



# TITLE IX INVESTIGATOR TRAINING: CONDUCTING FAIR AND THOROUGH TRAUMA-INFORMED INVESTIGATIONS

Bob Jones University

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# ABOUT US

## Vision

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

## Mission

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

## Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

# AGENDA

- | TITLE IX'S REQUIREMENTS
- | DEVELOPING AN INVESTIGATIVE STRATEGY
- | INVESTIGATIVE INTERVIEWS
- | EVIDENCE COLLECTION AND ASSESSMENT

# TITLE IX'S REQUIREMENTS

01

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# PROCEDURAL REQUIREMENTS FOR INVESTIGATIONS

Notice to BOTH parties

Equal Opportunity to Present Evidence

An advisor of choice

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

Opportunity to review all 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

# NOTICE REQUIREMENTS

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
  - the identities of the parties involved in the incident, if known,
  - the conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

# ADVISOR OF CHOICE DURING THE INVESTIGATION

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

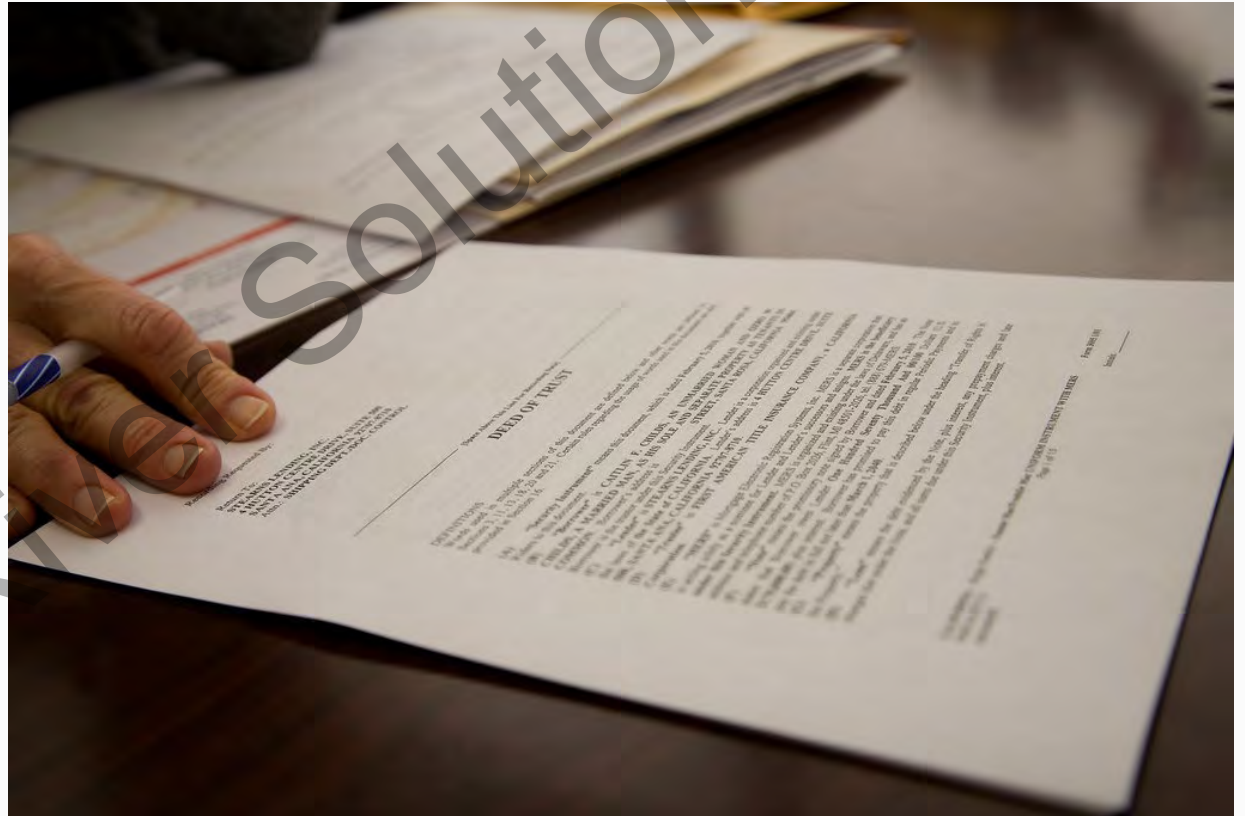
Institutions cannot place restrictions on who can serve.

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

No specific training is required.



# WRITTEN NOTIFICATION OF MEETINGS AND SUFFICIENT TIME TO PREPARE






# EQUAL OPPORTUNITY TO PRESENT EVIDENCE

# EVIDENCE REVIEW

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

Parties have 10 days to provide a written response.

# INVESTIGATIVE REPORT AND REVIEW



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



That report will be shared with the parties and the parties will have another opportunity to respond in writing.



The hearing must occur at least 10 days after the release of the final report.

**“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 in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

# “RELEVANT” EVIDENCE

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

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

“Evidence is relevant if:

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

# EVIDENCE THAT IS NOT “RELEVANT”

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

# WHO DECIDES?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance at this stage of the process.

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

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

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

# THE INVESTIGATOR

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

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/pre-judgment, and conflicts of interest.

# 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, 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.

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# 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.

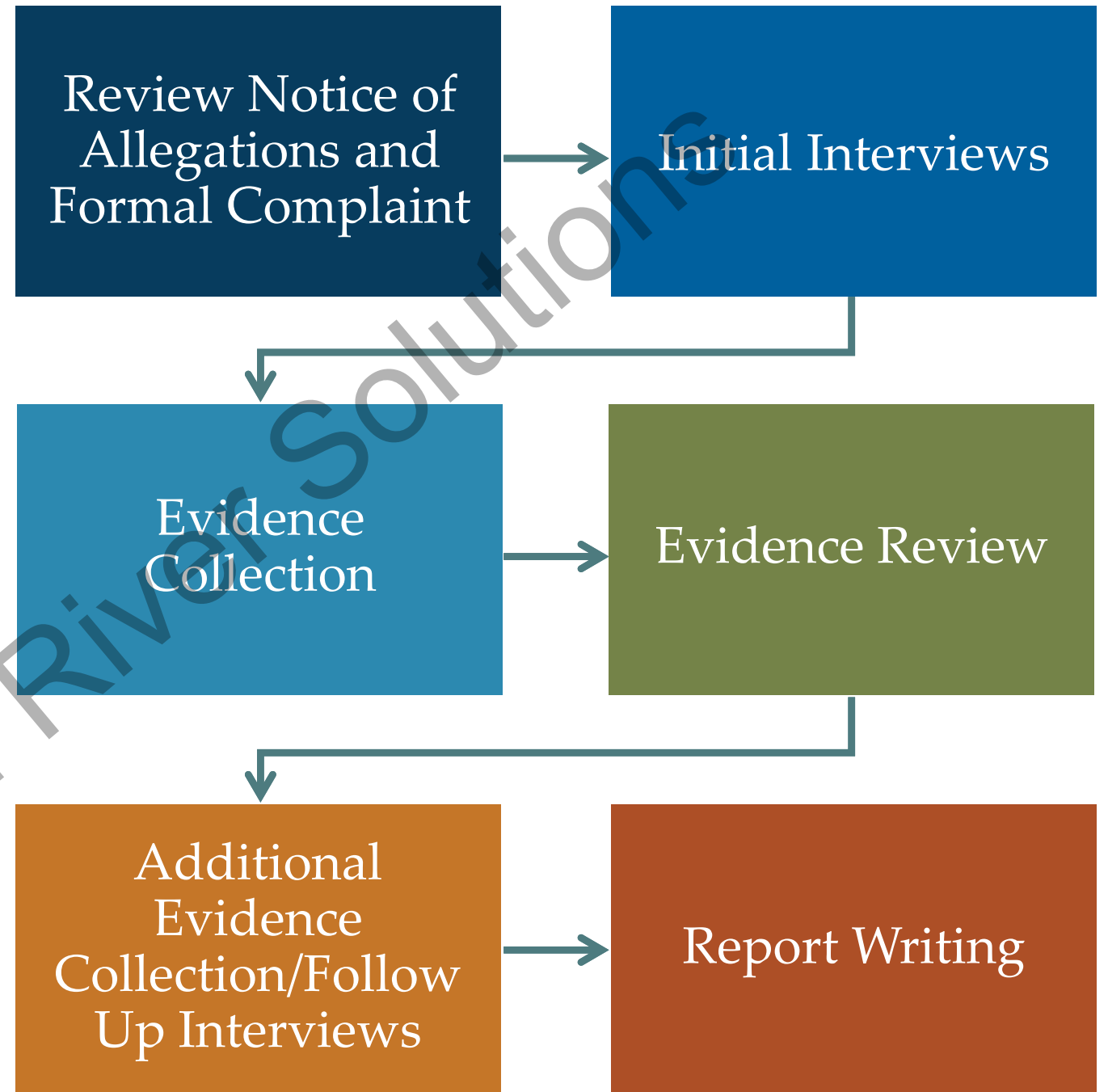
Trauma informed practices must be applied equally to all genders.

# DEVELOPING AN INVESTIGATIVE STRATEGY

02

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# 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?

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# STALKING

Policy definition: “**Stalking**” includes a course of conduct or pattern of words—whether verbal, written or electronic—directed at a specific person that would cause a reasonable person to fear for her, his or others’ safety or to suffer substantial emotional distress.

## Questions to Ask:

1. Did Respondent engage in a course of conduct or pattern of words?
2. Was that course of conduct directed at Complainant?
3. Would Respondent’s conduct cause a reasonable person to either
  - a. *Fear for their safety or the safety of others, or*
  - b. *Suffer substantial emotional distress?*

# SEXUAL ASSAULT

Policy definition: “**Sexual assault**” means any actual, attempted or threatened sexual act with another person without that person’s consent. Sexual assault includes, but is not limited to:

1. Rape and attempted Rape;
2. Intentional and unwelcome sexual touching (including disrobing or exposure), however slight, with any body part or any object, by a man or a woman upon a man or a woman, without effective consent or coercing, forcing or attempting to coerce or force another to touch you, themselves or a third party with any of these body parts or areas when such touching would be reasonably and objectively offensive;
3. Any sexual act in which there is force, violence, or use of duress or deception upon the victim;
4. Any sexual act perpetrated when the victim is unable to give consent; and
5. Sexual intimidation, which includes, but is not limited to:
  - a. Threatening, expressly or impliedly, to commit a sexual act upon another person without his or her consent;
  - b. Stalking or cyberstalking; and
  - c. Engaging in indecent exposure.

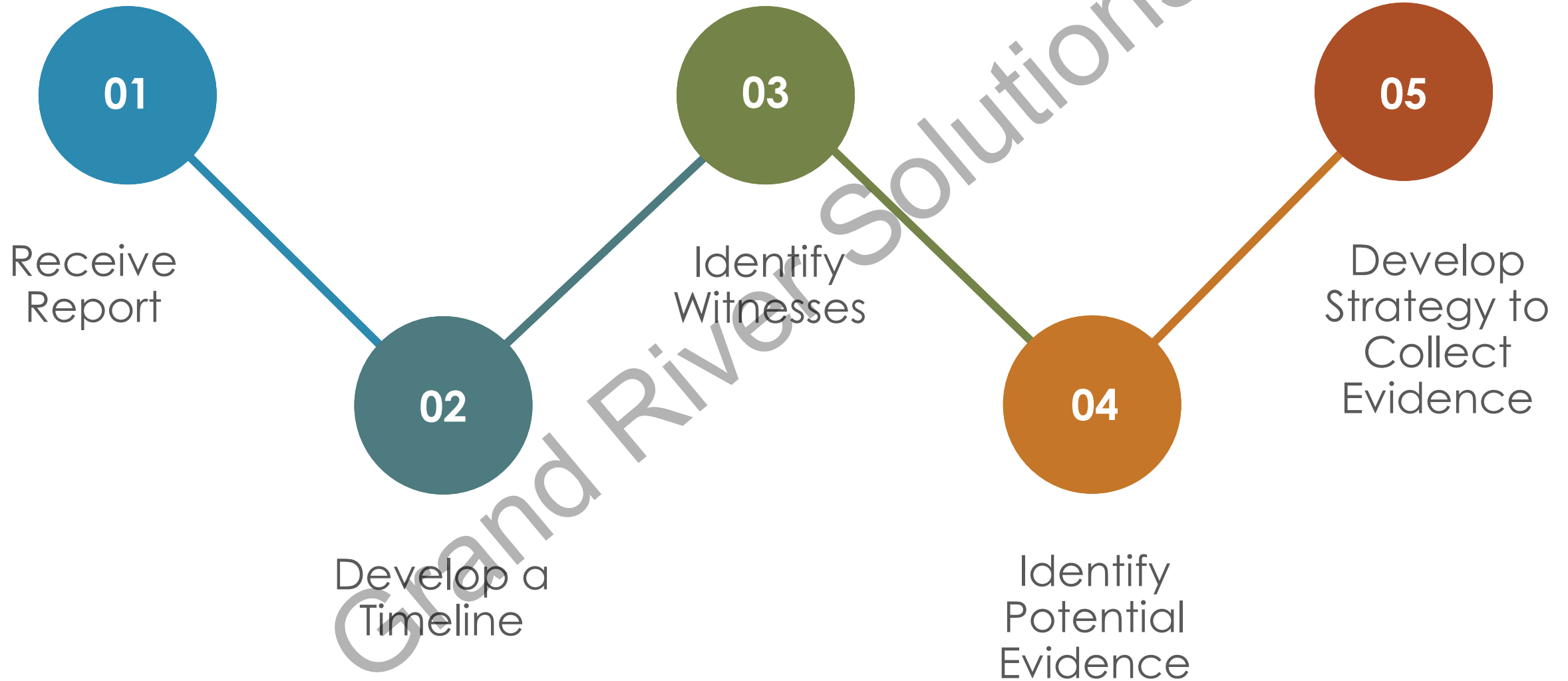
# SEXUAL ASSAULT (2)

Intentional and unwelcome sexual touching (including disrobing or exposure), however slight, with any body part or any object, by a man or a woman upon a man or a woman, without effective consent or coercing, forcing or attempting to coerce or force another to touch you, themselves or a third party with any of these body parts or areas when such touching would be reasonably and objectively offensive;

## Questions to ask:

1. Was there sexual touching with any body part or object?
2. Was it intentional and unwelcome?
3. Without effective consent?
  - *What is the ground for lack of consent?*
    1. Was there speech or conduct indicating a freely given agreement to have intercourse or participate in sexual activities?
    2. Coercion or force?

# THE PROCESS: DEVELOPING AN INVESTIGATIVE STRATEGY



# INVESTIGATION TIMELINE

## Prior History

- Between the Parties?
- Of the Parties?

## Incident

- Consent?
- Type of Contact?
- Injuries?

## Pre-Incident

- Communications?
- Interactions?
- Conduct?

## Post Incident

- Behaviors?
- Communications?

# The Importance of Organization

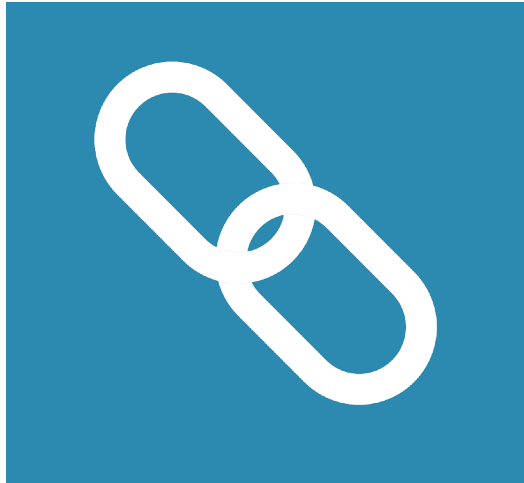


# INVESTIGATIVE INTERVIEWS

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# INTERVIEW OBJECTIVES



## Listen

Allow interviewee to share their experience

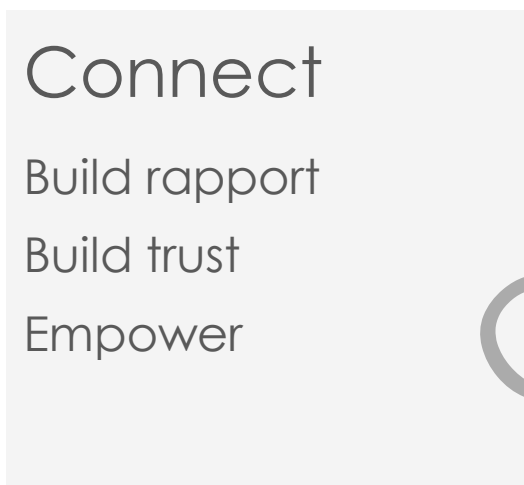


## Evidence Preservation

Text messages

Photographs

Names and contact info for witnesses



## Connect

Build rapport

Build trust

Empower



## Clarify

Understand what you have heard

Seek additional information

# 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

# EXPECTATIONS

What they should expect of you:

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

What you expect of them:

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



## HOW DO WE...

- Build Rapport and Trust?
- Empower?

# START INTERVIEW BY ELICITING A NARRATIVE

- “Help me understand your experience?”
- “What are you able to tell me about your experience?”
- “Start where you are comfortable and share what you are able to remember.”

Allow the person to speak uninterrupted. This takes patience.

# 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

# CAPTURE THE ENTIRE EXPERIENCE

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

# THE BEFORE

At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.



# AND THE AFTER

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

- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction;  
“Has anyone expressed concern about you since the assault?”
- Communication/contact between the complainant and respondent

# THROUGHOUT THE INTERVIEW



Explain questions, especially the difficult ones.

How much did you drink?

**What they hear:** this is your fault because you were drinking.

Do not ask leading questions.

Watch your tone.

Do not rush.

Listen.

Pay attention to and document information.

Document questions asked.

# 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

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Provide opportunity for the party or witness to review it.

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Provide opportunity for party or witness to provide a response.

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Incorporate the response.

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# AFTER THE INTERVIEW: REFLECTION



Reflect.

Is there something you missed or forgot to ask?



Do you need clarity on any of the information shared?



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



Has evidence of additional policy violations been shared?

# FOLLOW UP INTERVIEWS

- Seek Clarification
- Explore Inconsistencies
- Explore contradictions
- Explore difficult issues
- Opportunity to respond

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# 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 COLLECTION AND ASSESSMENT

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## EVIDENCE:

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

-Black's Law Dictionary

# TYPES OF EVIDENCE

## Direct Evidence

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

## Circumstantial Evidence

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

## Corroborating Evidence

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

# EVIDENCE

Testimony

Text  
Messages

Social Media  
Posts and  
Messages

Emails

Surveillance

Videos

Photographs

Police Body  
Camera  
Footage

Swipe Records

Medical  
Records

Phone Records

Audio Recordings

# EVIDENCE COLLECTION

- Identify the items of evidence that you would like to obtain.
- Develop an intentional strategy for obtaining that evidence.
- Overcome barriers to evidence collection.
- Considerations about collecting certain types of evidence.

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**A THOROUGH INVESTIGATION**  
is more than evidence collection

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# 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?

# A THOROUGH INVESTIGATION PERMITS THE DECISION MAKER TO ASSESS

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight



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# ASSESSING RELEVANCE

## Why Does it Matter?

- Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.
- Character Evidence
- Polygraph Evidence
- Opinion Evidence

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# OPINION EVIDENCE

When might it be relevant?

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



# OPINION EVIDENCE: TRY IT!

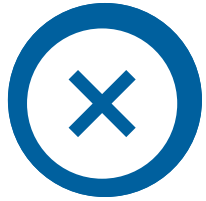
You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

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

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

# ASSESSING AUTHENTICITY

Investigating the products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.

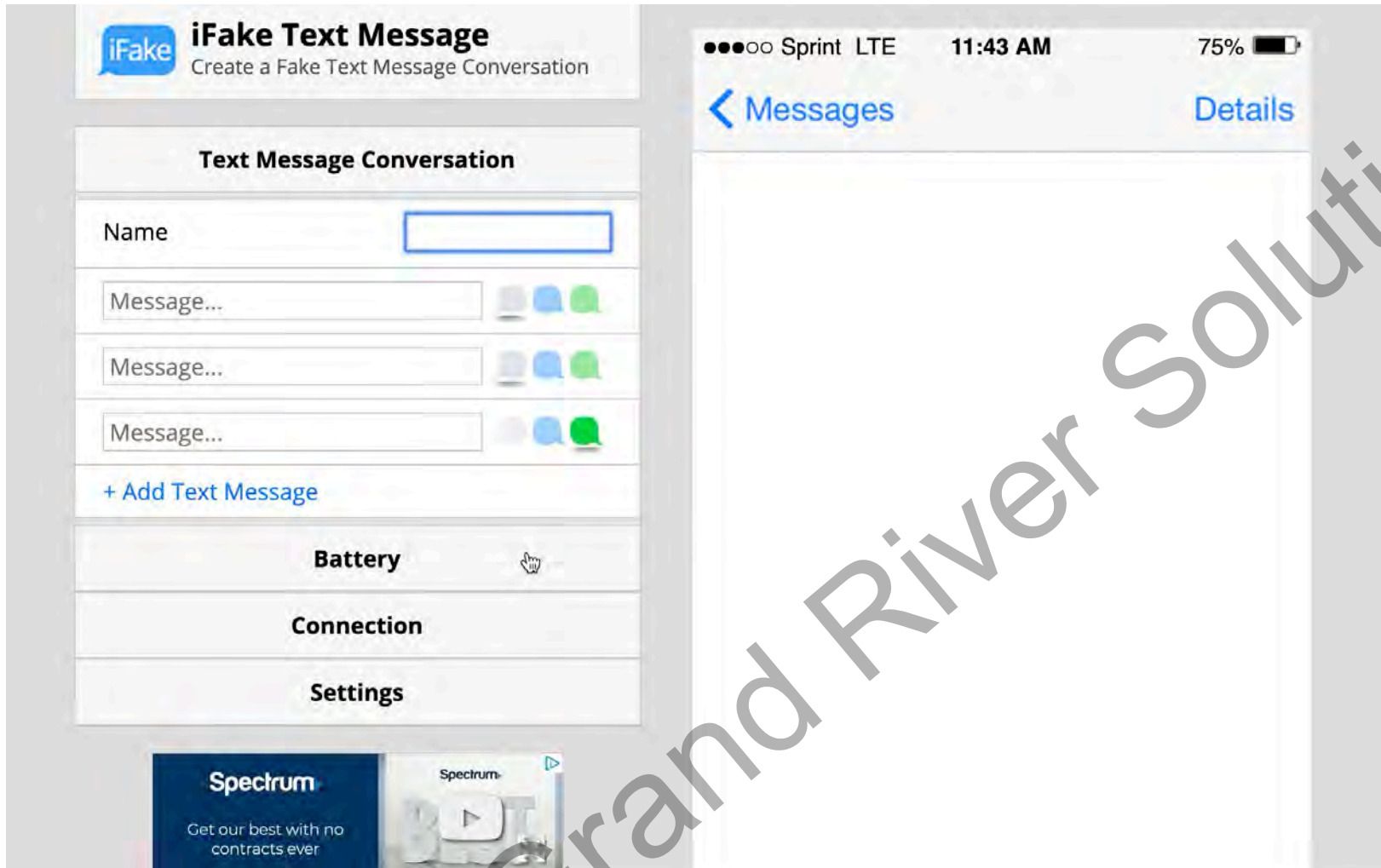


Investigate the authenticity if necessary.

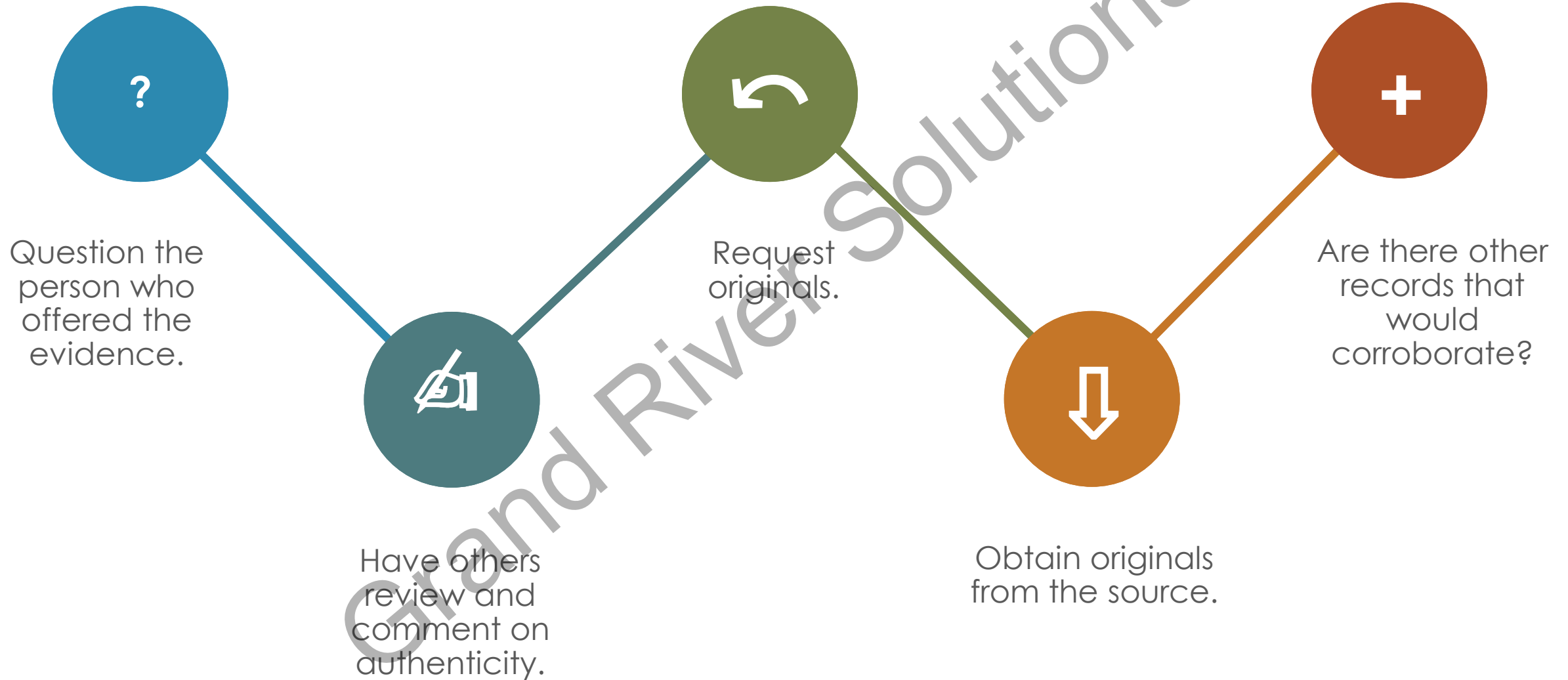
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# FAKE TEXT MESSAGES

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# IS IT AUTHENTIC?



# 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

# BARRIERS TO EVIDENCE COLLECTION



Non-participating parties

Uncooperative witnesses

Uncooperative advisors

Identity of party or witness unknown

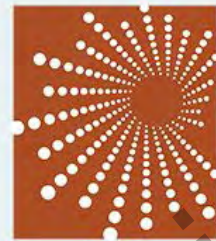
Refusal to share materials

Materials lost or no longer accessible

Difficult topics

# THE RIVER CONNECT IS MOVING TO LINKEDIN.

At the same place you do your business social media networking, you can now find The River Connect and all the great events, resources, and real-time discussions on the topics important to higher ed equity professionals.



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## CONNECT WITH US



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