

AGENDA

● | TITLE IX'S REQUIREMENTS

● | PROCESS PARTICIPANTS

● | THE INVESTIGATION PROCESS

● | THE HEARING PROCESS

● | QUESTIONS

TITLE IX'S REQUIREMENTS

01

Title IX of the Education Amendments Act of 1972

"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).



THE TITLE IX REGULATIONS

SEXUAL HARASSMENT ONLY

1

Narrows the definition of sexual harassment;

3

Narrows eligibility to file a complaint;

2

Narrows the scope of the institution's educational program or activity;

4

Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

SEXUAL HARASSMENT: SECTION 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) 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 recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

AND... ONLY COVERED, IF:

Place of Conduct

- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

Required Identity

- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent

PROCEDURAL REQUIREMENTS FOR INVESTIGATIONS

Notice to BOTH parties

Equal Opportunity to Present Evidence (not directly related, directly related but not relevant, and relevant)

An advisor of choice

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

Opportunity to review all directly related evidence and 10 days to submit a written response to the evidence prior to completion of the report

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

THE TITLE IX COORDINATOR (OR DESIGNEE) PREPARES THE NOTICE

- Sufficiency of Detail – The Who, What, When, Where
- The Applicable Policy and Procedure
- Presumption that Respondent is Not Responsible
- Right to Advisor
- Right to Review Evidence
- Any Prohibition against Knowingly Making False Statements

TIPS: It's a good practice to include a section on the prohibition of retaliatory conduct against other participants in the process, in connection to the participation.

PROCEDURAL REQUIREMENTS FOR HEARINGS

Must be live, but can be conducted remotely

No Compelling participation

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

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

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

THE REQUIREMENT OF IMPARTIALITY



SECTION 106.45(B)(1)(III)

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

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

WHAT CONSTITUTES BIAS?

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

This Includes:

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

IMPERMISSIBLE BIAS

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

CONFLICT OF INTEREST



AVOIDING PREJUDGMENT OF THE FACTS

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

AN IMPARTIAL INVESTIGATION IS...



Not influenced by
bias or conflict of
interest.



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



Truth seeking, not
"your truth"
confirming.

TRAUMA INFORMED PRACTICES

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

Trauma informed practices must be applied equally to all genders.

TRAUMA-INFORMED
PRACTICES PROVIDE
TOOLS & TECHNIQUES
FOR ENGAGING WITH
THE COMPLAINANT,
RESPONDENT, AND
WITNESSES.



Format/Structure of the
Hearing



Format of Questions



Approach to
Clarification

PROCESS PARTICIPANTS

02

THE PARTICIPANTS

The Parties

Complainant

An individual (e.g., enrolled student, University employee, applicant) who files a complaint to report a violation of this policy. It also includes any person who is reported to have experienced a violation of this policy in cases where some other person has made a report on that person's behalf or when the Title IX Coordinator signs a formal complaint.

Respondent

An individual against whom a complaint is filed.

THE PARTICIPANTS

Advisors

There are two types of Advisors



Advisor: throughout the
whole process



Hearing Advisor: hearing,
for purposes of asking
questions

ADVISOR OF CHOICE

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

Institutions cannot place restrictions on who can serve.

Institutions can create rules and guidelines for participation in the investigation.

No specific training is required.



THE INVESTIGATOR



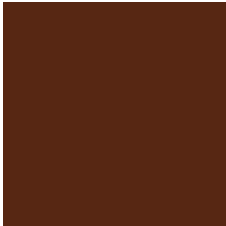
Can be the Title IX Coordinator, although that is disfavored.



The Investigator may not be a decision maker.



Must be trained in accordance with the requirements in the regulations.



Must conduct the investigation in an impartial manner, avoiding bias/prejudgment, and conflicts of interest.

THE PARTICIPANTS

The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required



THE PARTICIPANTS

The Decision-Makers

- **A panel**
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate



THE PARTICIPANTS

The Hearing Chair

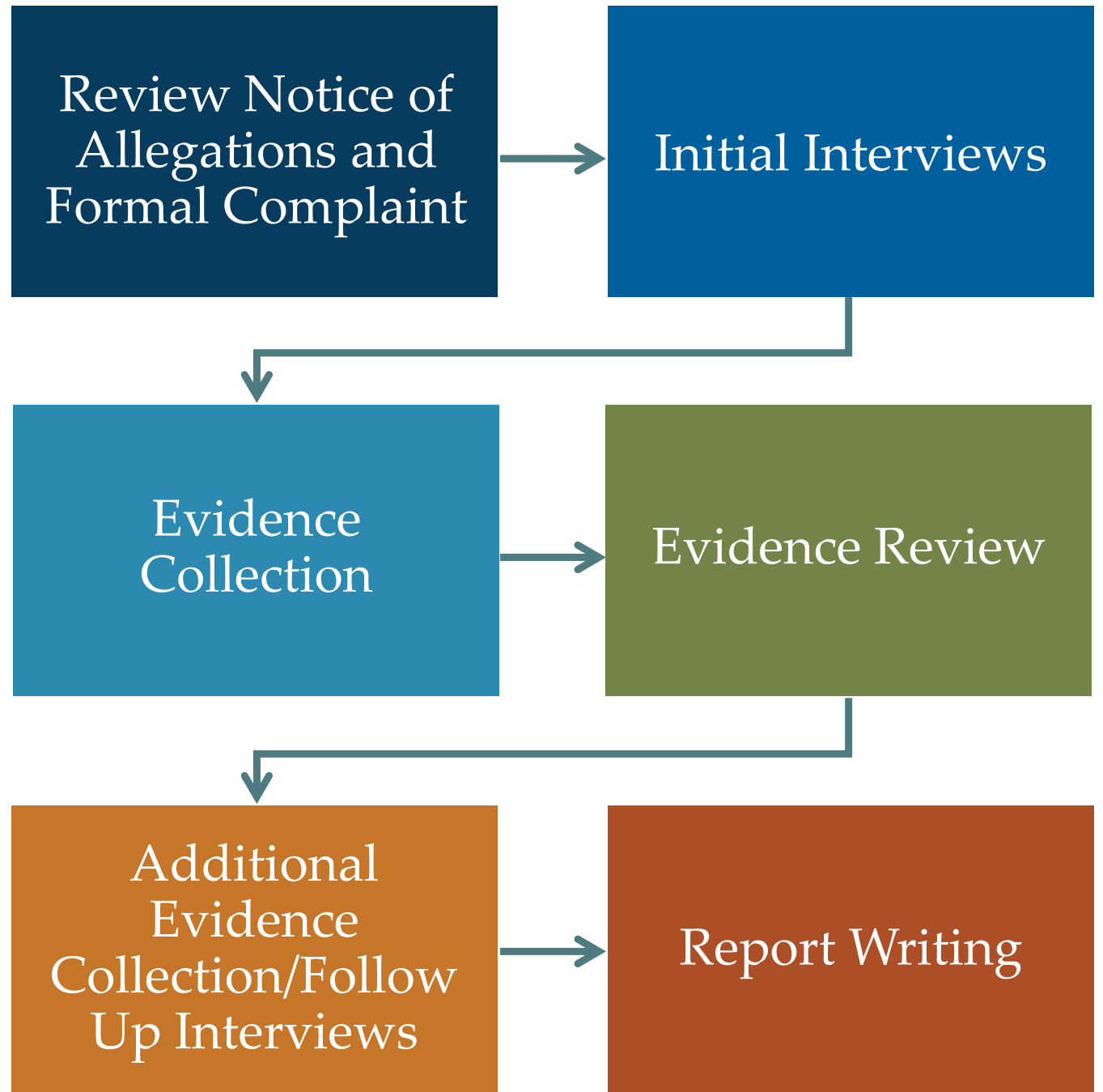
- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome



THE INVESTIGATION PROCESS

03

ESSENTIAL STEPS OF AN INVESTIGATION



UNDERSTAND THE SCOPE OF THE INVESTIGATION



Review the Notice of
Allegations and the
Formal Complaint



Ask questions if unsure

IDENTIFY THE CLAIMS AND WHAT NEEDS TO BE PROVEN

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?

RAPE

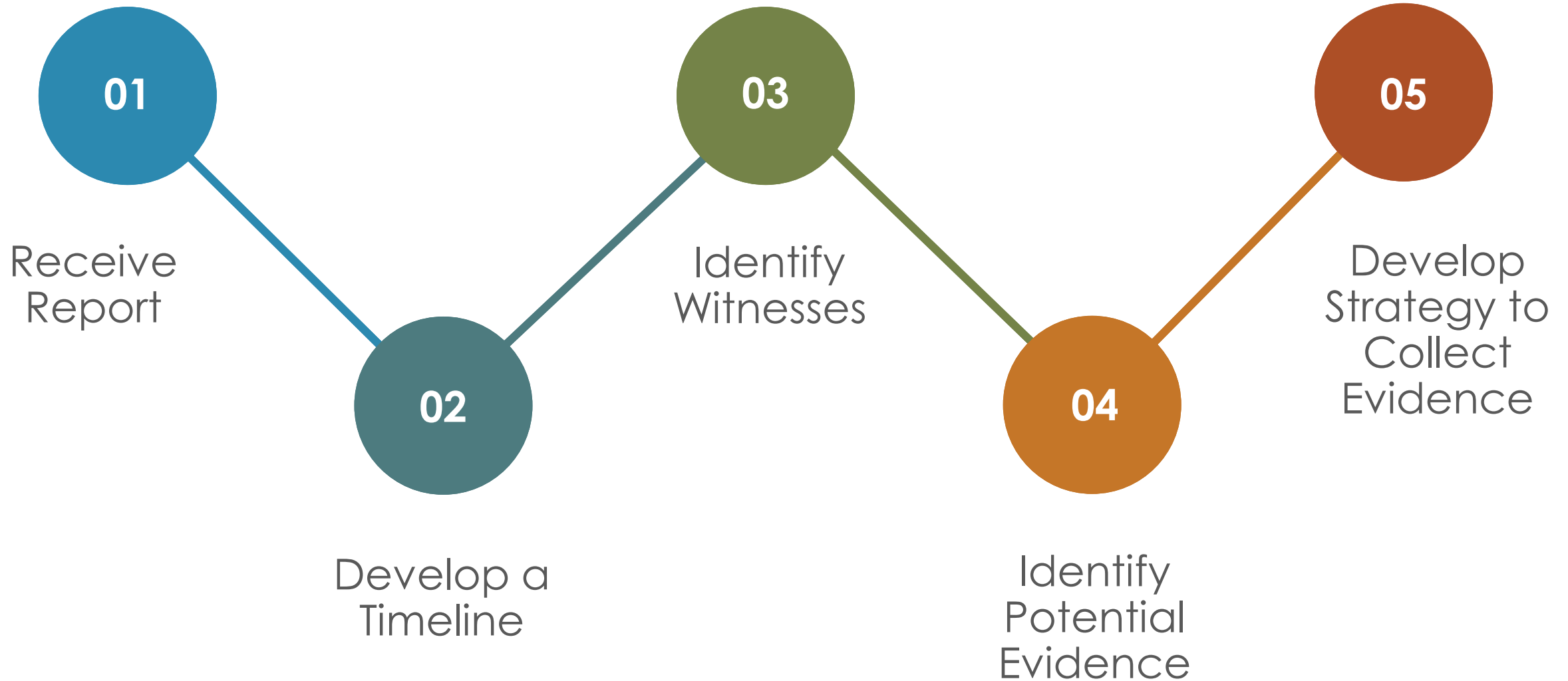
Definition: Penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant, or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Oral or anal sexual intercourse with another person, forcibly, or against that person's will (non-consensual), or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Questions to ask:

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?
 - *What is the ground for lack of consent?*
 1. Did respondent fail to seek and obtain Complainant's affirmative consent?
 2. Did Respondent force Complainant?
 3. Did Respondent coerce Complainant?
 4. Was Complainant incapacitated and therefore incapable of consent?

THE PROCESS: DEVELOPING AN INVESTIGATIVE STRATEGY



PRIOR TO THE INTERVIEW

- Secure an appropriate meeting location
- Allow for enough time to conclude the meeting
- If interviewing a party, inform them of their right to have an advisor present
- Prepare for the meeting

- Provide written notice of the meeting

INTERVIEW OBJECTIVES



Listen

Allow interviewee to share their experience



Evidence Preservation

Text messages

Photographs

Names and contact info for witnesses

Connect

Build rapport

Build trust

Empower



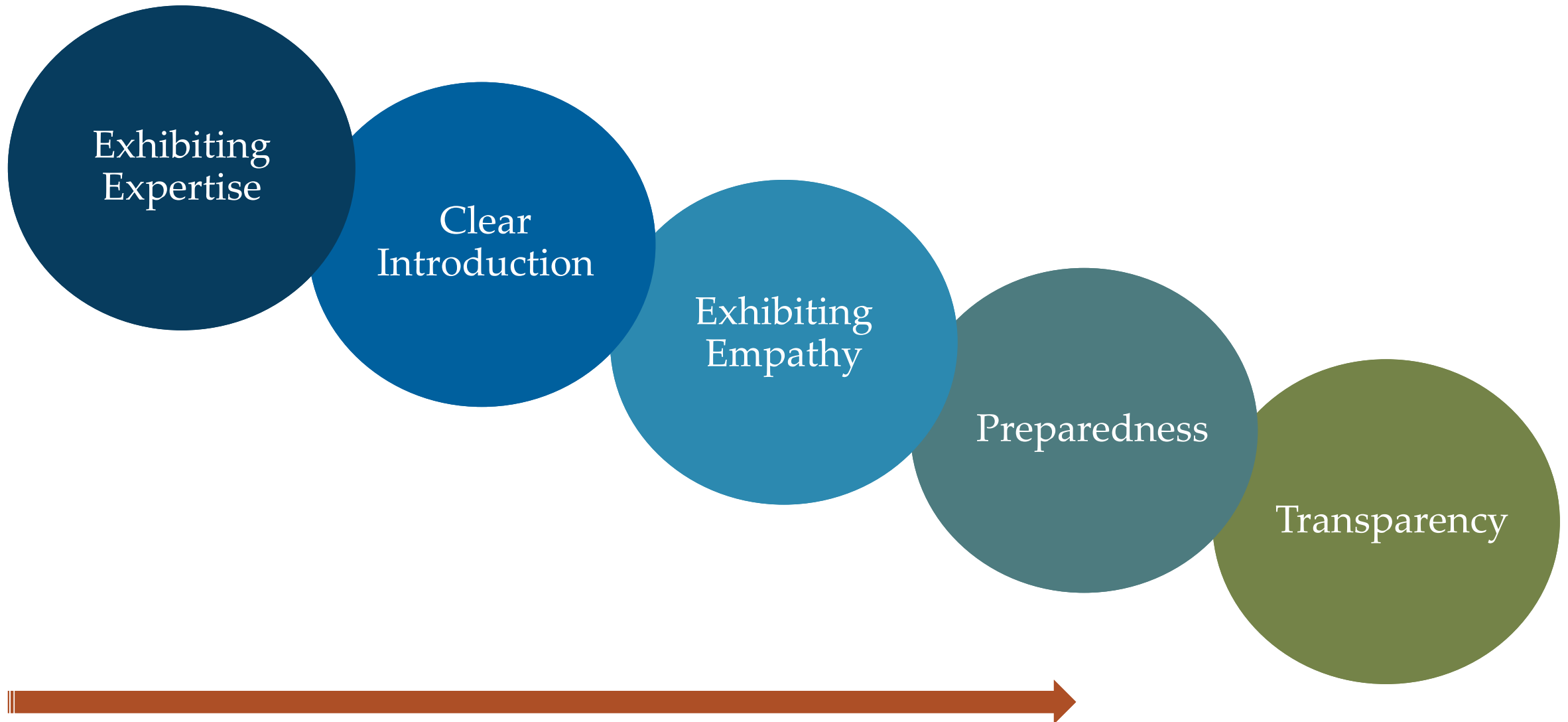
Clarify

Understand what you have heard

Seek additional information



RAPPORT AND TRUST



INVESTIGATIVE INTERVIEWS

1. Start by eliciting a narrative

2. Listen

3. Interview for Clarification

4. Listen

5. Avoid leading or blaming questions, interrogation

ASK QUESTIONS THAT ARE INTENDED TO CLARIFY AND MORE DEEPLY EXPLORE THE INFORMATION AND DETAILS PROVIDED BY THE PERSON IN THEIR NARRATIVE.

Do Ask:

Interview for clarification

Help me understand?

Can you tell me more about...?

Is there anything else you can share about...?

Avoid

Interrogation

Questions that blame

Questions that imply doubt

Leading questions

AT THE CONCLUSION OF THE INTERVIEW

Discussion submission of evidence.

Explain statement review process.

Explain next steps in the process.

Keep the lines of communication open.

Review available support, privacy requirements, and prohibition against retaliation.

AFTER THE INTERVIEW: ACTIONS

Memorialize the interview in writing: notes,
summary
transcript.



Provide opportunity for the party or witness to review it.



Provide opportunity for party or witness to provide a response (5 business days).



Incorporate the response.



FOLLOW UP INTERVIEWS

- Seek clarification
- Explore inconsistencies
- Explore contradictions
- Explore difficult issues
- Opportunity to respond

Tip: Questions should not imply doubt, be confrontational, or accusatory. Instead, questions about inconsistent evidence should demonstrate the investigator's curiosity and sincere desire to understand.

FOLLOW UP INTERVIEW APPROACH

01

Explain the purpose of the follow up

02

Set the stage for the topics you will be covering

03

Prepare the interviewee for “the shift”

04

Do not avoid asking the hard questions

THE “HARD” QUESTIONS

Details about the sexual conduct

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

HOW TO ASK THE HARD QUESTIONS

- **Lay a foundation for the questions**
 - Explain why you are asking it
 - Share the evidence that you are asking about, or that you are seeking a response to
- **Be deliberate and mindful in your questions**
 - “Can you tell me what you were thinking when...”
 - “Help me understand what you were feeling when...”
 - “Are you able to tell me more about...”

EVIDENCE

Testimony

Text
Messages

Social Media
Posts and
Messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera
Footage

Swipe Records

Medical
Records

Phone Records

Audio Recordings

EVALUATING THE EVIDENCE

01

Is it relevant?

Is the evidence important, or of consequence, to the fact-finding process?

02

Is it authentic?

Is the item what it purports to be?

03

Is it credible/reliable?

Is the evidence worthy of belief and can the decision maker rely on it?

04

What weight, if any, should it be given?

How important is the evidence to the fact-finding process?

**“DIRECTLY
RELATED” AND
“RELEVANT
EVIDENCE”**



DIRECTLY RELATED EVIDENCE

- Regulations do not define “Directly Related” Evidence.
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely on in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

“RELEVANT” EVIDENCE

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

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

“Evidence is relevant if:

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

EVIDENCE THAT IS NOT “RELEVANT”

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
 - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

ASSESSING AUTHENTICITY

Investigating the products of the Investigation



Never
assume that
an item of
evidence is
authentic.



Ask
questions,
request
proof.



Investigate
the
authenticity
if necessary.

A THOROUGH INVESTIGATION PERMITS THE DECISION MAKER TO ASSESS

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight





Evidence Review Process

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



ESSENTIAL ELEMENTS

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format

Tip: Should include a neutral and unbiased summary of the relevant evidence.

CONCLUSION OF INVESTIGATION, THRESHOLD REVIEW OF REPORT

- Prior to issuing the Final Investigative Report to the Parties, the Title IX Coordinator will review the draft Final Investigation Report and make a threshold determination either to dismiss the Formal Complaint or certain allegations within the Formal Complaint, or to proceed to adjudication.
- The Hearing phase of the Formal Process begins when the Title IX Coordinator or designee sends the Notice of Administrative Hearing and concludes when the Hearing Administrator issues a written Final Determination.

ADDITIONAL REQUIREMENTS

Share the
report with the
parties and
their advisors

In electronic
format or hard
copy

At least 10
days prior to
the hearing

THE HEARING PROCESS

04

PRE-HEARING MEETINGS

- Review the Logistics for the Hearing
- Set expectations
 - Format
 - Roles of the parties
 - Participation
- Decorum
- Impact of not following rules
- Cross Examination/Questioning Format & Expectations



DECISION MAKER OR HEARING PANEL AS A WHOLE



Review
evidence
and report

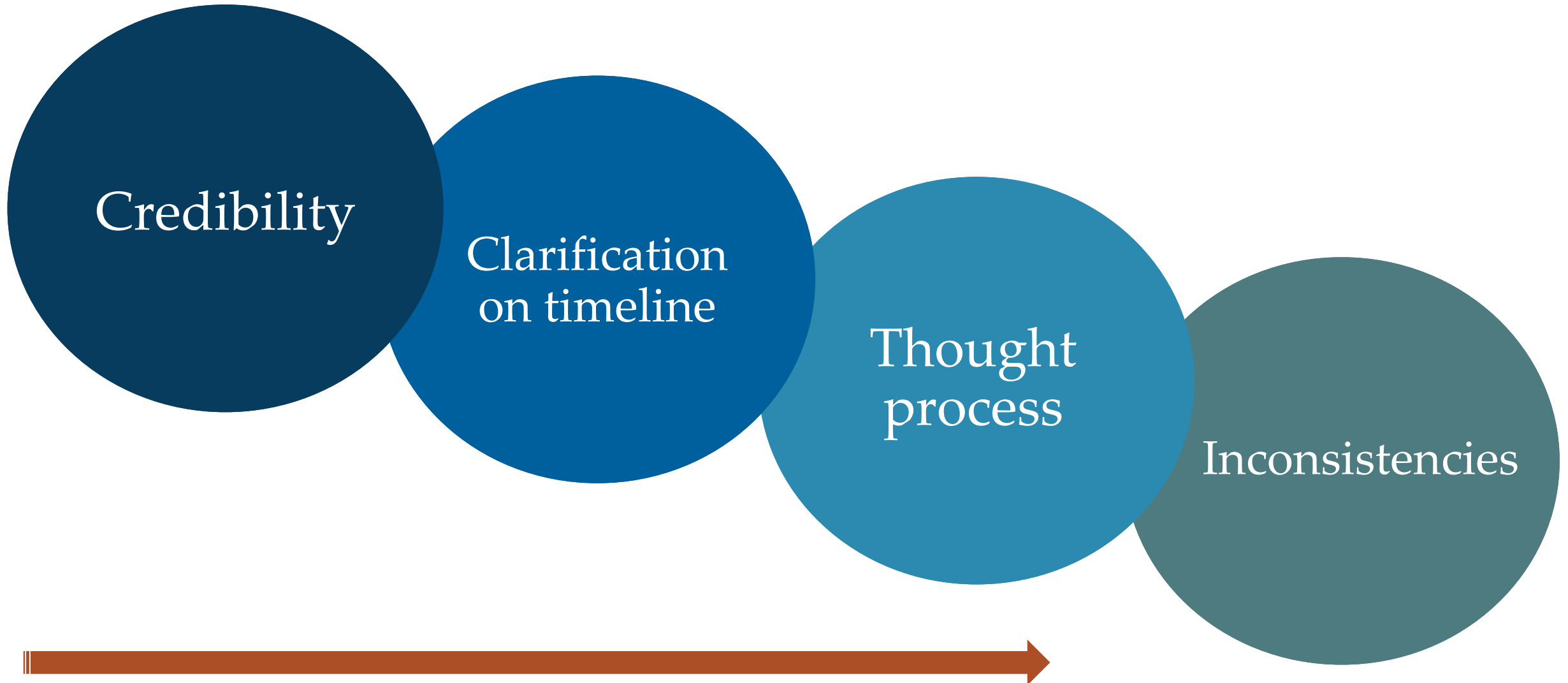
Review applicable policy
and procedures

Preliminary
analysis of
the
evidence

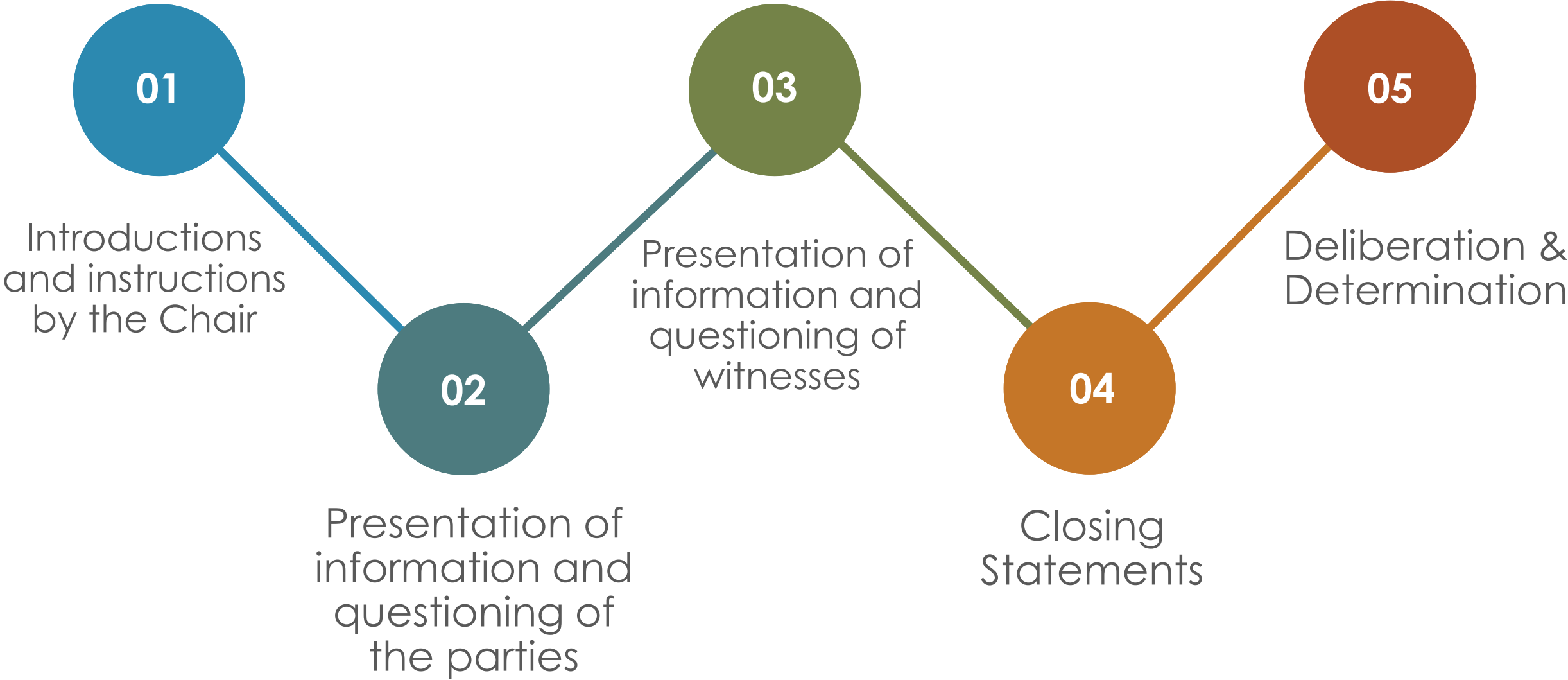
Determine
areas for
further
exploration

Develop
questions
of your
own

COMMON AREAS OF EXPLORATION



ORDER OF HEARING



FORMAT OF QUESTIONING

The Hearing Panel or the advisor will remain seated during questioning

Questions will be posed orally

Questions must be relevant

WHEN QUESTIONING....

- Be efficient
- Be prepared to go down a road that you hadn't considered or anticipated exploring.
- Explore areas where additional information or clarity is needed.
- Take your time. Be thoughtful. Take breaks if you need it.
- Listen to the answers.



IRRELEVANT AND IMPERMISSIBLE QUESTIONS



Information protected by an un-waived legal privilege

Medical treatment and care

Unduly repetitious or duplicative questions

Information that otherwise irrelevant

Complainant's prior sexual history, with limited exceptions.

QUESTIONING TO ASSESS RELIABILITY

No formula exists, but
consider asking
questions about the
following:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Character, background, experience, and training

Coaching

CROSS EXAMINATION

WHO DOES IT?



Must be conducted by the advisor



If party does not appear or does not participate, advisor can appear and cross



If party does not have an advisor, institution must provide one



Deliberations

PREPONDERANCE OF THE EVIDENCE

- Standard of proof by which determinations of responsibility are made
- **"More likely than not"**
- It does not mean that an allegation must be found to be 100% true or accurate
- **A finding of responsibility =**
 - There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- **A finding of not responsible =**
 - There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

WEIGHING THE EVIDENCE & MAKING A DETERMINATION

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



FINDINGS OF FACT

- **A "finding of fact"**

- The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
- Based on available evidence and information
- Determined by a preponderance of evidence standard
- Determined by the fact finder(s)

- **For example...**

- Complainant reports that they and Respondent ate ice cream prior to the incident
- Respondent says that they did not eat ice cream
- Witness 1 produces a timestamped photo of Respondent eating ice cream

- **Next steps?**

ASSESSING CREDIBILITY AND RELIABILITY

No formula exists, but
consider the following:

Sufficiency of
detail and
specificity

Ability to recollect
events

Material
Omission

Internal
Consistency

Inherent
Plausibility

Motive to
falsify

Corroboration

GOALS OF SANCTIONS/DISCIPLINE

End the harassment, prevent its recurrence, remedy the harm

- What steps would be reasonably calculated to end harassment and prevent recurrence?



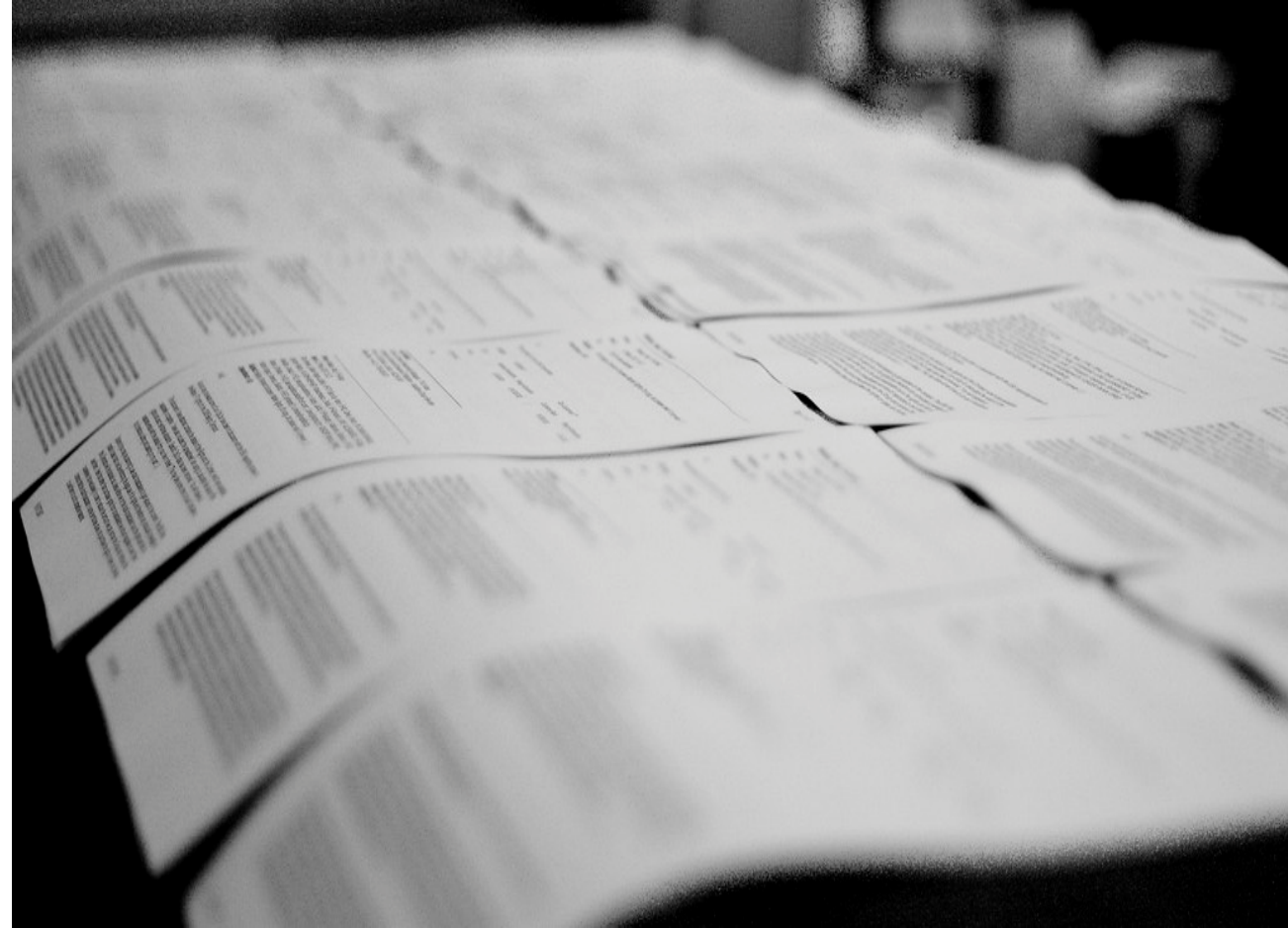
DETERMINING THE PROPER SANCTION

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?



FINAL DETERMINATION REPORT

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



QUESTIONS

?

