



**THE DEADLY SINS
OF TITLE IX
INVESTIGATIONS**

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TABLE OF CONTENTS

Introduction.....	2
1. Failing to Understand and Use Trauma-Informed Investigations and Questioning.....	2
Understanding the Impact of Trauma on a Neurobiological, Physical, and Emotional Level	
Promoting Safety and Support	
Knowing Positive Ways to Respond that Avoid Retraumatization	
Providing Choice with a Goal of Empowerment	
2. Assessing Credibility Ineffectively or Improperly — “Don’t Lie to Me”.....	6
3. Allowing Ambiguity and Assumptions to Rule the Day Rather than Telling a Cogent Story of What Happened.....	9
It’s All in the Details	
4. Interpreting the Evidence to Match a Conclusion Rather than Letting the Evidence Lead to a Conclusion.....	10
5. Failing to “Show Your Work” or Gathering Facts without Analysis of Evidence and Credibility...12	
Determining Credibility and Showing Your Work	
Making the Finding	
6. Being Blind to Personal Biases.....	13
Step 1: Nurture an Attitude of Humility	
Step 2: Nurture Continuous Curiosity	
Step 3: Understand Microaggressions	
7. Failing to Treat the Investigation as a Hearing.....	16
Conclusion.....	18
References.....	19
About the Authors.....	20

INTRODUCTION

For 2016, ATIXA has chosen the topic: *The Seven Deadly Sins of Title IX Investigations*. While there are certainly more than seven fatal mistakes, we honed in on what we feel are among the most common, as well as the most problematic. This whitepaper will address each in turn, provide context and guidance as to how to avoid these mistakes, and improve your policies and procedures to reflect best practices pertaining to civil rights investigations.

1. Failing to understand and use trauma-informed investigations and questioning.
2. Assessing credibility ineffectively or improperly — “Don’t Lie to Me.”
3. Allowing ambiguity and assumptions to rule the day rather than telling a cogent story of what happened.
4. Interpreting the evidence to match a desired conclusion rather than letting the evidence lead you to a conclusion.
5. Failing to “Show Your Work,” or gathering facts without analysis of evidence and credibility.
6. Being blind to personal biases.
7. Failing to treat the investigation as a hearing.

1. FAILING TO UNDERSTAND AND USE TRAUMA-INFORMED INVESTIGATIONS AND QUESTIONING

4 COMPONENTS OF TRAUMA-INFORMED RESPONSE

1. *Understand the impact of trauma on a neurobiological, physical, and emotional level.*
2. *Promote safety and support.*
3. *Know positive ways to respond that avoid re-traumatization.*
4. *Provide choice with a goal of empowerment.*

Imagine that you meet with a reporting party in a sexual misconduct allegation for an initial investigative interview. You are aware that the report involves allegations of unwelcome sexual contact occurring two nights ago, and that both parties were using alcohol and possibly drugs. You wisely prepared for this interview by reviewing your school policy and outlining your questions.

When the reporting party, Kai, arrives, you start the interview by asking why Kai hasn’t reported this incident to the police, and suggest that would be a good idea. As Kai describes the incident, you jump in with clarifying questions, trying to drill down on the details and establish a timeline of the night. You are having difficulty understanding why Kai remembers some parts of the night so clearly, and other parts not at all, so you press Kai to fill in some of the gaps. Kai is unable to share a clear account of what happened, and you become concerned that Kai’s credibility may be an issue.

You learn that the reported incident took place in the restroom at a bar, and now you’re wondering why Kai didn’t ask someone for help or just leave. When you ask, Kai doesn’t really have an answer, so you make note of that. You also note that Kai doesn’t appear upset at all, but seems pretty distant and a bit put off, and that, too, strikes you as odd. After all, if this had just happened to you, you’d probably be crying and would be grateful that the school wanted to help. You certainly would have left the restroom and called the police.

You ask where the drugs came from, but Kai refuses to answer. You know it’s your job to be impartial as an investigator, but Kai’s demeanor and memory issues make a negative impression on you. At the conclusion of the interview, you thank Kai for meeting and say you’ll be in touch. You continue with your investigation. A week later, you contact Kai to schedule a

follow-up interview, but you don't receive a reply. Ultimately, you prepare your investigative report, noting your concerns about Kai's credibility and demeanor.

At first glance, it may seem that you did a sound job. After all, you got Kai in for an interview quickly and worked hard to establish a linear account of what occurred. In fact, you have utterly failed, and committed the first deadly sin. Your approach was not *trauma-informed*. Investigators must understand how trauma may impact reporting parties, and must be able to deploy trauma-informed investigations.

Individuals who have been exposed to an event that creates a real or perceived threat to life, safety, or sense of well-being and bodily integrity may experience the event as a trauma. Sexual violence, relationship violence, and stalking can all create this threat or sense of threat and various factors contribute to how and whether individuals experience trauma as a result. In addition to the nature and severity of the incident, contributing factors can include personality, resiliency, prior victimization, and the availability of a support system.

Recognizing the potential for trauma, federal guidance has increasingly emphasized that school officials responsible for campus resolution procedures should be trained on the effects of trauma and on how to administer a resolution process that is trauma-informed. In its 2014 guidance, the U.S. Department of Education's Office for Civil Rights indicated that all persons involved in implementing a school's grievance procedures should have training or experience in the effects of trauma, including neurobiological change.

“Recognizing the potential for trauma, federal guidance has increasingly emphasized that school officials responsible for campus resolution procedures should be trained on the effects of trauma and on how to administer a resolution process that is trauma-informed.”

As investigators, this paper's authors employ a trauma-informed interviewing style not only because we are required to, but because doing so helps us gather more complete and more reliable information from reporting parties. Interacting with reporting parties in a manner that demonstrates awareness of and sensitivity to the impact of trauma helps to create an interview environment where they are more likely to provide an unfiltered account of what occurred, including very personal and sometimes embarrassing details. In addition, experiencing trauma has counter-intuitive implications for how someone responds in the midst of a threatening event and following the event, and it is critical that we understand this.

Trauma-informed investigating and interviewing include the following key components: 1) understanding the impact of trauma on a neurological, physical, and emotional level; 2) promoting safety and support; 3) knowing positive ways to respond that avoid retraumatization; and 4) providing choice with a goal of empowerment. Each of these are covered here at length:

Understanding the Impact of Trauma on a Neurobiological, Physical, and Emotional Level

Investigators should have received training on the neurobiology of trauma; that is, on how the brain responds to trauma by releasing chemicals into the body in response to the actual or perceived threat. This chemical “surge” is autonomic, and can't be controlled. It impacts individuals' response to a perceived trauma in the moment, and may corrupt recall of the event. As a result of the chemical surge, the ability of reporting parties to fight or flee the threat is impacted, which is why we often hear descriptions of freezing and being unable to move during an assault. This is called tonic immobility. It is also critical to understand that the chemicals released

KEY POINTS

- » *The body responds to trauma or perceived trauma by releasing a surge of chemicals that can stay in the body for up to 96 hours.*
- » *Questioning about a traumatic event can reactivate this neurobiological response.*
- » *This surge of chemicals may help explain delays in reporting, unexpected emotional affect, non-linear accounts, and fragmented memories.*
- » *Giving reporting parties a couple of sleep cycles before interviewing them may help by allowing time for the chemicals in the body to subside.*

into the body may stay in the body for 96 hours, and a triggering event (such as your interview) can reactivate this response. The chemical surge may help explain why reporting parties' emotional state may seem counterintuitive. For example, if the brain responded to the trauma with a surge of opioids, it would result in a reporting party displaying a flat or even disinterested affect. Inappropriate laughing, conversely, can also be common. These responses can't be controlled, as they are the result of the body's defense mechanisms and whatever chemicals the brain decides to release, which are different for each person and circumstance.

It is also crucial to understand that the encoding and grouping of memories is negatively affected when individuals are experiencing a trauma. Because of this, we should anticipate non-linear accounts, with jumping around and fragmented memories. When we press reporting parties to fill in gaps, we actually may do a disservice by causing them to speculate about details they don't have, which can create credibility concerns later. It can take up to 200 days for the brain to retrieve and reorganize the information from a traumatic event into something cogent, which is one reason why there may be a delay in reporting. What's happened still isn't fully clear to the person it happened to. When alcohol is a factor, memory may be further impacted, and answers to narrow and detailed questions will be difficult for reporting parties to access. Attempting to do so may create additional stress. Key interview techniques that reflect the neurobiology of trauma include allowing for one or two sleep cycles prior to interviews, which may bolster the ability to connect memories, and using strategies that pull out fragmented memories, such as tapping into the senses of smell and sound.

Asking individuals what happened may be less effective than asking them how it made them feel, as the feelings may help to decode memories of what caused the emotions. Most importantly, investigators should be patient and recognize that recall can be slow and difficult as a result of how memories are consolidated in the brain, and pressing reporting parties may actually have a deleterious impact. If you are frustrated with gaps in reporting parties' accounts, or their inability to retrieve details, don't show it. They are likely frustrated as well, and won't understand why they can't recall.

We see many reports of drugging on campuses, yet drugging is a relatively rare occurrence. Naturally, survivors jump to this conclusion, though, when they can't otherwise explain the gaps in their memories. A truly cogent account of a recent incident from reporting parties is nearly impossible, but we also find that reporting parties are motivated to fill in gaps they recognize so that we don't doubt them, even if they aren't as sure of the details as they portray themselves. In one recent allegation, a reporting party asserted that she had said "no" six times during an incident. It's likely she said "no" repeatedly, but that she said it six times is much more likely gap-filling than actual recall.

Promoting Safety and Support

The Title IX coordinator should ensure that reporting parties are aware of sources of support such as counseling and advocacy, and should identify who is available to consult on a safety plan, if one is needed. Investigators have a hand in creating an interview environment that feels safe. One way to do this is to be cognizant of the interview setting by providing a comfortable space that affords privacy to reporting parties. For example, pay attention to their basic needs by having water, coffee/tea, and tissues available, and by making sure the room is a comfortable temperature. Consider having interviews in a neutral location that will not draw attention to reporting parties as they enter or exit. Making stress balls or stuffed animals easily available can make a huge difference, in our experience.

“At the outset, you should be clear about your role, the fact that you are impartial, and about what the school process can or cannot accomplish, while still conveying sensitivity and empathy for the fact that the reporting parties feel harmed or violated.”

You can also promote safety by building rapport and trust while still maintaining your impartiality. It is important for reporting parties to know who you are and what your role is. You should also spend some time getting to know them as individuals, and not just as victims. This can be as simple as learning about how they came to attend or work for the school. This isn't "small talk," but a sincere desire to connect with them before questioning. It is important to allow reporting parties to self-identify, so avoid assumptions about gender and sexual orientation.

Providing transparency and predictability also helps to promote safety. At the outset, you should be clear about your role, the fact that you are impartial, and about what the school process can or cannot accomplish, while still conveying sensitivity and empathy for the fact that the reporting parties feel harmed or violated. Be clear about what you can share and what you can't, and how often you'll communicate with them throughout the process. Bookend interviews by road mapping what happens next and how they wish to be contacted by you for updates. Keep them informed as the investigation progresses, if they desire that.

Knowing Positive Ways to Respond that Avoid Retraumatization

Negative or blaming responses can cause real damage to individuals who may have already been harmed, often causes reporting parties to shut down and, in some cases, drop out of your process. Avoid this by being strategic and transparent in your questioning. If you need to ask about alcohol and drug use, or about previous sexual encounters, explain why. Explain amnesty so that talking about alcohol/other drugs isn't a barrier. It is the job of investigators to think critically about allegations, which means asking for details, clarifying vague statements, and pushing back at times. When you ask challenging questions, communicate why you are doing so, and pay attention to your tone and facial expressions. Be strategic; always consider why you are asking a question. Questions that serve your curiosity but don't further an investigation should be avoided. Even if reporting parties are highly educated, ask questions in simple language, because while they are in crisis, they may struggle to follow more complicated language or compound questions.

Responding positively also means simply paying attention to the reporting parties. You should summarize what you think you heard them say and repeat it back. This demonstrates that you are listening and that you understood what was said. Also, pay attention to their nonverbal cues. If they are disengaging or becoming increasingly anxious, this may be sign that you need to slow down, take a break, or shift your line of questioning. If you trigger something inadvertently, back off or withdraw the question. You can always come back around to it later in a different way. If you have to ask something that is potentially triggering or blaming, own it and be transparent about it. Consider the least triggering way to ask. For example, if you suspect that a reporting party felt trapped, and you want to establish that for the record, you might ask, "Did you try to leave?" However, if the reporting party didn't try to leave, this can feel blaming. Instead, you might ask, "Can you recall what options you considered when he closed the door behind you?" This is a more neutral question and might get you the information you seek without the subtly blaming potential implications of that line of questioning.

Providing Choice with a Goal of Empowerment

Individuals who have experienced trauma feel they have lost control over the situation, and the ability to reestablish a degree of control is crucial for healing. Even reporting parties who appear

poised and collected may be internally dysregulated. This is one of the reasons we usually start interviews with broad-based, open-ended questions that provide individuals control over how they share their accounts. Questions like, “What can you tell me about what happened?” and “Where would you like to start?” leave reporting parties in control. When you need to follow up, soft-approach questions such as “Can you tell me more?” and “Can you help me understand?” are useful.

If they made what you think was a poor decision, they’re probably already thinking the same thing. That sense of self-blame won’t help you uncover the real facts, and you should try to help them past it. People can make poor choices and still be victimized. Worse, if you decide to point out poor decisions, you gain nothing and risk alienating the reporting parties. Be sensitive to the fact that although defining or labeling their experiences may ultimately be part of your job, doing so at the investigative phase takes control away from them.

If reporting parties choose not to report to the police, respect that as their choice. You might be able to give them amnesty for drug use, but the police may not. Finally, remember that if reporting parties request a delay in your process for some reason, you can often honor that, document it, and return to your investigation when they are ready to proceed.

2. ASSESSING CREDIBILITY INEFFECTIVELY OR IMPROPERLY — “DON’T LIE TO ME”

Credibility is the process of weighing the accuracy and veracity of evidence. To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence. When source, content, and plausibility are strong, credibility is strong. Credibility exists on a 100 percent point scale, with the most credible evidence being 100 percent, and the least credible being zero percent. Most evidence lies somewhere in between. A low credibility rating alone may not weight the scale sufficiently, as you are trying to determine whether the preponderance of the evidence standard has been met or not. Using the language of the preponderance standard as a means to evaluate credibility indicates that evidence that is less than 50 on the 100 point scale is less credible than more so. Evidence has to be more credible than not to weight the scale at all. If it helps, think of the scale to weight the credibility of all evidence as 0–100; however, the evidence you actually use is really weighed on a scale of 50.01–100, because evidence that falls below 50 carries little weight.

“When source, content, and plausibility are strong, credibility is strong.”

It is important to note that credibility and honesty are not identical constructs, and parties and witnesses can be generally honest, yet provide information that is lacking in credibility or vice versa. Investigators must figure out the impacts of lies, especially when credibility determinations can, on their own, be sufficient to establish that policy was violated. A single lie does not entirely destroy credibility, most of the time. We have to decide if the lie is isolated or enough to undermine the credibility of the interviewee in total. Another consideration is how crucial was the discredited information.

A decision can still be made that an incident occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the incident. Put another way, a preponderance can be established simply because you believe one party and not the other based on the assessment of the credibility of the parties and the evidence provided.

Some aspects of credibility are positional or locational. For example, could witnesses hear what they say they heard? See what they say they saw? Know what they claim to know? Some

aspects of credibility are based on credentials, knowledge, and/or expertise, but those factors need to be established, not assumed. Some aspects of credibility are weighted based on neutrality, impartiality, and objectivity. The more loyal witnesses are based on relationships to one party, the more biased their evidence *may* be. Neutral witnesses may be more objective than partisan witnesses and may therefore be more credible.

“Credibility is best established through corroboration, which is provided through sufficient independent evidence to support the facts at issue. Corroboration is not merely a second witness who agrees with the first witness, because for instance, they could be lying to support each other. Rather, it is evidentiary support for what a witness contends after evaluating source, content, and plausibility.”

Credibility is best established through corroboration, which is provided through sufficient independent evidence to support the facts at issue. Corroboration is not merely a second witness who agrees with the first witness, because for instance, they could be lying to support each other. Rather, it is evidentiary support for what a witness contends after evaluating source, content, and plausibility. Also, look for subtle bias of which witnesses may not even be aware, including victim-blaming attitudes, group defensiveness (e.g., within teams, organizations or departments), or whether the witnesses fear getting in trouble. Lack of proximity (in time or geography) detracts from credibility. What was seen in person is most valuable. What was heard from a responding party about an incident after the fact is less so. What was learned after the fact from the responding party’s best friend about what the responding party said to the alleged victim is even less so. (*See the hearsay analysis in Sin #5 for more information.*)

Credibility can also be assessed by triangulation, which means using two (or more) data points to extrapolate or infer that a third data point is more likely than other possibilities. If X and Y are true, Z is more likely to be true than A, B, or C. This is an example of what is known as abductive reasoning. Generally, avoid micro-expression analysis and gestic unless you are an expert and have discovered someone’s tell for deceit. Otherwise, crossed limbs, looking up to the right, and other so-called telltales are not evidence. Let’s explore credibility assessment in context to get a better feel for it. Following are a few key credibility issues in context:

- » The behavior continued after the responding party was informed that the behavior was unwelcome. If established, this would add credibility to the reporting party’s account as corroborative.
- » Major inconsistencies in testimony would likely detract from credibility. Minor inconsistencies usually would not detract from credibility, and may even be the result of trauma. Even lying is not a 100 percent credibility killer. We all lie. The job of investigators, as noted earlier, is to determine why someone is lying, or what the lie is about. Lying about alcohol consumption to avoid an alcohol violation does not prove or disprove an underlying interpersonal violence allegation.
- » A delay in reporting harassment does not detract from credibility. Individuals may delay reporting over fear of retaliation, because they don’t know or trust the policy, over fear of being blamed for causing the harassment or incident, not due to a lack of understanding that it was harassment, etc.
- » Changes in the behavior of a reporting party after an incident might add to credibility. For example, after being harassed, the reporting party cried, was upset, avoided class (or meetings, or certain areas), their academic performance deteriorated, etc.
- » However the absence of such changes does not mean that the allegation is not credible, only that the individual who complained perhaps has been affected differently, less intensely than others might, or does not express emotions openly. Similarly, the reporting party could be displaying the classic symptoms of traumatic response because that individual thinks that an incident happened, not because it did; or because

the person may want you to think that it happened, but it didn't. This is infrequent, but still must be accounted for by investigators.

- » Documents such as diaries, texts, emails, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility, but can also be manufactured after the fact. The adage, "Trust, but verify," applies, especially in the age of *www.iphonefaketext.com*.
- » Telling other people about the incident may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility or help investigators to identify that a trauma response is in play.
- » Other similar allegations about a responding party can add to credibility of the allegation.
- » The fact that a relationship was at one time or in some aspects consensual does not detract from credibility, nor is it a defense against a subsequent charge of sexual harassment. Consensual relationships can be followed by sexual harassment when one person tries to end the relationship and the other person tries to intimidate the former partner into staying in the relationship. People can be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted.
- » The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility. Many people are fearful of doing so. Additionally, there is no obligation for the reporting party to inform the responding party that behavior is offensive.
- » Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity or accuracy.
- » Explanations of why the harassment occurred do not add to credibility. People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions. To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors.

The following do not add or detract from the credibility of the responding party because they are irrelevant:

- » Character witnesses. (*"He is such a good guy; I know he would never do that."*)
- » Popularity with staff and other students. (*"Everybody likes him; I just don't believe he would do that."*)
- » No history of past problems. (*"She's never been in trouble before."*)
- » Academic performance. (*"But she's a really good student. Her professors really like her."*)

The following do not add or detract from credibility of the reporting party:

- » Clothing. (*"Just look at what she was wearing."*) Clothing does not cause sexual harassment, nor do they give anyone permission to touch someone or make sexual remarks.
- » Appearance. (*"She is so pretty; no wonder he did it,"* or *"She is so unattractive! I don't believe anyone would do that to her."*)
- » Flirting behavior. (*"He's always flirting with the boys. What did he expect?"*)
- » Males as victims. (*"He should have realized she meant it as a compliment."*)
- » Sexual orientation of victims (*"Listen, he came out and told everyone. He should have expected that people would act like this."*)

3. ALLOWING AMBIGUITY AND ASSUMPTIONS TO RULE THE DAY RATHER THAN TELLING A COGENT STORY OF WHAT HAPPENED

“It’s All in the Details”

In an era long, long ago (before hand-held electronic devices), there were connect-the-dots puzzles that children used to create pictures. These connect-the-dots exercises were always limited because when you were done, all you had was an outline of a cow or a horse or a windmill. There were no details to make the pictures come alive. These exercises remind us of the traditional student conduct process involving two parties, in which both parties are interviewed once and information is gathered from each of them at that time. Perhaps witnesses are interviewed in advance of the hearing as well, but not generally. Then, the parties and their witnesses appear before a hearing panel, which takes the outline created from the connected dots and works to fill in the details on the spot. They try to make sense of what happened and to determine if one of the parties should be held responsible for a violation of an institutional policy. This is not an effective model for complex interactions or interpersonal violence.

As the children grew older, they experienced “paint-by-number” exercises, which provided color and some more details, but lacked context and nuance. The colors were flat and the images superficial. This conjures a picture of a poorly executed investigation in which key pieces of information are present, but their relationship to each other is often hard to determine; it lacks details. We see the overall picture, but not the way in which the colors and shading should interact to provide depth and realism.

“A strategic and well-conducted investigation answers questions along the way, filling in the outline to create a three-dimensional picture of the reported conduct.”

An effective and appropriately detailed investigation is like a painting in which the brushstrokes tell a story, or even like a 3D image generated with sophisticated software, in which every detail is intricately illustrated. Similarly, a sound investigation must actively gather and accumulate information to tell a story. Investigators make a serious mistake if they only gather part of the evidence or information, either because of discomfort, neglect, assumptions about the usefulness or applicability of additional evidence, or simply because they are overworked.

We see many investigators who have a tendency to allow witnesses or parties to provide ambiguous answers, or to not fully answer questions. This can occur for many reasons, such as discomfort asking a clarifying question, particularly if it involves a difficult subject like sexual behavior or drug or alcohol use. There could also be concerns that re-asking a question or noting that an interviewee did not respond fully may be viewed as confrontational or uncomfortable. It may simply be because investigators are focusing on their next question rather than listening intently. Relatedly, many investigators fail to follow-up with initial requests for information to ensure interviewees provide it. Sometimes, it doesn’t occur to investigators to ask about important facts during interviews. That’s why it is essential to review interview notes afterward to identify gaps, and then re-interview individuals to follow up as needed. Otherwise, we’re leaving a corner of the painting blank. Complete the image.

We also see investigators misstep in a number of other ways such as only gathering the information given to them by the parties, only speaking with the witnesses provided by the parties, failing to ask for probative information such as text messages or emails, and failing to ask the direct or uncomfortable questions. Widen your scope. Sometimes, investigators who are wearing too many hats may allow their busy schedules to justify cutting corners or taking shortcuts. In many cases, investigators should determine the relevance of evidence once they

receive it, not beforehand, because faulty assumptions could severely skew investigations.

Take the example of an interview with Betsy. You ask her if you should interview her friend Ann, and Betsy says “no,” because Ann doesn’t know anything about what is being reported. If you decide to skip interviewing Ann because of this, you are only painting by numbers. Maybe Ann does know, and now you won’t because you didn’t ask. Maybe Betsy doesn’t know what Ann knows. Maybe Betsy does know that Ann knows something unhelpful to her, and you allow Betsy to throw you off the track without checking first-hand. A well-developed, well-conducted, strategic and comprehensive investigation is, therefore, critical.

A strategic and well-conducted investigation answers questions along the way, filling in the outline to create a three-dimensional picture of the reported conduct. It also involves ongoing review of the information gathered and ongoing re-calibration of the investigative strategy as more information is gathered, more evidence is needed, more witnesses are identified, and the subtle shading of an interaction is identified.

In one recent case, it was only mentioned during the third interview with the reporting party that she was using a tampon during the alleged assault. This was corroborated by police, who retrieved it from the trash for analysis. Until that point, the allegation seemed like a 50/50 situation, with both parties believable but neither story more credible than the other. The reporting party simply didn’t think it was important, and because it was an intimate detail that’s not normally the subject of polite conversation, she avoided disclosing it. She did not know that the investigators were looking for just one feather to tip the scale, and that investigators didn’t have it. Individuals who know that something happened to them don’t always understand what investigators are looking for and the need to convince others that it did. They know it did. This fact turned out, in the context of the other information available, to make it much clearer that the sexual interaction was non-consensual, and the responding party was found in violation. If you need a feather and are looking for it, don’t be afraid to ask the parties for anything they can think of that could tip the scales one direction or another.

4. INTERPRETING THE EVIDENCE TO MATCH A CONCLUSION RATHER THAN LETTING THE EVIDENCE LEAD TO A CONCLUSION

In the previous section, we encouraged investigators to paint a clear picture, or use the investigation to tell a story. But, the story should be that of the parties, not that of the investigators. The fourth of the Seven Deadly Sins pertains to the tendency to jump to a conclusion too soon or to allow assumptions regarding the conclusion to improperly skew investigations.

“An investigator’s duty is not to ‘believe one story over the other,’ but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the preponderance of the evidence supports a finding of responsible or not responsible.”

The error is often in the analysis, which can be the result of “confirmation bias,” in which subsequent evidence is viewed through a skewed lens that reinterprets it as consistent with investigators’ presuppositions or early impressions regarding an allegation. Often, confirmation bias can result from “first impression bias.” This is when investigators formulate a conclusion or initial *hunch* early

in the investigation process based on information such as the initial evidence presented, the affect of a party, or the first couple of witnesses interviewed. The investigators then make

up their minds as to what they think happened, and that predetermination then shapes the evidence they *look for*, even subconsciously. Moreover, investigators tend to be more susceptible to this misstep as evidence mounts in support of one interpretation or the other. As investigators become increasingly convinced that their initial hunch is correct, subsequent facts that detract from the investigators' storyline are disregarded and the investigators are unwilling to reexamine their storyline even though significant evidence contradicts it after the first impression is developed.

Astute investigators may form these impressions as a hypothesis, but are willing to give them up as subsequent information leads towards new or different directions. While we want investigations to read like stories, they are often more fragmented — a collection of numerous different pieces of evidence. An investigator's duty is not to "believe one story over the other," but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the preponderance of the evidence supports a finding of responsible or not responsible.

Let's assume that a reporting party did not present himself well during an investigative interview. He appeared timid, nervous, and unsure, while the responding party appeared confident, well-spoken, and charming. The evidence is straightforward, but it's colored by the fact that the responding party *seems*, for one reason or another, more believable than the reporting party.

This type of situation is actually fairly common. Despite the evidence, investigators may just not *feel* like an incident happened as alleged, often making statements like, "He just doesn't seem like the type of guy that would do something like that." It is this type of partiality, this type of first impression bias, that may ultimately skew a finding and improperly taint a rationale or interpretation. Salvation from this Deadly Sin lies in investigators' commitment to allowing the evidence to speak for itself without spin or interpretive overlay. Investigators should refrain from speculating as to what a particular piece of evidence *could mean* in their conclusions, though that level of curiosity along the way is valuable.

This confirmation bias can reveal itself during the actual writing of the investigation report as well. The mistake often occurs when investigators form a conclusion about the evidence and then exhibit a bias in presenting only evidence that supports their conclusion and ignoring or discounting evidence that does not. This can be particularly problematic when the investigators are not the decision-makers, as they are passing on biased and skewed summaries to those who will ultimately render decisions.

Investigators must also fight the urge to "make sense of things." It is not uncommon for evidence to be jumbled and irreconcilable. It is investigators' role to use the evidence available to paint as clear a picture as possible, though not by filling gaps with speculation and unsupported theories. Investigation reports should be written in a neutral and impartial manner, with conclusions and findings tied directly to the greater weight of the evidence, rather than by using hunches, gut feelings, and assumptions to fill gaps.

In many cases, the best defense is to actively prevent oneself from preemptively drawing a conclusion and using co-investigators and the objective eyes of deputy coordinators or Title IX coordinators to ward off the creeping nature of confirmation bias. There is nothing to be gained by formulating a hunch early in the investigative process, and an allegation should never be "heard," even subliminally, prior to completing the investigation. Every lead should

be pursued, regardless of whether it comports with other evidence. Investigators should reserve their judgment until it is time to make or recommend a finding, being mindful of interpretation, and let the evidence — all the evidence — speak for itself in the end.

5. FAILING TO “SHOW YOUR WORK” OR GATHERING FACTS WITHOUT ANALYSIS OF EVIDENCE AND CREDIBILITY

Gathering facts and evidence *without* putting them through an analysis based on the type of evidence and the credibility of the parties makes us vulnerable to engaging in a negligent process. This sin is similar to the fourth, in that sometimes investigators fail to articulate their analysis in the report or final outcomes *because* they have reached a conclusion on the basis of their feelings and/or experience, rather than the evidence. This sin is also one that has led to the Office for Civil Rights requiring that our notification of final outcome (original and appellate) include a rationale as well as a determination and/or finding. Without a well-developed rationale, the parties will also lack a basis on which to formulate an appeal, if one is available and one or more parties wish to pursue that option.

We are transitioning out of the era when, for a finding, we would simply write, “We find the party not responsible on the basis that the evidence presented did not show a preponderance of evidence that policy was violated,” or “We find the party responsible on the basis that it is more likely than not that the policy was violated.” Now, we must articulate — in writing — the information on which that decision was actually based. Indeed, OCR has repeatedly stressed the need for institutions to provide the parties with the finding, the sanction and the rationale.

Showing your work:

- » *Ensures the best possible decision is made.*
- » *Provides transparency to the parties.*
- » *May reduce the likelihood of litigation from unsatisfied parties.*

Determining Credibility and Showing Your Work

We discussed credibility determinations in the second sin, but address it here in the context of the report, and showing your work. It is critical to articulate *why* one party or statement was more or less credible than the other. Making a determination on the basis of credibility can be difficult, especially when it relies heavily — or in some cases solely — on the testimony of the parties (sometimes referred to as “he said, she said” cases). It is inadequate to merely state, “I found Jordan to be more credible than Pat, so a violation of the policy was more likely than not to have occurred.” You must say why Jordan was more credible or why Pat was less credible. Consistency, plausibility, reliability, cooperation, reticence, and motivation to lie may all have factored in this decision, and good investigators will detail how and why in their files and reports, so that the ultimate decider of fact can understand the basis for the investigators’ credibility assessment and hopefully agree with it.

Making the Finding

Who makes the finding will vary from campus to campus, but the investigators are in the best position to evaluate the evidence, and must play a role in decision-making. On some campuses, they will make the finding. On others, they recommend it to the Title IX coordinator, director of human resources, or director of student conduct. On yet other campuses, a hearing is used, but we continue to be mystified by the rationale for why an investigation and a formal hearing panel are *both* needed, and what the coordinator’s role is if the hearing results in a final determination, considering that OCR has said that the coordinator needs to ensure that Title IX is satisfied. We wrote about this extensively in a previous whitepaper, “Equity is Such a Lonely

Word” (www.nchem.org/wordpress/wp-content/uploads/2012/01/2014-Whitepaper-FINAL.pdf). If you persist in using the hearing model, perhaps the role of the hearing should be to determine whether or not to accept the recommendations of the investigators. Any need for a fully adversarial hearing with witnesses must be based on weaknesses in the investigation process, which this whitepaper is designed to help you shore up.

Regardless of who makes the finding, it is imperative to clearly lay out how a determination was reached, and what evidence supports it. Show your work. What do the investigators think? What do they know? What can they prove? Those things should be articulated in a brief (one- to two-page) statement that is shared with the parties. Failing to show all of the work and the rationale for decisions makes campuses vulnerable, as it may be tantamount to engaging in a negligent process and undercuts the transparency needed to help the parties know and understand why and how a decision was reached.

6. BEING BLIND TO PERSONAL BIASES

We have a mantra for investigators that we share in all of our trainings, “You have no side other than the integrity of the process.” This does not mean that investigators do not or cannot render findings, but it does mean that their biases, whether positive or negative, cannot impact investigations or resolutions. We all have biases. Becoming a good Title IX investigator requires recognizing and understanding what those biases are, checking them at the door, and not allowing them to influence investigations. Failure to screen out, or neutralize, personal biases impairs the integrity of the process. Rather than detail the most common biases and how those impact investigations, we have chosen to focus more holistically on how to recognize, neutralize and possibly even overcome biases.

KEY POINTS

Address personal bias by:

- » *Nurturing an attitude of humility.*
- » *Nurturing a continuous curiosity about others and their points of view and experiences.*
- » *Understanding microaggressions and how to avoid and address them.*

Recognizing and understanding our personal biases effectively requires developing a sense of cultural competency. This starts with adopting a stance of cultural humility. It doesn’t mean pretending that we have no culture-influenced ideas or beliefs. We all come with unique experiences and ideas. The development of cultural humility involves recognizing that our perspective is one of many, and that we need to be open to seeing things from others’ perspectives.

We suggest addressing bias using three steps. These are certainly not the only means to address bias, but we find that these strategies are particularly helpful in the investigation arena. First, investigators should move toward an attitude of humility, and away from an attitude of arrogance, privilege, or ethno/cultural centrism. We must learn to observe and listen, rather than to talk and explain. Second, we should nurture an openness and willingness to understand cultures, experiences, and ideas that are different from our own. We should explore the differences around us with an understanding that the more we know, the better our investigations will be. Third, we should become more aware of the concept of microaggressions, understand how they impact us and those around us, and seek to reduce the ways in which microaggressions can manifest in investigations. When we inadvertently carry out a microaggression, it can shut a witness down or create a tension or distrust in the investigators and the resolution process as a whole.

Step 1: Nurture an Attitude of Humility

Reducing personal bias starts with nurturing an attitude of humility in our interactions with those around us. Let’s face it: our work addressing and mitigating Title IX issues is difficult. Emotions can run high, misunderstandings abound, egos rise, and we often face emotional,

hardened, or inflexible viewpoints or perceptions in the midst of conflicting details, expectations, and feelings.

Humility can be defined as a lack of arrogance, privilege, and entitlement. Investigators should refrain from lecturing or attempting to serve in a developmental role during interviews. This reminder is particularly true for student affairs professionals, who may be accustomed to using a “teachable moments” approach with students. Don’t insert “conduct counseling” into your investigation interviews or your investigation report.

Just recently, we reviewed a report that stated, “You have been found not in violation of the university’s sexual misconduct policy, but we strongly caution you about your sexual decision-making and the respect we expect you to show your potential partners.” Anything after the comma in that sentence is outside the role any investigator should play. This reflects a tendency to drift out of your proscribed lane as an investigator. Stay in your lane. Allow others to focus on developmental and educational efforts if deemed appropriate for the situation. The investigators’ role is to listen to and seek to understand the witnesses’ and/or parties’ perspectives while gathering facts and evidence, and working towards rendering an appropriate finding. From the investigative standpoint, this may seem like a lost opportunity, but to the interviewees, it can feel like biased judgment or criticism, or a failure to see things from their perspective.

“The investigators’ role is to listen to and seek to understand the witnesses’ and/or parties’ perspectives while gathering facts and evidence, and working towards rendering an appropriate finding.”

Step 2: Nurture Continuous Curiosity

This second step is something we can do both before and during an investigation. It is an ongoing process of augmenting our understanding and experiences to better appreciate the nuances and uniqueness of those who come from a different background, gender, sexuality, culture, disability, heritage, generation, etc. from our own. Supplement and explore new ideas and ways of thinking. Exposure and knowledge will help foster an attitude of unbiased openness to the views or perspectives of those being interviewed.

While investigators may have a general understanding of experiences common to certain groups (e.g., Middle Eastern students practicing Islam; family and extended family being particularly important to Latino and Hispanic groups; or experiences of oppression and discrimination in the psychology of the African-American population), it remains essential to not assume that the issues common to a certain group have been important to or experienced by a specific member of that population. For example, can we be curious about where an individual identifies as home? What about how a person defines boundaries of appropriate conduct? How are concepts such as gender norms and roles, sexuality, sexual intimacy, and physical contact viewed? Are there language barriers around certain terms or concepts? There are a few areas where we see an increased need for investigators to show continuous curiosity.

We are seeing a need for investigators to better understand that individuals who are gay, lesbian, bisexual, transgender, queer, or questioning often come to the investigation process with a history of being bullied, teased, and treated poorly by others. Individuals from these groups often report lower levels of perceived social acceptance and psychological and physical well being.¹ Investigators should tread carefully when exploring sexual identity and past events such as the

1. Woodford, M., Howell, M., Silverschanz, P., & Yu, L. (2012). “That’s so gay!”: Examining the Correlates of Hearing this Expression Among Gay, Lesbian, and Bisexual College Students. *Journal of College Health*, 60, 429–434.

coming-out process, support or rejection from friends and family, and overall social integration. Above all, they should avoid the assumption that a person's sexual identity must be a factor in the investigation, while also being curious as to whether they think it does, and if so, how.

We should be aware of differences in wealth, health care access, education, and experience as potential barriers to the successful establishment of rapport and trust. Asymmetry between the parties can be very disempowering in the investigation process, and we have to be conscious of how that plays out, and make appropriate attempts at leveling. These differences can be overcome when they are addressed with a sense of grace, awareness, and understanding. Investigators and coordinators should develop an awareness of how their individual experiences and privilege (or lack thereof) may create expectations in their conversations with others. These often-unseen "ruts in the road" can hinder the exploration of alternative hypotheses and information gathering from individuals who come from a different socioeconomic status or culture.

Those who come into a Title IX investigation may bring with them experiences related to either a physical or mental disability. Those experiences are important to understand, as they may affect the willingness of an individual to form rapport, share information, or engage in open communication with a person in a position of authority. Examples of disabilities may include mental health issues, deafness, the inability to walk, chronic pain, social awkwardness, or a thought disorder. Investigators may not be aware of a disability so it is important to keep bias in check by maintaining an open mind, recognizing that there may be a host of variables that could explain an interviewee's behavior, distrust, or lack of openness.

Step 3: Understand Microaggressions

Microaggressions are blind spots, or unconscious biases, that result in actions or statements that can be hurtful to those on the receiving end. Microaggressions are "brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership."² These unintended slights can have serious implications and impact those of a different sex or gender, country, ethnicity, culture, or sexual orientation, or those who have a disability or mental illness. Relevant to this whitepaper, they can subject an investigation to allegations of bias.

The central challenge in addressing microaggression is understanding that these slights are often unintentional and may even be the result of a person in authority attempting to pay a compliment to someone as a way to build rapport. This creates the dual problems of a blind spot for the person in authority, as well as the common reaction of defensiveness (e.g., "Well, that certainly wasn't what I meant. Why do they have to be so sensitive?"). One prominent microaggression scholar² emphasizes the nature and power of these these small, unintentional, everyday microaggressions by using images of thumbtacks and raindrops on the cover of his books. Such imagery illustrates that while small, the composite impact of repeated or continual microaggression-based experiences over time can create have a dramatic impact on the recipient.

The issue of microaggressions in Title IX work may not be easy for investigators or coordinators to handle gracefully. Increased training to identify, intervene, and manage these

2. Sue, D. (2010). *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation*, p. xvi. Hoboken, NJ: Wiley.

behaviors and comments is needed. Subtle victim-blaming or a lack of trauma-informed practice are common culprits. When preparing questions in advance of interviews, it can be helpful to have a co-investigator review them to make sure they are neutral and do not come off in ways you do not intend. If, during interviews, you realize that a question is poorly framed, or has come off wrong, take it back. We all make mistakes. Talented investigators fix them before they cause more harm.

7. FAILING TO TREAT THE INVESTIGATION AS A HEARING

The last of the deadly sins is misunderstanding the nature of the investigative interview. Meeting with the parties to determine if policy was violated is an administrative hearing. Certainly, due process (or fair process, for private colleges) is critical to a fair and impartial resolution, but too many campuses view due process as something that's required only in the hearing phase of a resolution, rather than throughout the resolution.

Following *Dixon v. Alabama* (5th Cir., 1961) and *Goss v. Lopez* (USSC, 1975), colleges and universities have built “castles of due process” to provide responding parties with the “opportunity to be heard,” or have interpreted “a hearing” to mean a baby court proceeding. We’ve talked above about why the adversarial hearing model isn’t well suited to resolving civil rights allegations, but as we move towards civil rights investigation as our mechanism of resolution, we still have to ensure that due process and fair process are afforded.

“If done correctly, a civil rights-based investigation process in which the investigators render a finding can constitute a ‘hearing’ that fulfills all the hallmarks of due process within the college and university setting.”

If done correctly, a civil rights-based investigation process in which the investigators render a finding can constitute a “hearing” that fulfills all the hallmarks of due process within the college and university setting. The hallmarks of due process using a traditional hearing-based model in the college and university setting are:

- » A resolution mechanism that substantially or materially complies with the school’s policies and procedures.
- » Advanced written notice to both reporting and responding parties of each of the allegations (charges, in student conduct language) prior to issuing a finding.
- » Opportunity for the parties to review all evidence and information that will be used to render a finding, prior to a final determination.
- » Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with unbiased and impartial decision-makers.
- » Opportunity for the parties to suggest questions that should be asked of witnesses and the other party(ies).
- » A reasonable and rational decision based on the evidence presented.
- » Timely written notification of the outcome, with a brief supporting rationale, to both parties.

The hallmarks of an appropriate civil rights investigation in the college and university setting are:

- » A team of two well-trained, impartial investigators who (often) meet multiple times with the parties to gather information, testimony, and evidence.
 - The parties are provided ample opportunity to provide a list of witnesses and additional evidence.
- » Detailed and written notice to both parties of the allegations and each of the policies alleged to have been violated.

- » Meetings by the investigation team with all relevant witnesses.
- » Opportunity for the parties to provide investigators with a list of questions for the other party(ies) and/or witnesses that may be asked at the investigators' discretion.
- » Gathering of all available and relevant evidence by the investigators.
- » Opportunity for the parties to review all evidence and information that will be used to render a finding, either in written form or orally before the determination is finalized.
- » Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with the decision-makers. On many campuses, the parties are provided with a copy of the draft investigation report for review and comment.
- » A reasonable and rational decision based on the evidence presented.
- » A finding or recommendation on each alleged violation by the investigators, who met and/or spoke with the parties and the witnesses, and who examined all relevant evidence.

This represents a robust, thorough, efficient, and impartial process, and is how a civil rights investigation is properly performed to fulfill the elements of due process. How is this not a “hearing” or a robust “opportunity to be heard?” It is.

Yet many argue that a “hearing” must consist of a single incident review, in which a jury-like panel of three to seven people (or sometimes a single administrator) reviews all the evidence, hears testimony, and questions parties and the witnesses. In almost every single case across the country, these panelists are less well trained, less experienced, and less knowledgeable about the facts than the investigators. Is it likely that such a panel will render a superior or more informed finding? No. Further, the parties and witnesses have less of an opportunity to speak with and provide information and evidence to the decision-makers in a hearing than they do through an investigation-led model. Given that so many cases hinge on nuance and credibility, institutions should want those who are most knowledgeable about the evidence, the parties, the witnesses, and who have been involved in a case for weeks or months, to make the decision or have some influence on it.

The frequent retort is that the investigators are not impartial, but a hearing panel is. This argument is both logically flawed and generally unsupported by caselaw³. It is rooted in inapt comparisons to the criminal justice process. If the investigators are not impartial, they should not be investigating. If the investigation has made them less than objective, how is it that an impartial investigation biases the investigators? If the investigation is biasing somehow, won't it bias the panelists too? Impartiality is not the same as “ignorance of all evidence and charges until the hearing.” Rather, it means rendering an objective finding free from impermissible bias and prejudice. Trained, experienced investigators are less likely to be improperly biased or prejudiced than a hearing panel that usually has less training and expertise in rendering findings involving civil rights violations.

3. It must be noted that in some jurisdictions, judges have required institutions to use a formal hearing panel to render findings. This is disappointing, though not surprising, given that judges and attorneys typically feel that the court's processes are the epitome of fairness and due process. Ask yourself: How fair and equitable is the court system from a civil rights and equity-based perspective? Have you ever heard the phrase, “got off on a technicality?” Are outcomes different in court based on your socioeconomic standing? The color of your skin? Your sex or gender? Your national origin? The answer is often “yes.” There is a better way to achieve equity through a process built on equity for all parties.

Courts across the country, including those at the highest level in every jurisdiction, have upheld the civil rights investigation-based model in an array of harassment and discrimination cases at colleges and universities, ranging from Title VII to the Americans with Disabilities Act. To argue that a formal hearing at a singular point in time is superior to the civil rights investigation-led model is to argue rigid form over substance. Can a hearing panel be fair and impartial? Absolutely. But the civil rights model is more likely to fulfill the sometimes-oppositional concepts of due process *and* equity than a hearing model that is designed primarily to afford due process.

Accordingly, institutions can and should treat the investigation and finding process as a hearing, because it is. Investigators should keep the principles of due process and equity at the forefront of their practices, and should ensure that all parties have full, written notice of the alleged violations and are given ample opportunity to review and respond to all evidence.

CONCLUSION

This whitepaper has provided a detailed review of what we call the *Seven Deadly Sins of Title IX Investigations*. These are far from the only mistakes or problems that can undermine or significantly impair an investigation, but they are among the most common. They are also problems that can be addressed and, hopefully, eliminated from your practice via attention and intention. While the process of becoming a professional civil rights investigator can take a lifetime to achieve, we hope you will view the opportunity to improve skills as a process of constant enhancement and refinement, as we do with our own investigation techniques and practices.

For those of you looking for more great suggestions than can be offered in a short whitepaper, we hope you will join ATIXA, which features an Investigator Community of Practice (<https://atixa.org/join/communities-of-practice/>). We also hope you will consider the foremost guidebook on campus/school civil rights investigations, the ATIXA *Investigation in a Box Kit*, a 230-page guide written by the authors of this whitepaper that covers the whole range of investigation best practices (<https://atixa.org/resources/investigation-in-a-box/>).

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