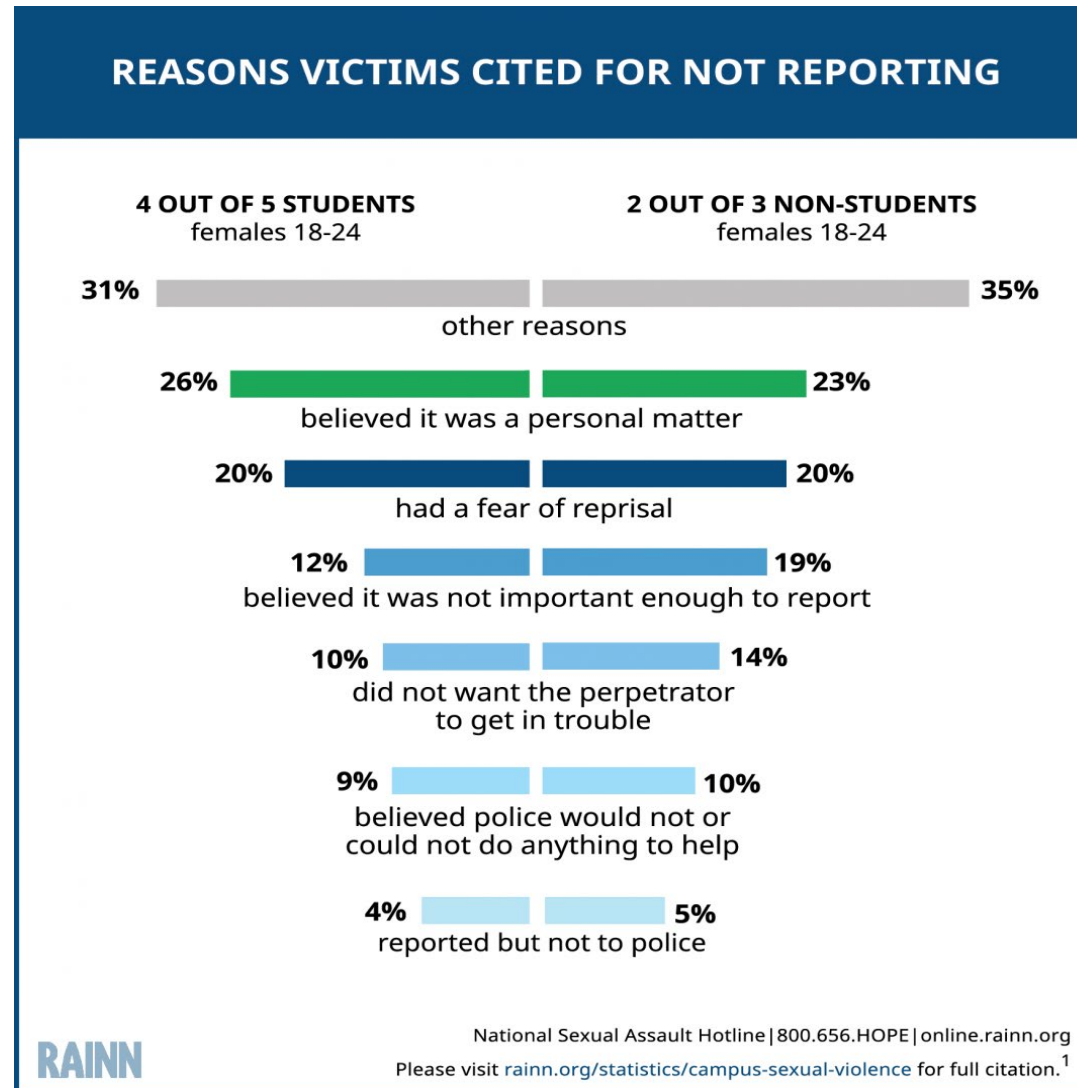
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THE ISSUE OF SEXUAL ASSAULT

- More than 50% of college sexual assaults occur in either August, September, October, or November.
- Freshmen and sophomores are at greater risk than upperclassmen (“red zone” during their first few months of their first and second semesters in college)
- 60% of sexual assaults of college students occurred on campus
- 10.3% took place in a fraternity
- 70% of females assaulted on campus knew their attacker
- Students with disabilities experience assault 50% more frequently than students without disabilities
- Sexual assault victim/survivors are more likely to suffer from depression and/or post-traumatic stress disorder, abuse alcohol and drugs, and/or contemplate suicide

RAINN

REPORTING SEXUAL VIOLENCE



Bias in Sexual Violence Investigations

Title IX requires a college or university to conduct a “prompt, thorough and impartial inquiry.”

Bias is defined as “to feel or show inclination or prejudice for or against someone or something.”

Investigator-Specific Biases

- Complainant/Respondent is likeable/sympathetic
- Complainant/Respondent is not likeable/sympathetic
- Repeat Complainant/Respondent
- Fact pattern similar to a prior, unrelated investigation
- Complainant/Respondent behavior patterns

Cultural Considerations

- Communication styles
- Attitudes toward conflict
- Approaches toward completing tasks
- Decision-making styles
- Approaches to knowing
- Attitudes toward disclosure
 - Appropriate to share emotions, reasons for conflict

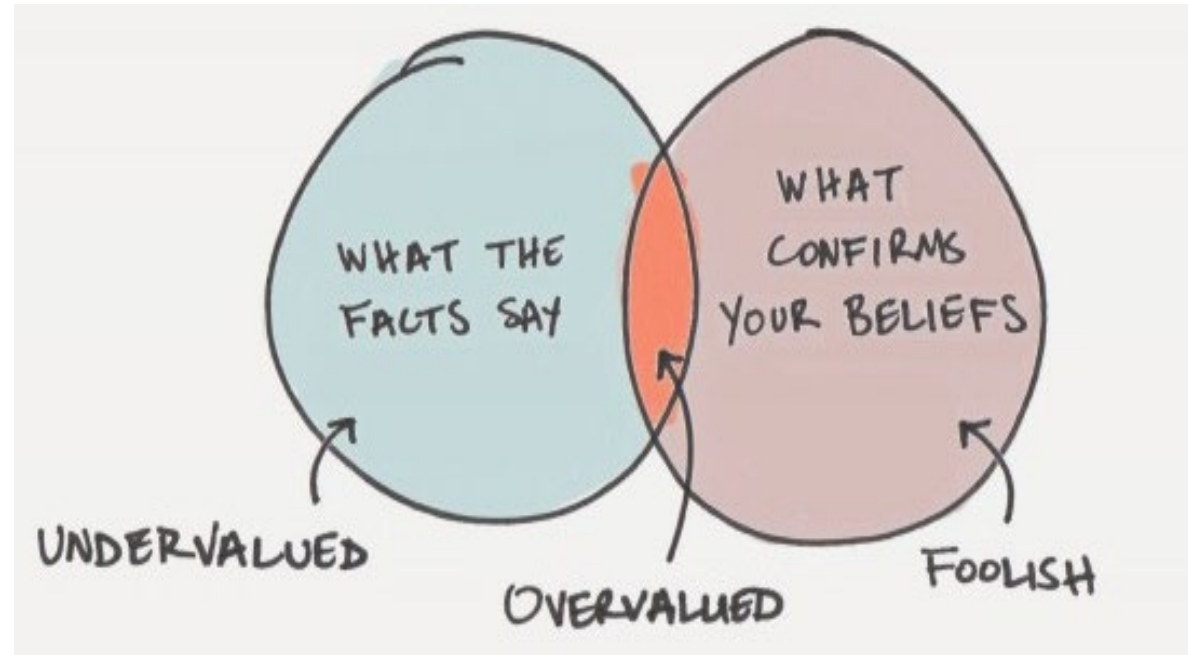
--Sue Ann Van Dermyden, 2017

Investigation Impact

- Establishing rapport
- Language may need to be altered
- Storytelling style may need to be accommodated
 - Linear versus circular styles
- Recognize ethnocentric behaviors
 - Assumption that own culture is “right” while others are “wrong”
- Avoid stereotyping and assumptions

--Sue Ann Van Dermyden, 2017

Confirmation Bias



--JamesClear.com

What other role might bias play in an Investigation?

- Priming – Your pre-investigation or mid-investigation thoughts about the case
 - “This is a really bad case.”
 - “This person has complained three times before.”
 - “This is low level.”
- Phrasing – The way you ask a question can influence the answer – The misinformation effect
 - Do you get headaches frequently, and if so, how often? 2.2/week
 - Do you get headaches occasionally, and if so, how often? 0.7/week
 - How long was the movie? 130 minutes
 - How short was the movie? 100 minutes

Headaches: Elizabeth Loftus (1975); Movie: Richard Harris (1973)

Sexual Violence Case Specific Biases

- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area and it is important not to intentionally or unintentionally cast your lens on the matters you investigate
 - Your own sexual experiences
 - Moral or religious views about sex
 - Comfort level in using terms – subject matter

Alcohol and Drug Use Biases

- You may have your own views on and experiences with:
 - Alcohol use
 - Drug use
- These things may have impacted your life

Rape Myth Acceptance

- Many studies have found that the higher the rape myth acceptance (stereotypical beliefs about rape), the more responsibility is attributed to the victim/survivor.
 - The victim/survivor wanted it
 - The person causing the harm didn't mean to
 - Clothing
 - Alcohol

Counterintuitive Behavior of Rape Victims

- Delay in reporting
- Change in account of what happened
- Unexpected demeanor/disposition
- Unexpected behavior
 - Contact with person who caused the harm
 - Resumption of normal routine
 - Subsequent sexual activity (sometimes with the person who caused the harm)

Significant Time Between Incident And Report

- The norm when the person causing the harm was not a stranger
- Many victim/survivors are able to report only after they receive the necessary support to do so
- Why do they wait? For many of the same reasons they later recant
 - They fear repercussions
 - They are pressured by others not to report
 - They feel shame, embarrassment
 - They are afraid of the person who caused the harm
 - They are afraid of not being believed
 - Fear that nothing will be done about it



Neurobiological Responses to Trauma

Why is this Important?

- Recognize what a victim/survivor goes through (physically and mentally) during an assault
- Understand how a victim/survivor's brain may process information during an assault
- Identify the effects trauma has on memory and a victim/survivor's ability to recall details of an assault (especially the way in which they are asked to do so)
- Identify reasons for varying behaviors and emotions in victim/survivors following assault

The Eight General Dimensions of Trauma

1. Threat to life or limb;
2. Severe physical harm or injury (including sexual assault);
3. Receipt of intentional injury or harm;
4. Exposure to the grotesque;
5. Violent, sudden loss of a loved one;
6. Witnessing or learning of violence to a loved one;
7. Learning of exposure to a noxious agent; and
8. Causing death or severe harm to another.

--Wilson & Sigman, 2000

Types of Trauma

- *Physical trauma;
- *Medical trauma;
- *Psychological trauma;
- *Social or Collective trauma;
- *Historical or Intergenerational trauma;
- *Immigration trauma;
- *Developmental trauma;
- *Ongoing, Chronic, and Enduring trauma; and
- *Vicarious or Secondary Trauma (“Compassion fatigue”)

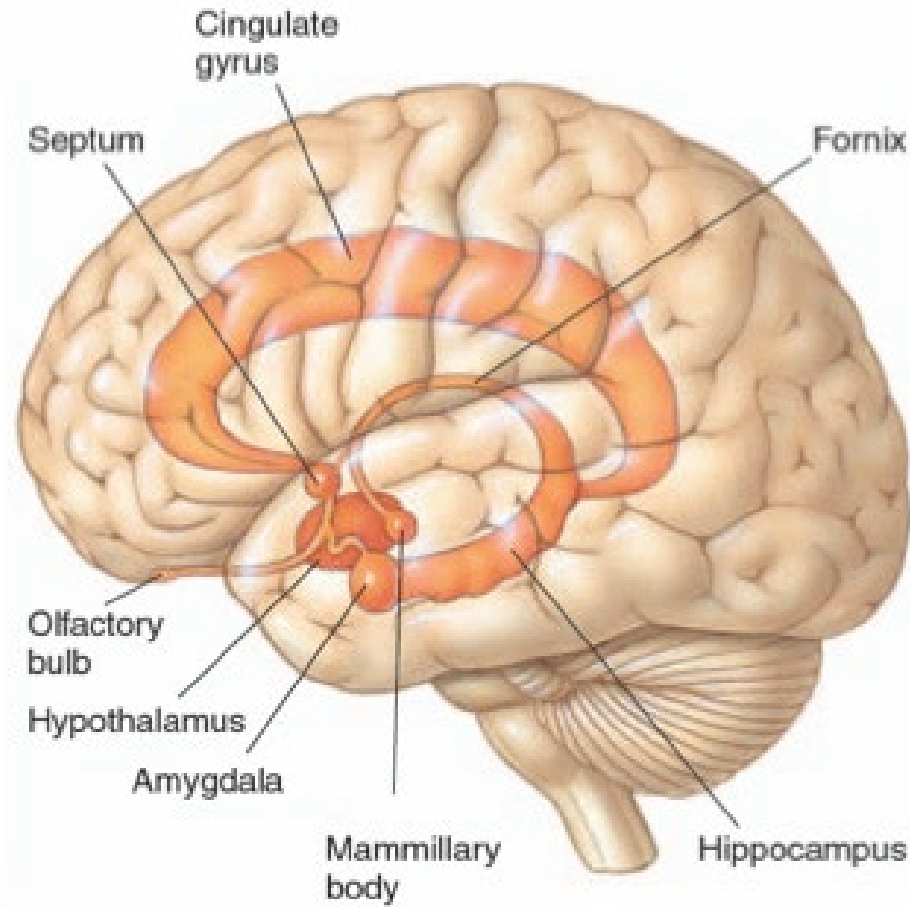
--Brenda Ingram, 2017

Examples of Traumatic Events

- Car accidents
- Surgery
- Child abuse
- Divorce for young children
- Community violence
- Sexual abuse and assault
- Domestic Violence
- Diagnosis of a terminal illness
- Suicide or murder of a loved one
- Earthquakes, tornadoes, natural disasters
- War
- Violent Crime

--Brenda Ingram, 2017

Neuroscience – The Limbic System



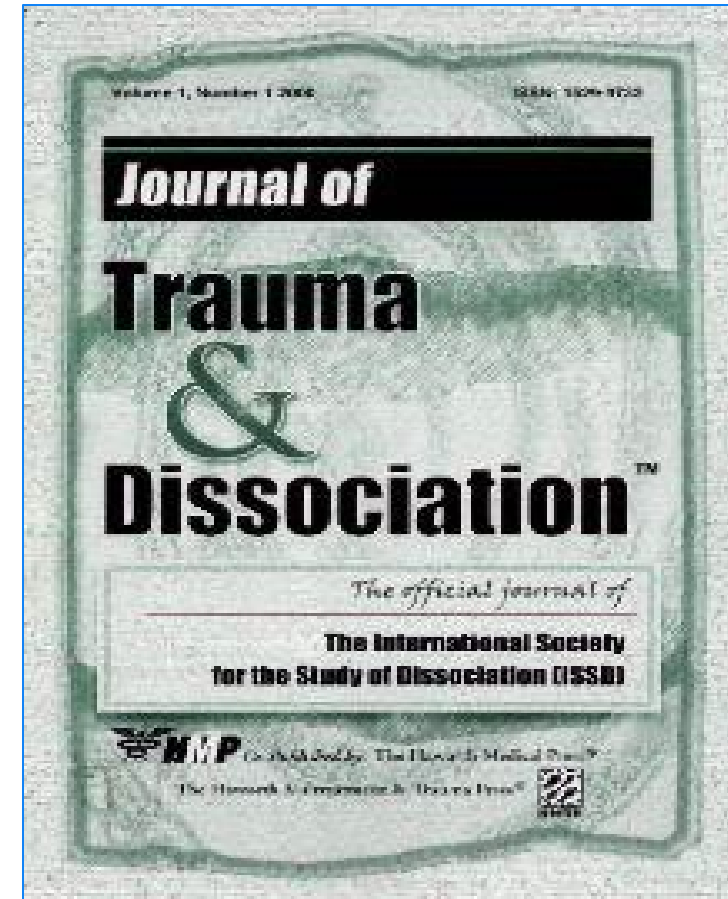
Responses of the Brain & Body During Trauma



- **Freeze**
 - Assess situation, avoid (more) attack
- **Flight and Fight**
 - Avoid (more) attack
- When ***flight*** is impossible & ***fight*** useless.....
 - **Dissociation**
 - Protect from overwhelming sensations & emotions
 - **Tonic Immobility**
 - Last ditch effort to avoid (more) attack – or at least survive

Dissociation

- Defense mechanism (of the brain) to protect against overwhelming sensations & emotions
 - Occurs automatically, without trying
- Portions (i.e., memories) of an experience that are normally linked together become “dis-associated”
- Examples (during & immediately following a trauma):
 - “Blacked out” or “spaced out” – in some way felt that I was not part of what was going on
 - What was happening seemed unreal to me – like I was in a dream or watching a movie or a play
 - Felt “disconnected” from my body



Tonic Immobility

- Uncontrollable response
- Mentally know what's happening but physically unable to move (like being awake during surgery)
- Rate of occurrence
 - 12 – 50% victim/survivors of rape experience tonic immobility during assault (most studies are closer to 50%)
 - It is more common in victim/survivors with prior history of sexual assault
 - Result of activation of memories of old assault plus stress hormones response activation related to new assault

Tonic Immobility (continued)

- Caused by:
 - Fear
 - Physical restriction
 - “Perceived” inability to escape
- Occurs suddenly
 - Usually after a failed struggle (escape response)
- Can end suddenly
 - Followed by more struggle or efforts to escape
- Can last from seconds to hours

Memory Fragmentation

- Memory recall can be very slow and difficult (or not possible)
 - Memories are “fragmented” – they come only in bits and pieces (often do not follow a timeline)
 - Process can be very frazzling and frustrating for victims

Traumatic responses can alter...

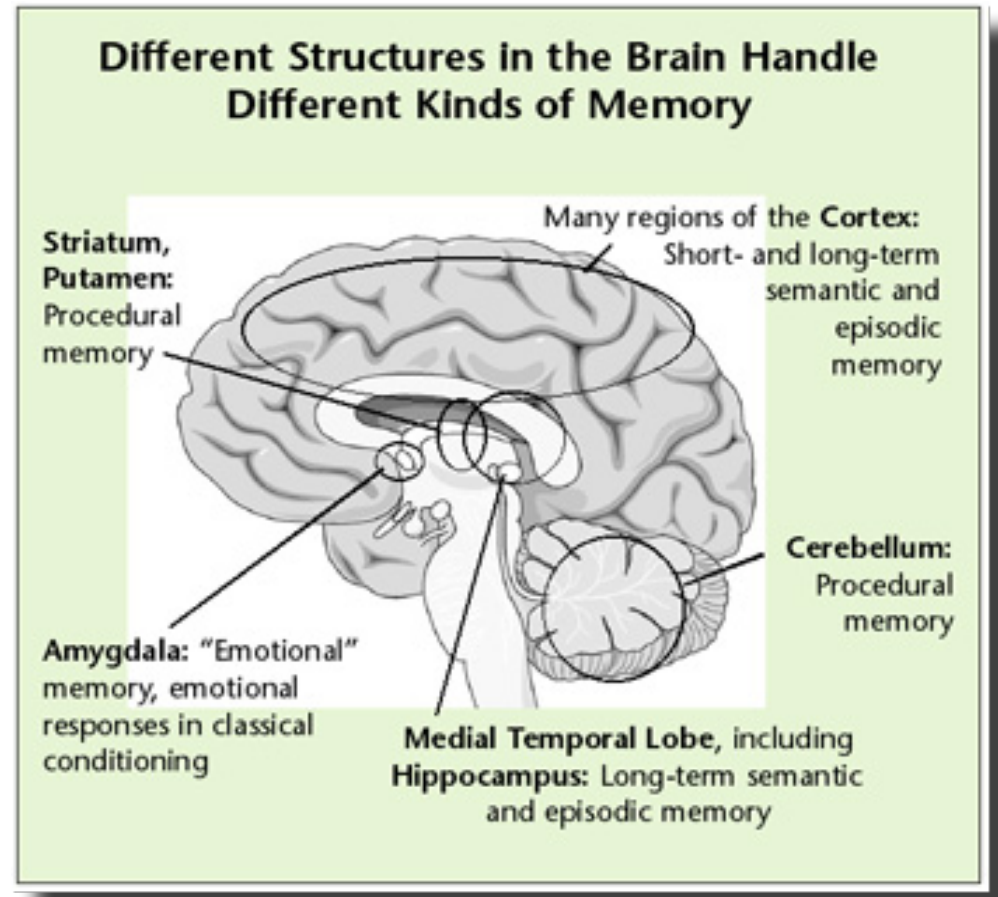
- Physiology
 - Heart rate, respirations, dilated pupils, dry mouth, knot in the stomach
- Affective (mood and emotion) responses
 - Fear, helplessness, horror
- Cognitive (thought) processing
 - Memory – fragmented, out of sequence
 - Time distortion
 - Increased confabulation
 - Trauma memory and recall

Trauma and Memory: what we know

- The body and brain react to and record trauma in a different way than we believed traditionally
- Many professionals were trained to believe that even when a person experiences a traumatic event, the pre-frontal cortex records the vast majority of the event including: Who, What, When, Where, Why, and How

[The Forensic Experiential Trauma Interview](#), Strand & Heitman

Trauma and Memory: brain diagram

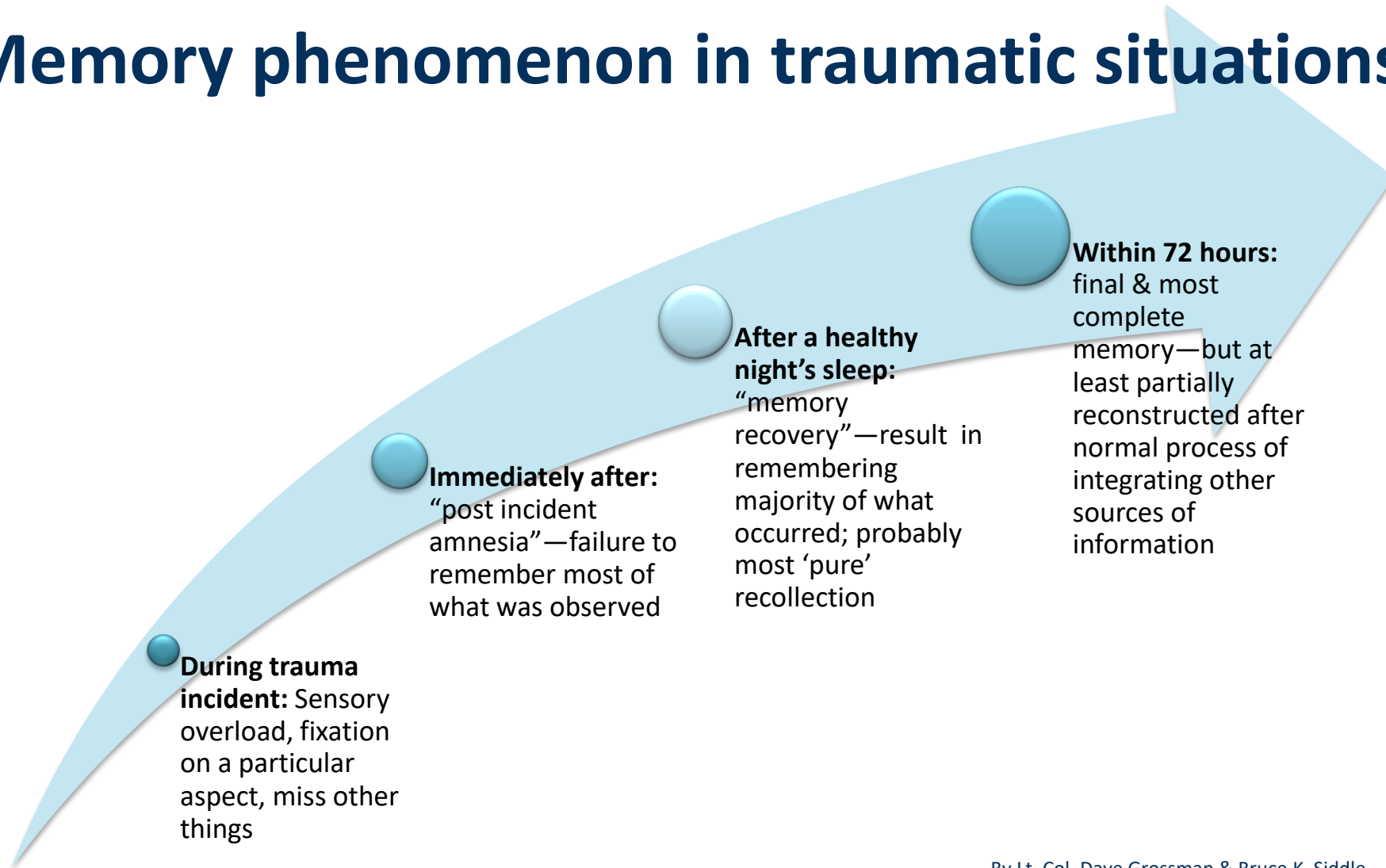


Trauma and Memory: research

- Most trauma victims are not able to accurately provide detailed information, but when asked to do so often inadvertently provide inaccurate information and details which frequently causes the fact finder to become suspicious of the information provided
- Inconsistent statements are often thought of as red flags – especially in the criminal justice system—however, research shows this is not a reliable assumption when stress and trauma impact memory

--Strand, 2013

Memory phenomenon in traumatic situations



By Lt. Col. Dave Grossman & Bruce K. Siddle

The Firearms Instructor: The Official Journal of the International Association of Law Enforcement

Firearms Instructors

Issue 31 / Aug 2001

Common Victim/Survivor Behaviors to Consider

- May be trying to protect others – physically, psychologically
- May feel pressure from the person causing harm or others
- May actually feel safer maintaining the relationship
- May have some emotional/physical attachment with the person causing harm
- May still be under the influence or manipulation and control of the person causing harm
- May be worried about collateral misconduct – perceived or real

Trauma and Memory: applying science

- One of the mantras within the criminal justice system is “inconsistent statements equal a lie.”
- Nothing could be further from the truth when stress and trauma impact memory, research shows.
- In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.

--Strand, 2013

The Impact of Trauma on Victim/Survivor Behavior

- The effects of trauma can influence behavior of a victim/survivor during an interview
- People are often reluctant to recall experiences that evoke negative feelings and emotions such as anger, fear, humiliation, or sadness

--Strand, 2013

The Impact of Trauma: Interviewer Considerations

- Interviewers should be familiar with the signs of trauma and not assume the victim/survivor is evading the truth.
- Memory loss, lack of focus, emotional reactivity, and multiple versions of a story can all be signs of trauma exhibited during interviews.
- For example, lack of linear memory is often a sign of trauma, so it may be helpful during initial interviews to ask, “What else happened?” instead of “What happened next?”

--Strand, 2013

The Impact of Trauma: Interviewer Considerations (continued)

- Environmental barriers such as the layout of the room, the length of the interview, and the comfort of the interview room are also factors to consider.
- Privacy and security may be a large concern for people who have just experienced something traumatic; therefore, the interview room should be a quiet area.

--Strand, 2013

The Impact of Trauma: Cultural Considerations

- Cultural and language needs must be ascertained and reasonably accommodated to avoid shutdown due to culturally offensive or inappropriate approaches.
- Be aware of cultural considerations of gender, subject matter, and narrative style.
- Some cultures reveal a story in a circular rather than linear manner.

--Strand, 2013

Trauma-Informed Interviewing

A Forensic Interview

A forensic interview is:

- Non-leading
- Victim/survivor sensitive
- Victim/survivor centered
- Neutral and
- Developmentally appropriate that helps investigators determine what happened

--Strand, 2013

The Science of Forensic Interviewing

- The goals of a forensic interview are to minimize any potential trauma to the victim/survivor, maximize information obtained from the victim/survivor and witnesses, reduce contamination of the victim/survivor's memory of the alleged event(s), and maintain the integrity of the investigative process.
- The Forensic Experiential Trauma Interviewing (FETI) approach is a trauma-informed interviewing approach.

--Strand, 2013

Initial Meeting with Complainant

- Information on Retaliation
- Request for Confidentiality or to Not Pursue Complaint
- Transparency in the process and its limitations
- Clear information about the school's complaint resolution process versus law enforcement's process and information/options about both

Initiating the Interview

- Creating expectations
 - Timeline
 - Safe and comfortable location
 - Explanation of role as a fact finder
 - Explanation of need to ask a range of questions
 - Recognition of awkwardness
- Determine who accompanying complainant
- Openness to questions at any time throughout the investigation

The central investigative question

- What is the issue you are attempting to determine in your investigation?
- For instance:
 - Did Robert engage in forcible, non-consensual sexual intercourse with Susan in violation of Minnesota State's 1B.3 policy?
 - Did Sarah intentionally and without consent touch Robert's genital area in violation of Minnesota State's 1B.3 Policy?
 - Did Professor Smith engage in stalking Professor Johnson in violation of Minnesota State's 1B.3 policy?

Information You Should Obtain During the Course of the Interview

- Description of the complainant's behavior and relationship with the respondent
- Description of the respondent's behavior
- Documentation of the specific incidents or acts committed and whether they were repeated
- Establish whether or not there was consent
- Establish whether there was force or threat of force

Interviewing

First, do no harm...

Any possible efforts should always be made to minimize potential further trauma to the complainant.

Trauma Informed Interviewing

- Most investigators and decisionmakers believe when a victim/survivor experiences trauma, the brain records most of the event including the “Who, What, Where, Why, When and How,” as well as other details of the event
- Most investigators are trained to obtain this type of information in interviews with victim/survivors
- High-stress situations can result in a trauma response on the part of the victim

Source: http://www.army.mil/article/72055/Army_expert_receives_national_recognition_for_combating_sexual_assault

How Does Trauma Informed Interviewing Work?

- Start with one basic, open-ended question
 - What are you **able** to tell me about your experience?
(in your own words)
 - Just let them talk (ask clarifying questions later)

Avoid “why” questions

- Interpreted as blaming
- Fear of being blamed is a huge part of why victims do not seek help
- Victims are easily re-traumatized by healthcare personnel, LE, prosecution, and loved ones

Examples:

- Why did you go with him?
- Why didn't you scream”
- Why didn't you kick him in the --- --?
- Why did you wait so long to come forward?

Trauma Informed Interview Considerations

- Engage victim in recalling memories from the event based on their personal experience and their senses
 - What was your thought process during this experience?
 - What are you *able* to remember about.....the 5 senses?



The Forensic Experiential Trauma Interview (FETI), Russell W. Strand & Lori D. Heitman

Continuing the Trauma Informed Interview

- Gather information about the victim/survivor's reactions during and as a result of experience
 - What were your reactions to this experience?
 - Physically...
 - Emotionally...
 - Ask them to describe and recall as many memories as possible
 - Give them time
 - Try to avoid probing them with additional follow-up questions at this point
 - What was the most difficult part of this experience for you?
 - What, if anything, can't you forget about this experience?

Finalizing the Interview

- Clarify any information and details gathered during interview
 - This step is completed only *AFTER facilitating* all you can about the victim/survivor’s “experience”
 - “Can you tell me more about....”

--The Forensic Experiential Trauma Interview (FETI), Russell W. Strand & Lori D. Heitman

Concluding of the Interview

- Thank the complainant for bringing the issue forward
- Give them your contact information in case they remember anything
- Explain future procedures and timeline
- Explain retaliation policy and procedure for reporting

Evidence – comprehensive investigation

- Your main goals:
 - Gather all facts the complainant is able to provide about their experience and try to understand the context
 - *Show* that you gathered all the facts from every avenue – even if you do not think it will change the outcome! *Why?* **Your investigation will be highly scrutinized!**

Other Witnesses

- Locate any witness who may have been around the complainant or the respondent before, during, after - try to document all interactions between respondent and complainant from any witness who saw/heard the interactions.
- Someone may have noticed level of intoxication, etc.

Other Witnesses (continued)

- Since in many instances only two people saw the actual sexual assault take place, sexual assault cases allow for testimony from a broad definition of witnesses
- “Ear” witnesses – overhearing corroborative statements made by the complainant or the respondent to each other, before, during, or after the alleged assault

Chain of Disclosure Witnesses

- Interview the disclosure witnesses – what did the complainant tell to others in the first hours/days after the assault?
- These are *invaluable* witnesses for the investigation – show the “unfolding” of the complainant’s disclosures to friends/family.
- Often these people helped the complainant decide to make a complaint
- How did the respondent describe to friends or acquaintances what took place between themselves and the complainant?

Documentary Evidence

- Text messages
- Videos/Photographs
- Social media
- Emails
- Uber receipts
- Key card swipe records
- Police report
- SART exam, medical records

Affirmative Consent

Affirmative Consent – 1B.3 Policy Language

What is Affirmative Consent?

- Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions**.
- A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent. Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.

Who has the responsibility to obtain affirmative consent?

- It is the responsibility of the person who wants to engage in sexual activity to ensure that the other person has consented to engage in the sexual activity.

Can affirmative consent be revoked?

- Consent must be present throughout the entire sexual activity and can be revoked at any time. If coercion, intimidation, threats, and/or physical force are used, there is no consent.

Who cannot give affirmative consent?

- If the complainant is mentally or physically incapacitated or impaired so that the complainant cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes conditions due to alcohol or drug consumption, or being asleep or unconscious.



MINNESOTA STATE

Intoxication versus Incapacitation

Incapacitation is ...

- A state where a person cannot make an informed and rational decision to engage in sexual activity.
- A person who was incapacitated due to the influence of drugs, alcohol, and/or medication and could not understand the fact, nature or extent of the sexual activity.

Determining Incapacitation

- Incapacitation is a **subjective determination** made in light of all the facts available.
- Why is it a subjective determination? Because people reach incapacitation in different ways and as a result of different stimuli (e.g., alcohol, marijuana, substance interaction with medication, etc.). They also exhibit incapacity in different ways.

What is the investigator evaluating?

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.

Areas of Inquiry

- Body weight, height and size;
- Tolerance for alcohol and other drugs;
- Gender
- Amount, pace and type of alcohol or other drugs consumed
- Signs of intoxication
- Food and non-alcoholic drinks

Incapacitation Analysis: Evaluation

- Evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs impacts an individual's:
 - Decision-making ability
 - Awareness of consequences
 - Ability to make informed judgments; or
 - Capacity to appreciate the nature and the quality of the act.

Occidental College Policy

Incapacitation Analysis

- Incapacitation is a very high bar
- You can be very intoxicated and still not incapacitated

--Keith Rohman, 2017

Assessment of Incapacitation: Obvious Indicators

- Obvious indicators
 - Physically helpless?
 - Difficulty with motor skills, like walking
 - Unable to communicate?
 - Cannot communicate consent to sexual activity
 - Cannot communicate unwillingness to engage in sexual activity

--Keith Rohman, 2017

Assessment of Incapacitation: Other Indicators

- Other indicators:
 - Does the person know where they are or how they got there?
 - Did the person do things in public that were out of character?
 - Possible memory blackout
 - Cannot verbalize coherently
 - Bizarre or risky action

--Keith Rohman, 2017

Assessment of Incapacitation: Counter-Indicators

- Counter-indicators
 - Stops to use or request birth control
 - Stops to do things to prepare for sexual activity
 - Brushes teeth after vomiting
 - Goes to the bathroom
 - Carefully removes clothing
 - Carries on relatively normal conversations
 - Motor abilities are not impaired

--Keith Rohman, 2017

Assessment of Knowledge

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the Respondent knew or reasonably should have known that the Complainant was unable to consent to the sexual activity.

--Keith Rohman, 2017

Assessment of Knowledge: Respondent

- Respondent observed Complainant asleep or unconscious
- Respondent observed Complainant unable to communicate due to physical or mental condition
- Respondent observed Complainant ingest alcohol and/or drugs, rate of ingestion, time of consumption
- Respondent observed Complainant's physical and verbal behaviors
- Respondent was told about the amount of alcohol and/or drugs Complainant ingested
- Respondent's actions like assisting Complainant after Complainant threw up
- Respondent's comments to others about Complainant's state

--Keith Rohman, 2017

Incapacitation Analysis: Questions

- 1. What is the evidence that the complainant was under the influence of alcohol and/or drugs?
- 2. Did the alcohol and/or drugs cause the complainant to be incapacitated?
- 3. What did the respondent know, or what should the respondent have known, about the complainant's level of intoxication and/or incapacitation?

Assessing Credibility

What is CREDIBILITY?

- Credibility is about the believability of a party or witness (sometimes about a piece of evidence)
- It is an assessment of the evidence/facts using a set of factors as tools
- **Caution:** We are investigating on a preponderance of the evidence standard. It is important to acknowledge how this is different from determining the truth or who is lying. Even a criminal standard—beyond a reasonable doubt, which is much higher does not purport to determine the truth. Including the words truth, lie, or variations, is a misnomer and clouds the standard we are applying.

When and Why USE CREDIBILITY

- EVERY investigation requires a credibility assessment – the length and depth of that assessment varies based on other factors in the investigation
- Why?
 - Demonstrates the investigator's impartiality
 - Ensures the investigator knows the case in detail
 - Provides extra information/added value for the decisionmaker
 - Creates a stronger report

Comprehensive Consideration

- Put every credibility factor in your report template.
 - Corroboration/Lack of Corroboration
 - Consistency/Lack of Consistency
 - Actual Knowledge
 - Inherent Plausibility
 - Motive to Falsify
 - Material Omission
 - Past Record
- Consider each factor as you work through the evidence collected.
- Delete the ones that do not apply.

--Sue Ann Van Dermyden, 2017

Corroboration

- Is there testimony from a party or witness, or a piece of physical or documentary evidence that corroborates the party's or witness' testimony? Did the party or witness contemporaneously document or report the incident(s) in some way?
- What to do in party said versus party said situations? Is corroboration required? Can there be a preponderance of the evidence without corroboration?

Consistency

- Is there party or witness testimony or physical evidence that is consistent with the party's or witness' testimony?
- Example: Complainant said he and Respondent went to a party at ABC House around 9 p.m. Friday night. Respondent said she went to a party with Complainant and Witness B on Friday night. There is an Uber receipt confirming a ride from the address of the party to Witness B's apartment.

Actual Knowledge

- The extend of the interviewee's opportunity to perceive matters about which they testified.

Inherent Plausibility

- Is the testimony believable on its face? Does it make sense?

Inconsistent Statements in a Trauma Environment

- Recall Trauma Effects
 - Memory loss, lack of focus, emotional reactivity, lack of accurate and detailed information, non-linear stories, and multiple versions of a story can all be signs of trauma
 - Trauma victims may have an interrupted memory process
 - Trauma victims reluctant to recall experiences that evoke negative feelings
 - Lack of linear memory is often a sign of trauma

--Brenda Ingram and Sue Ann Van Dermyden, 2017

Trauma effects continued

- Inconsistency by trauma victim is the rule
- The more confused the victim, the more likely they experienced trauma
- Additive stories with more details over time does not harm credibility
- Inconsistent statements do not equal a lie
- Wildly varying stories more challenging
- Weigh material vs. immaterial inconsistencies appropriately

--Brenda Ingram and Sue Ann Van Dermyden, 2017

Additional factors

- **Motive to falsify.** Did the person have a reason to lie? Does the person have a bias, interest, or other motive? Consider relationships, history, context.
- **Material omission.** Did a party omit a material piece of evidence, despite having a reasonable opportunity to provide it?
- **Past record.** Does the Respondent have a history of similar behavior in the past? Does the Complainant have a relevant history?

--Sue Ann Van Dermyden, 2017

Caution!

- Reputation. Does the interviewee have a reputation for honesty or veracity or their opposite?
- Attitude. Did the person cooperate when participating in the interview and/or providing information?
- Demeanor. Did the person seem to be telling the truth or lying (and why)?

--Sue Ann Van Dermyden, 2017

MINNESOTA STATE CONTACT INFORMATION

Office of Equity and Inclusion (OEI)

<http://www.minnstate.edu/system/equity/>

Office of General Counsel (OGC)

<http://www.minnstate.edu/system/ogc/>