Title IX Investigator Training

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NACUA NOTES

J. Nolan, "Promoting Fairness in Trauma-Informed Investigation Training"

- National Association of College and University Attorneys ("NACUA") NACUANOTE, February 8, 2018, Vol. 16 No. 5
  - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at: https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training

- cited 8 times in Title IX regulations Preamble

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Topics for Discussion

- New Title IX regulations: most pertinent background and definitions
- Focusing on conduct, not gender
- Conducting Investigations:
  - Impartiality: avoiding prejudgment, conflicts of interest, bias
  - “Directly related” and “relevance” concepts
  - Creating investigation reports
  - Potential impacts of trauma on memory
  - Introduction to witness-centered interview concepts
  - Ensuring that witness-centered investigation approaches are applied in a manner that is demonstrably balanced, thorough, and fair to all parties

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Introduction to New Title IX Regulations

The Long Road to the New Regulations…

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces notice and comment process

- **September 22, 2017:** OCR issued:
  - Dear Colleague Letter ("2017 DCL") withdrawing 2011 DCL and 2014 Q&A
  - Q&A on Campus Sexual Misconduct ("2017 Q&A")

- **November 16, 2018:** Proposed Regulations Posted
  - Officially published in Federal Register later in November, 2018
  - Fact Sheet and Summary also posted

- **May 6, 2020:** Final Regulations Posted
  - Officially published in Federal Register May 19, 2020

- **August 14, 2020:** Final Regulations Effective

Scope of Institutional Responsibility

- Institution must respond when it has:
  - "Actual knowledge"
    - When "an official of the recipient who has authority to institute corrective measures" has notice, e.g., Title IX Coordinator
  - of "sexual harassment" (as newly defined)
  - that occurred within the school's "education program or activity"
    - "includes locations, events, or circumstances over which the recipient exercised substantial control" over the respondent and the context in which the sexual harassment occurred
    - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
  - against a "person in the United States" (so, not in study abroad context)

School's "education program or activity"

- School's "education program or activity":
  - "includes locations, events, or circumstances over which the recipient exercised substantial control" over the respondent and the context in which the sexual harassment occurred.
    - Not a simple artificial bright-line on/off campus distinction
    - Does not simply depend on geographic location of activity

School's "education program or activity"

- Examples: Did conduct occur in location/context where school:
  - Owned premises (or officially recognized student organization that owned or controlled the premises): including fraternities
  - Exercised oversight, supervision or discipline, or
  - Funded, sponsored, promoted or endorsed event

Decision Point: School's "education program or activity"

- "[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity."

- Given this change, schools will have to decide whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined "education program or activity"

Title IX Sexual Harassment

- Prohibited "sexual harassment" means conduct on the basis of sex that constitutes one or more of the following:
  - An employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (i.e., quid pro quo);
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment); or

Title IX Sexual Harassment

- Prohibited "sexual harassment" means conduct on the basis of sex that constitutes one or more of the following:
  - Sexual assault (as defined in Clery Act)
    - FBI/UCR SRS or NIBRS until January 2021, thereafter just NIBRS
  - Or "dating violence," "domestic violence," and "stalking" (as defined in Clery Act/Violence Against Women Act).

Procedural Changes

- Must investigate “formal complaints”
- Must satisfy certain notice and ongoing notice requirements
- Must produce investigation report with certain elements
- Must give parties and advisors opportunity to review all information “directly related to allegations”
  - 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

Procedural Changes

- New procedures require that schools:
  - Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
  - Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;
  - Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

Procedural Changes

- New procedures require that schools:
  - Give the parties an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney)
  - Provide written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
  - Provide both parties an equal opportunity to review and respond to the evidence gathered during the investigation; and
  - Send both parties the investigator's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility

Focus on Conduct, Not Gender

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Focus on Conduct, Not Gender

- Majority of reported incidents and investigations in university context involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but:
  - The gender, gender identity and/or sexual orientation of any party to an investigation should have no bearing on how colleges and universities will investigate

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CDC National Intimate Partner and Sexual Violence Survey, Summary Report (2011)

- 16,507 survey respondents
- Found that men and women had similar prevalence of nonconsensual sex in the previous 12 months
- Estimated 1.270 million women raped and 1.267 million men “made to penetrate”

http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf

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Focus on Conduct, Not Gender

- *See Nungesser v. Columbia Univ.*, 169 F.Supp.3d 353, 365 n.8 (S.D.N.Y. 2016) (citing Lara Stemple and Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 Am. J. Of Public Health, e19 (June 2014)
  - **("noting that although the idea of female perpetrators sexually assaulting male victims is 'politically unpalatable,' studies have found that up to 46% of male victims report a female perpetrator"))** (parenthetical note in *Nungesser*)
- *Sexual Victimization of Men* article is available here:
  - https://www.researchgate.net/publication/262306031_The_Sexual_Victimization_of_Men_in_America_New_Data_Challenge_Old_Assumptions

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Focus on Conduct, Not Gender

Sexual Victimization of Men article observes in part (with citations):

- Portraying male victimization as aberrant or harmless adds to the stigmatization of men who face sexual victimization
- Fallacies described as “rape myths” in context of female victimization have been largely discredited in American society, but this discourse has not been developed in the context of male victims
- Myths regarding sexual assault of men pose obstacles to men coping with victimization

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Focus on Conduct, Not Gender

- *See also* Jessica A. Turchik, *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, Psych. of Men & Masculinity, Vol. 13, No. 3, 243-255 (2012) (available at: https://www.researchgate.net/publication/232425813_Sexual_Victimization_Among_Male_College_Students_Assault_Severity_Sexual_Functioning_and_Health_Risk_Behaviors/link/09e41510807d975c0a000000/download)
- 299 male college students asked whether they had experienced at least one sexual victimization experience since age 16:
  - 21.7% reported unwanted sexual contact, 12.4% reported sexual coercion, and 17.1% reported completed rape
  - 48.4% of these experiences involved female perpetrators

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Court Decisions Focused on Conduct, Not Gender

- *Nungesser v. Columbia University*, No. 1:15-cv-3216-GHW (S.D.N.Y. March 11, 2016)
- Court granted University's motion to dismiss "successful" respondent's claim that University failed to appropriately address public statements and activism by complainant in his case because, e.g.:
  - Plaintiff's claim was based on the "logical fallacy" that because the allegations against him concerned a sexual act, that everything that follows from it is "sex-based" for Title IX purposes
  - Personal animus by complainant against him was based on their belief that he raped them, not per se because he is male
  - Persons of any gender may be perpetrators or victims of sexual assault

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Court Decisions Focused on Conduct, Not Gender

- *Doe v. University of Chicago*, No. 16 C 08298 (N.D.Ill. September 20, 2017)
- "Successful" plaintiff/respondent claimed that University's response to public statements about him by complainant was so inadequate as to violate Title IX
  - Court rejected claim for the most part, holding, among other things:
    - Personal animus expressed toward someone because they are believed to have engaged in sexual assault is not per se discrimination because of sex for Title IX purposes

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Court Decisions Focused on Conduct, Not Gender

John Doe v. Columbia College Chicago, 2017 WL 4804982 (N.D.Ill. Oct. 25, 2017):

- "As in *University of Chicago*, any harassment that Doe suffered at the hands of Roe and her friends—including the alleged physical assault, the verbal comments made to Doe, and the social media comments and text messages—was 'because they believed he had committed sexual assault or because of personal—not gender—animus.'"
- "Doe's own allegations make clear that he was harassed because of his relationship with Roe and because of his status as a person accused of sexual assault, not because of his gender."

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Court Decisions Focused on Conduct, Not Gender

John Doe v. Columbia College Chicago, 2017 WL 4804982:

- "Roe and her followers' social media statements about Doe, for example, labeled him a "predator," a "rapist," and a "danger" to CCC's students. Even viewed in the light most favorable to Plaintiff, these statements are not gender-based harassment because they derive solely from Doe's status as a person who Roe and her friends believed committed a sexual assault, not from Doe's status as a male."
- As the court in *Nungesser* explained, calling someone a rapist is not "inherently gendered."

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Colleges and Universities are "Anti-SA, Anti-IPV, Anti-Stalking"

- Universities are opposed to prohibited misconduct; they are not opposed to anyone because of gender
- *Gomes v. Univ. of Maine Sys*. (D. Me. 2005): "There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it. It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.'"

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Conducting Investigations

Impartiality:
Avoiding Prejudgment,
Conflicts of Interest, and Bias

Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

» "the Department's interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what "men" or "women" do or do not do."

Impartiality: Avoiding Prejudgment and Bias

From Title IX Regulation Preamble:

» Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims."

» Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that "rely" on sex stereotypes in training Title IX personnel on how to serve in those roles impartially and without prejudgment of the facts at issue, meaning that research and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment."

Impartiality: Avoiding Prejudgment and Bias

- Analogous regulatory language:
  - Regulations' "presumption of non-responsibility" requires schools to investigate and resolve complaints: "without drawing inferences about credibility based on a party's status as a complainant or respondent."
  - Hearing officers must not have "bias for or against complainants or respondents generally or for an individual complainant or respondent"

Impartiality: Avoiding Prejudgment and Bias

- Preamble repeatedly warns against risk of "sex-based bias" in decision-making
- Preamble:
  - "To the extent that commenters accurately describe negative stereotypes applied against students with disabilities, and particularly against students with disabilities who are also students of color or LGBTQ students, the final regulations expressly require recipients to interact with every complainant and every respondent impartially and without bias."
  - "A recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations."

Impartiality: Avoiding Prejudgment and Bias

- Practical application of these concepts in investigations:
  - Do not rely on cultural "rape myths" that essentially blame complainants
  - Do not rely on cultural stereotypes about how men or women purportedly behave
  - Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Impartiality: Avoiding Prejudgment and Bias

- Practical application of these concepts in investigations:
  - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
  - Avoid any perception of bias in favor of or against complainants or respondents generally
  - Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Conflicts of Interest

- Commenters argued that investigators and hearing officers employed by schools have an "inherent conflict of interest" because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors
- Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents
- Department's response:
  - Department's authority is over schools, not individual investigators and other personnel, so Department will focus on holding school's responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Conflicts of Interest

- Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience
- "Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE
- "exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

- Bottom line:
  - Follow facts of every individual case
  - Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party

“Directly Related” and “Relevance” Concepts

“Directly Related” Evidence

Regulation:

- 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
- Including 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
- So that each party can meaningfully respond to the evidence prior to the conclusion of the investigation

"Directly Related" Evidence

- In Preamble, Department declines to define "directly related" further, indicating that it "should be interpreted using [its] plain and ordinary meaning."
- Department notes that term aligns with (similarly undefined) term in Family Educational Rights and Privacy Act ("FERPA"), which defines covered education records in part as documents that are:
  - "directly related to a student; and
  - Maintained by an educational agency or institution . . . ."
- Department ties parties' right to review directly related information under Title IX regulations with Department's prior position that students may review FERPA-protected information about other students if necessary to preserve their due process rights

“Directly Related” Evidence

- 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
- Point of information-sharing provision is to promote transparency and allow parties to object to investigator’s conclusion that certain evidence is not relevant, and argue why certain evidence should be given more weight
- Cautious approach:
  - Read term broadly, withholding or redacting information only where explicitly irrelevant under regulations (see below), or where not related to allegations

"Relevant" Evidence

- Investigative reports must "summarize 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."

“Relevant” Evidence

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - 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

Evidence That is Not "Relevant"

- Hearing-related regulation provides:
  - "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."

Evidence That is Not "Relevant"

- Regulations provide that schools will not:
  - "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

Creating Investigative Reports

Summarizing "Relevant" Evidence

- Again, Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - 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

Investigative Reports

» Regulation:

- "Prior to completion of the investigative report, the [school] must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and
- the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report."

Investigative Reports

- Regulation:
  - Investigative reports must “fairly summarize relevant evidence”
  - “at least 10 days prior to a hearing . . . send to each party and the party’s advisor, if any, the
  - investigative report in an electronic format or a hard copy, for their review and written response.”
- Investigator does not need to revise investigative report in light of this written response from parties

Recommendations Regarding Responsibility?

- In addition to summarizing relevant evidence, investigative reports MAY include a recommendation regarding responsibility and related analysis
- Recommendation option is not specifically required or prohibited by regulations or Preamble
- Whether to include recommendations or not may be decided by each institution at its discretion
- Obviously, decision-makers must make independent decisions based on
  - Investigative report and related evidence, and
  - Information presented at hearing, including information resulting from cross-examination

Introduction to Witness-Centered Interview Concepts

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Traditional Interview Techniques

- Often focus on “who, what, when, where, why”
- Often focus on what questioner thinks they need, e.g.:
  - Developing a chronology
  - Fitting facts into policy violation elements framework
- Questioner’s determinations and (worse yet) pre-determinations of what is relevant, and what is not, can be controlling
  - Questioner often interrupts witness to seek immediate clarification
- Common questioning techniques:
  - Leading questions
  - Yes/no or choice questions
  - Paraphrasing for “clarification”
- “Why did you/why didn’t you” questions that can discourage participation

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"Malleability of Memory"

Elizabeth Loftus, Ph.D., "Planting misinformation in the human mind: A 30-year investigation of the malleability of memory," *Learning & Memory* (2005) (reviews 30 years of research)

- Summarizes research on "misinformation effect", whereby study subjects report that they "remember" observing details in scenarios that were not actually there, because researchers intentionally misinformed them that those details were there
- Subjects found to be more susceptible to effect where:
  - Relatively more time had passed between observation and test
  - Subject self-reported they often had lapses in memory and attention
- Article notes that in the "real world", "misinformation" that contaminates memory can come from:
  - Witnesses' talking to each other
  - Leading questions or suggestive techniques
  - Media coverage

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"Creating False Memories"

Elizabeth Loftus, Ph.D., "Creating False Memories," *Scientific American* (Vol. 277 #3, pp. 70-75)

- Loftus and others did "lost in the mall" experiments in which adult study subjects were asked to "try to remember" events that subjects were told a family member had told the researchers about
- Subjects were given three one-paragraph descriptions of events that had actually happened to the subjects in childhood, as reported by relatives, and one description of a "lost in the mall" event that had not actually happened

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"Creating False Memories"

Elizabeth Loftus, Ph.D., "Creating False Memories," *Scientific American* (Vol. 277 #3, pp. 70-75)

- 29 percent "remembered", either partially or fully, the false event
- Takeaways per researchers:
  - "Memories are more easily modified . . . when the passage of time allows the original memory to fade."
  - "Corroboration of an event by another person can be a powerful technique for instilling a false memory."
- Potential application to interview/investigation context:
  - Questioners should take care to avoid questioning approaches that could undermine a witness's recollection of authentic memories
  - Leading, yes/no choice, and paraphrasing questions can potentially have such an effect

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National event focuses on trauma and memory

"This Kavanaugh hearing is a blown-up politicized version of exactly what Title IX investigators face every day."

Unidentified commenter quoted in "The Kavanaugh-Ford Hearing and Campus Sexual Assault: 3 Parallels", *Chronicle of Higher Education* (Sept. 27, 2018) (available at: https://www.chronicle.com/article/The-Kavanaugh-Ford-Hearing-and/244662).

"Cognitive Interview" technique and trauma/memory issues were discussed during hearing

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Putting Discussion in Context

- This discussion concerns potential effects of trauma that some people may experience in some situations
- No part of discussion should be misunderstood to suggest that all individuals will experience trauma, emotionally or physically, in a certain, "dose-dependent" way
- Scientific theories about the potential effects of trauma should never be used to determine responsibility for misconduct in a specific investigation

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Potential Effects of Trauma

- During sexual assault or other traumatic event, individual may experience a threat to survival
- Body may summon energy to fight/flee/freeze
- May result in shock, “dissociation,” and / or other involuntary responses during and after violence
- Memory of traumatic event may be fragmented/impaired due to neurobiological factors

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HPA Axis - Limbic system

- Hippocampus
  - Brain's lookout – during stress or trauma, it signals the
- Pituitary
  - Master gland – controls hormonal manufacturing
- Adrenals
  - Sit on top of the kidneys and make numerous hormone models in doses that reflect the signals from the pituitary

Hypothalamus Pituitary-Adrenal Axis Hormones

- Catecholamines
  - Neurotransmitters such as norepinephrine that influence behavior
    - e.g., fight, flight or freeze
- Cortisol and adrenaline - increase energy
- Endogenous opioids - block pain and/or emotion
- Oxytocin - promotes feelings of well-being

Note: Types and amounts of hormones created in the HPA Axis vary greatly between individuals

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Potential Effects of HPA Axis Substances on Memory

- Structures in brain involved in encoding memory (e.g., hippocampus) may be sensitive to HPA axis substances
- HPA axis substances may interfere with or affect encoding of memory

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Potential Effects of Trauma on Memory

- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-traumatic event

- Central details may be remembered very well, but peripheral details less so

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Potential Effects of Trauma on Memory

- Be very thoughtful about how much, if any, weight to place on witness's affect and other presentation given potential effects of trauma, stress, alcohol, cultural factors, etc.
  - Recognize that presentation may not necessarily be "evidence"

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Potential Effects of Trauma on Memory

- Generally in interviews we expect to hear information generated by the cerebral cortex – organized, chronological.
- With individual who has experienced trauma, the information recalled regarding traumatic incidents may not be organized and/or chronological.
- Shouldn't prejudge by assuming that disorganized reporting is necessarily evidence of EITHER:
  - false reporting, or
  - existence of trauma

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Example Interview Concepts

- The following slides are intended to orient participants to interview concepts and approaches that differ from the traditional “who, what, when, where, why” approach
- This presentation does not endorse a particular concept
- Instead, this discussion is intended to encourage investigators to:
  - think critically about how traditional interview approaches may facilitate or interfere with a witness’ recollection of authentic memory, and
  - consider how alternative interview approaches might promote better sharing of information,
  - while meeting institutional needs to conduct an investigation that is demonstrably balanced, thorough, and fair to all parties

"The Cognitive Interview" (1992)

- **Fisher and Geiselman, "Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview" (1992)**
- Used primarily by law enforcement
- Extensively studied for effectiveness
  - See "THE COGNITIVE INTERVIEW: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years," 16 Psych. Pub. Pol. and L. 340 (Nov. 2010)
- Language of book is "couched in terms of police investigations" because that is context in which authors did practical aspects of their research, but authors suggest that "[n]on-police investigators . . . [can] simply modify the general concepts to make them compatible with their particular investigative conditions." (p. 4)
- Approach not designed for Title IX/Clery context and I wouldn't recommend following it per se in Title IX/Clery cases
- I'm discussing it here to demonstrate its commonality with the Forensic Experiential Trauma Interview

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"The Cognitive Interview" (1992)

- Suggests based on psychological research that some "memory-related" problems may be due not to a witness's not having certain stored memories, but rather by "inappropriate retrieval"
- Certain interviewing approaches may "indirectly control the [witness's] retrieval plan, and the more efficiently they guide the [witness] to search through memory the more information they will uncover." (p. 14)
- CI encourages the investigator to understand that the witness, not the investigator, should be the "central character in the interview," (p. 15)
- CI "not intended as a recipe"
  - Investigator should "use good judgment and change directions as unexpected conditions arise"
  - CI offered as "a general guiding principle . . . to be used in concert with sound judgment and the flexibility to respond to the unanticipated." (p. 15)

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"The Cognitive Interview" (1992)

"Dynamics of the Interview" (Chapter 3)

- Examples given are, frankly, dated and gender-stereotypical
  - male pronouns are used to describe the police officer investigators and interviewees are usually referred to as women
- Submits that most effective interviewers ask the least questions and encourage the witness do most of the talking (p. 20)
- **Advocates encouraging witness to take active role in interview by:**
  - **Using open-ended questions**
  - **Not interrupting witnesses in middle of open-ended narrative (pp. 20-21)**

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"The Cognitive Interview" (1992)

"Dynamics of the Interview" (Chapter 3)

- Suggests interviewer should **"avoid making judgmental comments and asking confrontational questions"** unless "certain" there is deception involved (p. 26)
- Encourages interviewer to obtain all that can be obtained through open-ended questions before addressing inconsistencies and conflicting information, which can be done "later in the interview" (p. 26)

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"The Cognitive Interview" (1992)

"Overcoming Eyewitness Limitations" (Chapter 4)

- Chapter includes many suggested techniques for, and generalized statements about, police investigations that would not translate well to neutral, Title IX/Clery investigative interview context, but general observations of note include (at pp. 41, 44-45)
  - Encouraging witnesses to **share details as they come to mind**, rather than requiring witnesses to respond only to the questions asked or stick to a chronology or what they might think are more central details
  - Encouraging witnesses to share, rather than suppress or edit out, potentially inconsistent statements, **then following up later for clarification**
  - Encouraging witnesses to **take their time** and **share as much detail as they can**

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"The Cognitive Interview" (1992)

"Mechanics of Interviewing" (Chapter 6)

- Not all aspects of law enforcement-focused discussion and examples would translate well to neutral, Title IX/Clery investigative context, but some noteworthy general concepts include:
  - **Use neutral questions rather than leading questions**
  - **Avoid negative wording** (e.g., "You don't know X, do you?)
  - **Avoid compound questions**
  - **Avoid unnecessarily complex questions**
  - **Avoid jargon and technical terminology**
  - **Generally use open-ended rather than closed questions, and only used closed questions strategically, once basic answers to closed questions were established through responses to open-ended questions**
  - **Pace questioning slowly and allow pauses between questions to encourage witnesses to speak more freely**
  - **Inquiring about touch, smell and taste sensory impressions**

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"The Cognitive Interview" (1992)

- "THE COGNITIVE INTERVIEW: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years," 16 Psych. Pub. Pol. and L. 340 (Nov. 2010) reviewed numerous studies of CI and noted among many other observations that:
  - When used under laboratory conditions, interviews conducted using CI and modified CI produced more recollection of correct details when compared to other specified interview techniques
  - Research on effectiveness of CI when used in interviews that occurred long after an event was lacking

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What is Certified FETI®?

www.CertifiedFeti.com

These slides are only authorized to provide general information on what a Forensic Experiential Trauma Interview® is. Use of these slides to instruct, in any way, on how to conduct a Forensic Experiential Trauma Interview® is strictly prohibited.

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WHAT IS FETI®?

The Forensic Experiential Trauma Interview® is a science and practice-based interviewing methodology informed by the current research on the neurobiology of trauma and memory.

FETI provides interviewers with a framework to maximize the opportunities for information collection and accurately document the interview in a neutral, equitable, and fair manner.

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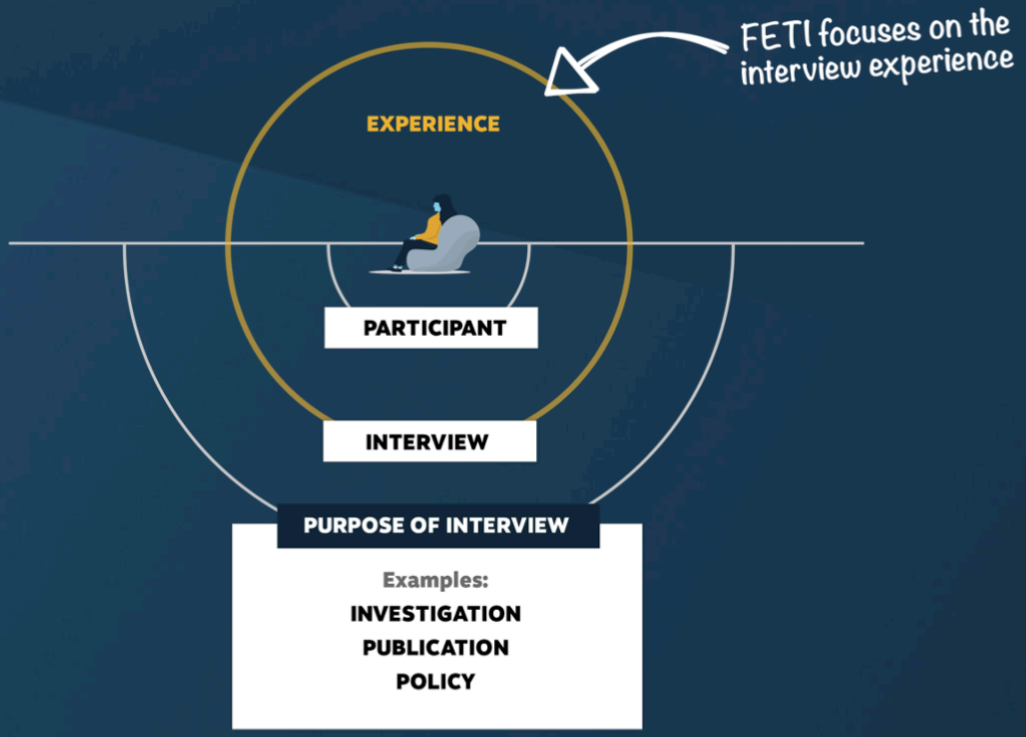
ONE METHODOLOGY

One way of interviewing for all situations and all participants.



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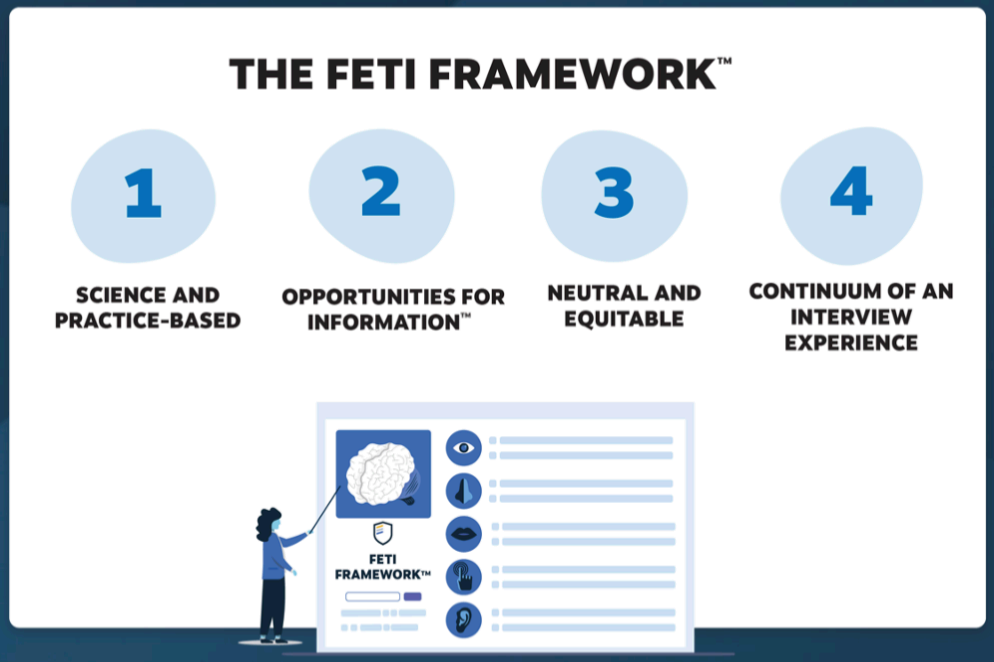

A key part of the Methodology includes the FETI Framework,™ which outlines the skills, abilities and information necessary to conduct a Forensic Experiential Trauma Interview.

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ON SCIENCE AND TRAUMA

Any life event has the potential to be stressful or traumatic. Information on neuroscience and brain-based responses informs the FETI® Methodology to provide a better understanding of how high-stress or trauma may affect behavior and memory.

Certified FETI® courses do not train any individual to connect an interview participant's behavior to trauma, stress or any other experience that may be perceived to cause influence on a person's actions.

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GOAL OF A FETI® INTERVIEW

To obtain what the participant is
ABLE TO tell the interviewer.

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The FETI Framework™ provides interviewers with instruction on how to

COLLECT THE DOTS

NOT

CONNECT THE DOTS™

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CERTIFIED FETI® METRICS

The following provides a synopsis of the metrics when evaluating a FETI® Interview:

- The interviewer demonstrates appropriate neutrality and equity. For example, the interviewer is not aligned with or supporting any side and remains impartial and unbiased, not assumptive or judgmental.
- The interviewer opens the interview with empathy. This can be as simple as expressing appreciation (e.g. 'Thank you for being willing to speak with me today') or a more in-depth exploration of the System of Security™ taught in the Introduction to FETI® course.
- The interview is accurately documented using the participant's exact words and not a synopsis of what was said.

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CERTIFIED FETI® METRICS

- The interviewer demonstrates compassion and genuine empathy to the participant. For example, it would be appropriate for the interviewer to say to the participant, "I appreciate you being willing to speak with me."
- The interviewer uses Brain-Based Cues® throughout the interview. Brain-Based Cues® shorten and simplify the way an interviewer provides opportunities for the participant to share information about aspects of their experience.
- The interviewer maintains their appropriate role during the entire interview. For example, the interviewer does not attempt to "connect the dots" and focuses only on "collecting the dots".
- An interviewer does not ask compound, leading, assumptive, minimizing, sequencing, yes/no or why questions during any part of the interview.

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CERTIFIED FETI® METRICS

- The interviewer utilizes Unidirectional Interviewing™ during the entire interview. Unidirectional Interviewing™ assists an interviewer with understanding the difference between an interview and a conversation allowing for information to come from the participant without interruption or input from the interviewer. This includes not paraphrasing, changing the participants words, confronting or providing the participant with advice, opinion or personal information from the interviewer.

- The interviewer is intentional about their Interviewer Person™ which includes tone, facial expression, empathic listening, physical presentation, mindset and body language.

- The focus of a “successful” interview is solely on the knowledge, skills and abilities of the interviewer and not on the information that was provided by the interviewee.

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WHAT FETI® IS NOT

The following are examples of approaches that are not consistent with the Certified FETI® Methodology:

- The interviewer asks the participant to recall information in a specific sequential order.
- The interviewer asks the participant to imagine something during the interview.
- The interviewer sympathizes or offers platitudes to the participant during the interview. For example, saying "I'm sorry this happened to you."
- The interviewer uses rapport techniques such as theme building, or finding common interests, complimenting the participant, or identifying similar experiences to create connection

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WHAT FETI® IS NOT

- The interviewer offers opinions to the participant during the interview. For example, 'You're so brave for being here', 'I believe you', 'What happened isn't your fault' or 'You're doing the right thing by speaking with me'.
- The interviewer draws conclusions or assesses credibility during the interview based on the information provided by the interviewee.
- The focus of a "successful" interview is on the information provided by the interviewee.
- The interviewer enters an interview with a predetermined list of questions about what they think is needed from the interviewee.
- The interviewer provides intervention or problem-solving during the interview. For example, 'Next time you should ...' or 'Is it possible you could have ...'

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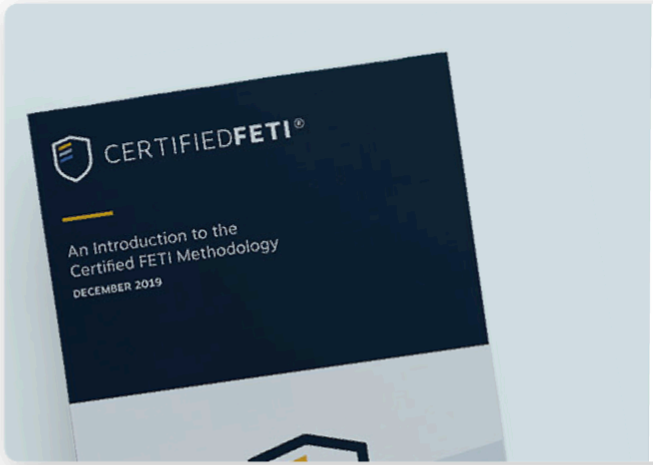
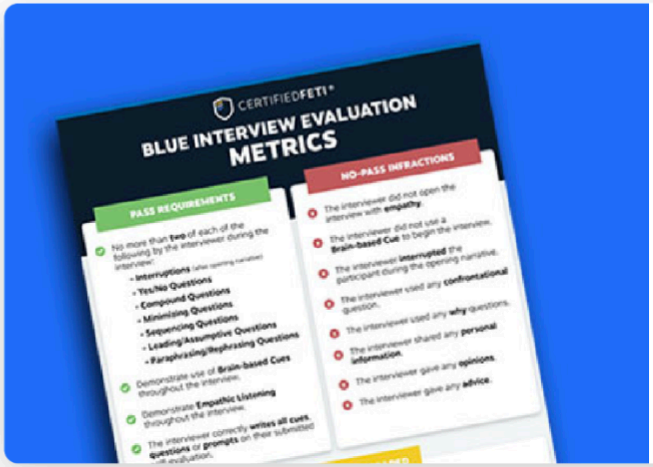


READ THE FULL PAPER ON THE FETI METHODOLOGY

You can download and read the full introductory paper at www.certifiedfeti.com/intro-paper



DOWNLOAD LATEST CERTIFIED FETI METRICS

You can download the Certified Evaluation Blue Metrics sheet at www.certifiedfeti.com/metrics

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Interviewing for Clarification

- It is crucial to interview and question witnesses for clarification (sometimes in initial, and definitely in follow up, interviews)
  - Promotes accuracy and fairness
  - If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

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Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

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Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
  - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on "presentation as evidence"

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Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Similar cues can be used
- Sensory information can be gathered from respondents
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Goal: Neutral, open-ended questioning approach should be used with both parties

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Summary and Questions

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Thank You!

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