

The New Title IX Final Regulations: What You Need To Know To Stay In Compliance Day 4

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Presenter

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Day 4

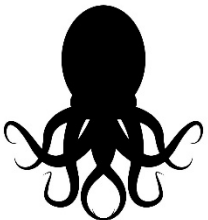
- A. Relevance & Sufficiency
- B. Credibility & Bias
- C. Conflict of Interest



A. Relevance & Sufficiency

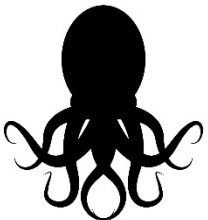
Relevance: What is it?

- Legal term that deals with the “admissibility of evidence” in various legal settings.
- Federal Rules of Evidence (FREs) are the set of rules that guides whether or not a specific type of evidence can be used in court cases.
- FRE Rule 401. Evidence is relevant if:
 - a) it has a 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



Federal Rules of Evidence (FREs): Applies to T9 Grievance Process?

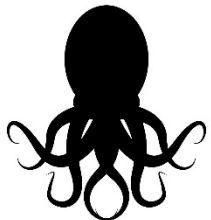
- FREs serve as a good way ensure evidence is relevant
- The FRE's are not required to be used in an administrative hearing (T9 grievance process is viewed as an administrative hearing)
- Administrative hearings are not subject to the FREs; but they can choose to adopt them if they want.
- Institutions may use information regarding the FREs to help understand and apply “relevance”





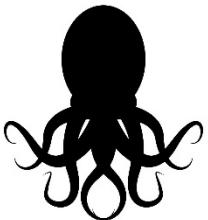
Relevance: What is it? (cont'd)

- Evidence must help to prove that “something” is either true OR not true. (That “something” has to be important (“of consequence”))
- The Title IX grievance procedure is considered an administrative process.
- What is “inculpatory” vs. “exculpatory” evidence?
[§106.45(b)(5)(ii)] Which one is “relevant?”



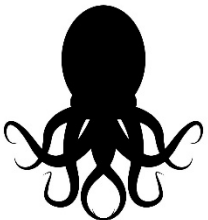
Can relevant evidence be excluded? YES!

- FRE Rule 403 allows relevant evidence to be excluded from a hearing
- If the probative value is substantially outweighed by danger of:
 - (a) Unfair prejudice
 - (b) Confusing the issues
 - (c) Misleading the jury
 - (d) Undue delay
 - (e) Wasting time
 - (f) Needlessly presenting cumulative evidence



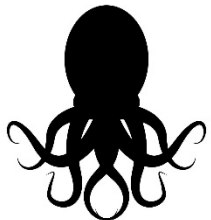
Other “Relevance” Considerations

- Rape Shield Law [*§106.45(b)(1)(iii)*]
- Cannot “..use... evidence that constitute or seek disclosure of information protected under a legally recognized privilege, unless the person holding the privilege has waived the privilege.” [*§106.45(b)(1)(ix)*]
- What about “hearsay?” What is hearsay? Can you use hearsay evidence?



“Relevance” & Interview Questions:

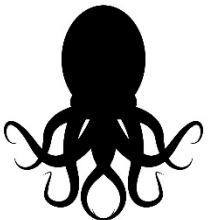
1. To develop a rapport
2. To receive general context or background information
3. To receive specific information relating to the definition (“elements”) of the type of prohibited conduct
4. To test the witness’ credibility- remember: feasibility, likelihood, motivation to lie, etc.
5. To clarify



What about “Hearsay?”

What is hearsay?

- An out-of-court statement offered by a party to establish the truth of the matter asserted.
- It can be a document or a witness telling you what another witness said.
- Remember, the grievance process is an administrative hearing; NOT a court of law.
- Administrative hearings may consider hearsay, BUT it is best to use it to find other corroborating evidence using the hearsay when possible.



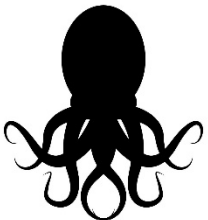
Hearsay

Example 1:

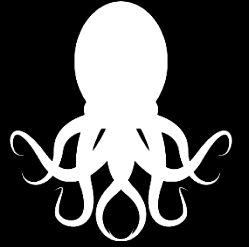
- Witness A says: “I was standing right there and saw Car A run the red light and hit Car B.”

Example 2:

- Witness B says: “My cousin told me that she was standing right there and saw Car B run the red light which caused Car A to hit them.”



Activity: Interview questions



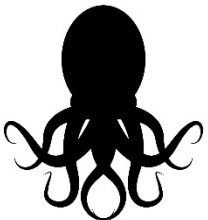
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Why is the interview question being asked? Place the # in the chat box that you believe is the reason WHY the question is being asked.

#	Reason for the question:
1.	To develop a rapport
2.	To receive general context or background information
3.	To receive specific information relating to grid “elements”
4.	To test the witness’ credibility- remember: feasibility, likelihood, motivation to lie, etc.
5.	To clarify information shared previously

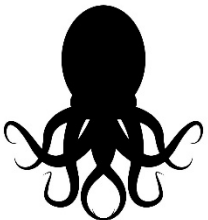
Sufficiency: When is the evidence “sufficient?”

- The institution “must ensure that the burden of proof and the **burden of gathering evidence sufficient** to reach a determination regarding responsibility”
[106.45(b)(5)(i)] occurs during the investigation
- How do you know when you have enough evidence, such where a decision maker can make an appropriate determination?
- “Reasonably available and relevant”
- Gather all names of available witnesses; all available documentary evidence; determine what facts are still needed based on the analysis grid (this is coming up!)



Remember,

- Make sure the evidence you gather remains relevant to the issue regarding the policy violation
- The FREs are inapplicable to the grievance process unless an institution adopts them.
- Investigators should have a means for making a determination as to whether the information that has been gathered is **sufficient** for a decision maker to make a determination
- Did the investigator gather all relevant information reasonably available at the time of the investigation?

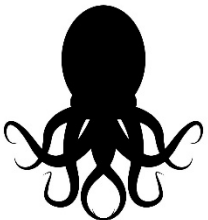




B. Credibility & Bias

Credibility

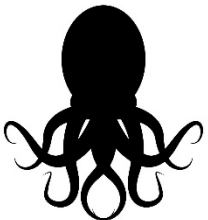
“Credibility” means “the quality of being believed or accepted as true, real, or honest.”¹



¹Definition is taken from the Merriam-Webster dictionary online at: <http://www.merriam-webster.com/dictionary/credibility>

.Credibility (cont'd)

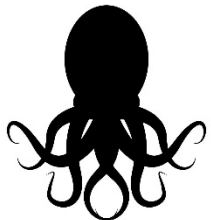
- Pieces of information may be different in value.
- Distortions of the truth vs. lie = “shades of gray;” not always black and white
- No formal rules for “credibility”
- Investigators will need to rely on their own set of experiences when assessing credibility (be aware of potential bias and stereotyping).
- Ask: Is the reason WHY you believe something or someone “explainable?” Reasonable?





.Credibility (cont'd)

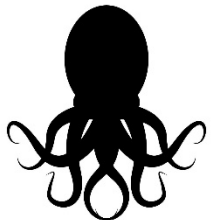
- Some hallmarks of credibility are believability, trust, accuracy, fairness, and objectivity.
- Assessing credibility will (for the most part) be subjective.
- There will be times when your investigative conclusions will be based solely on a credibility assessment.
- Assess the credibility of the speaker and the information that is conveyed. How?





Important Things to Remember When Assessing Credibility

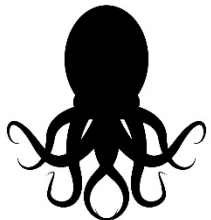
- **Likelihood:** Is the way the witness is describing the event likely to be accurate? Does it seem problematic? Is it more likely than not to have happened the way the witness described it? Why?
- **Experience:** Did the witness personally experience what they saw or heard? Did they hear it from someone else? (Hearsay?)
- **Corroboration:** Is the information they are providing corroborated by other information?





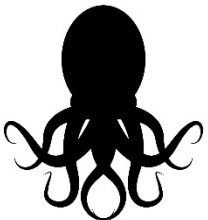
Important Things to Remember When Assessing Credibility (cont'd)

- **Motive to distort the truth?:** Is there a reason why the witness would want to distort the truth? What is the reason?
- **Information differences:** Did information provided in a previous statement differ from information in a subsequent statement? Determine the relevancy of the information to the investigation.



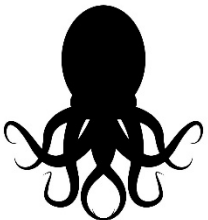
Remember:

- Credibility has no formal rules; but a determination regarding credibility cannot be based on bias or stereotypes.
- Always ask yourself: “Why do I think this way?” Is there objective information or documentary evidence from another witness that contradicts the information provided in the interview?
- Use known hallmarks when assessing credibility: likelihood, experience, corroboration, motive to lie and information differences.
- “Notice and Wonder” can be a powerful tool to help you assess credibility, especially when there are discrepancies.



“Notice and Wonder”

- Used to ask about discrepancies in information and to address problematic witness behavior during an interview.
- Allows investigators the ability to get clarification from the witnesses directly, without putting them on the defensive (if asked in a correct manner).
- As with many “tools” sometimes they work and sometimes they don’t.



“Notice and Wonder” Examples

Example 1: *(contradictory statements)*

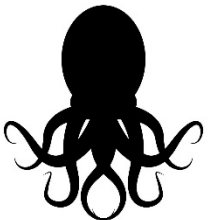
“I noticed in your previous statement, you stated _____.

In a subsequent statement you stated _____.

I’m wondering if you can help me understand why there is a difference between the two.”

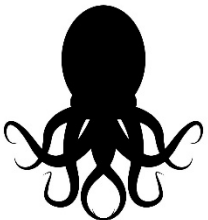
Example 2: *(hyper emotional response)*

“I noticed you seem a bit emotional/upset with the questions I am asking, and I wondered if there was a particular reason why. Is there something I said that offended or angered you? Is there anything I can do to make things easier for you during this interview?”



Bias (& Stereotypes)

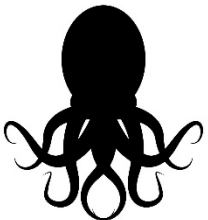
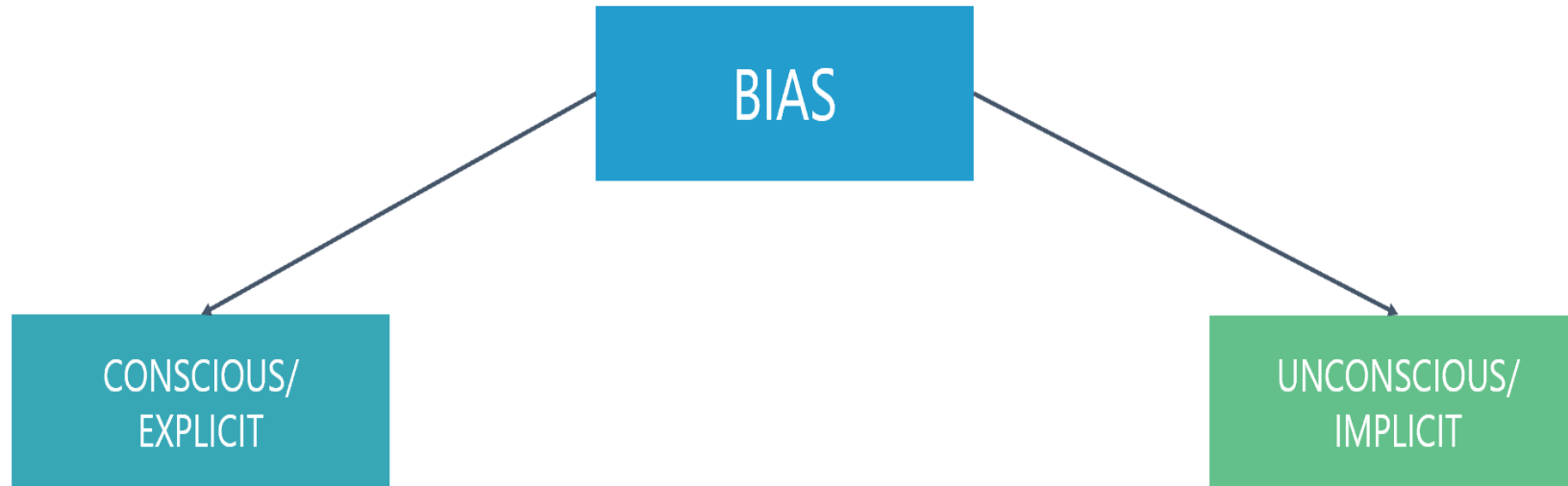
- “Bias” is defined as “a tendency to believe that some people, ideas, etc., are better than others that usually results in treating some people unfairly.”¹
- “Stereotype” is defined as “to believe unfairly that all people or things with a particular characteristic are the same.”²
- Bias is often based on stereotypes.



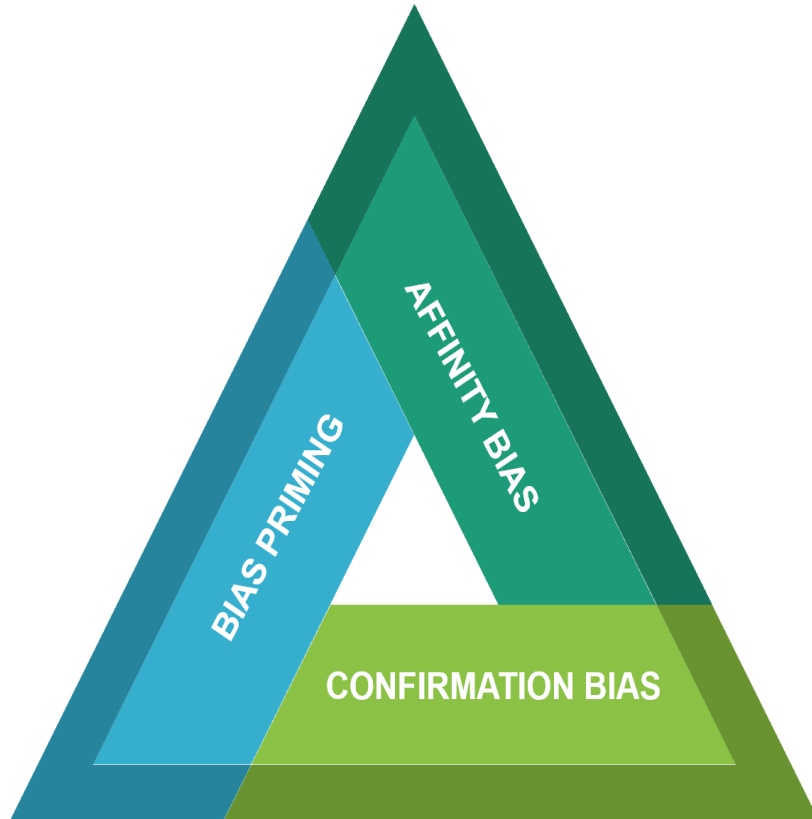
¹Definition comes from Merriam-Webster online dictionary: <http://www.merriam-webster.com/dictionary/bias>

²Definition comes from Merriam-Webster online dictionary: <http://www.merriam-webster.com/dictionary/stereotype>

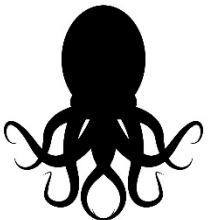
BIAS IN INVESTIGATIONS



3 TYPES OF UNCONSCIOUS/IMPLICIT BIAS



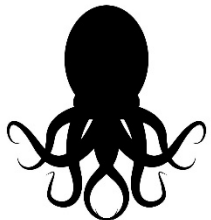
- 01 AFFINITY BIAS**
Favoring information by someone who is similar.
3 contexts: interviewer; interviewee; investigator evaluating representations of others location
- 02 CONFIRMATION BIAS**
Natural tendency to favor information that confirms a preconceived notion
- 03 BIAS PRIMING**
Asking questions or using words that may influence the way someone answers or responds to a question (like "leading" questions)





Affinity Bias

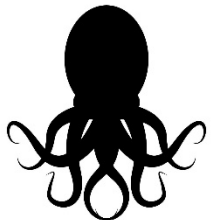
- “Unconscious tendency to get along with others who are like us.”
- Example: Bev’s Krispy Kreme Donut Story



Confirmation Bias

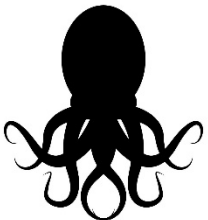
<https://www.youtube.com/watch?v=6xMaR8au-YU>

Confirmation bias is the tendency to search for, interpret, favor, and recall information in a way that confirms or supports one's prior beliefs or values



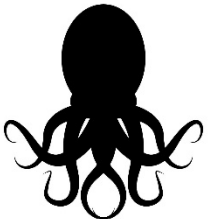
Bias Priming

- Psychological process in which exposure to a stimulus activates a concept in memory that is then given increased weight in subsequent judgment tasks.
- Example: Football season! I love the Spartans! (Not!)



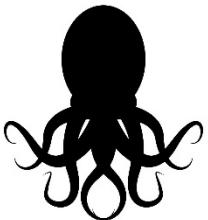
Remember:

- No matter what type, everyone has biases. Bias and stereotyping are based on personal experiences and opinions, and they are different for everyone.
- Not everyone will fit your expectations or preconceived notions; be careful of stereotypes.
- Identify and acknowledge your own personal biases; don't allow them to influence you during an investigation.
- Dealing with any types of implicit bias takes a lot of practice.



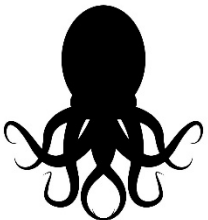
Some Thoughts...

- Ask yourself: Why do I think this way?
- Unconscious bias can occur before your investigation starts, while gathering information, choosing witnesses, during interviews and while writing the report.
- Focus on the information provided.
- Don't look for something that's not there (unless there is a reasonable basis to believe it exists and is relevant to your investigation).



Some Thoughts... (cont'd)

- Be conversational and build rapport, but don't be afraid to talk about the “uncomfortable” details during your interviews. Start with open-ended and then narrow down the questions as the witness begins to give you more detail.
- Recognize the different types of witnesses and how best to approach them.
- Unconscious bias can occur at all stages of the investigation. Identify and acknowledge your own personal biases; don't allow them to influence you during an investigation.
- Let the facts determine the outcome.

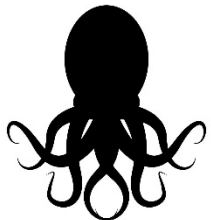




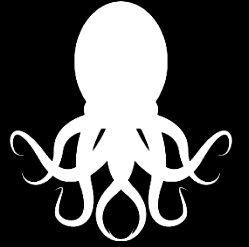
C. Conflict of Interest

C. Conflict of Interest

Definition: a conflict between the private interests and the official responsibilities of a person in a position of trust



Activity: Conflict of Interest?



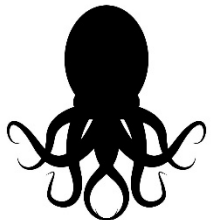
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Provide an example of when the following positions may be “conflicted out” during a case, such where they should **not be assigned** to it or **be removed** if they are in the middle of the case. Why should they conflicted out?

Doctor	Title IX Coordinator
Investigator	Decision-maker
Firefighter	Police Officer

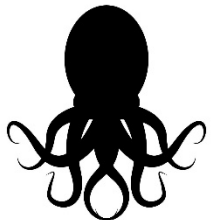
Potential conflict of interests

- Knowledge of an area or topic where a personal opinion has formed
- Family member or personal friend is involved
- Interest in the outcome (beneficial or detrimental)
- Strong personal beliefs
- Bias for or against a particular person or area
- Incapability to remain unbiased or non-judgmental
- Previous involvement
- Any other reasons?



Remember:

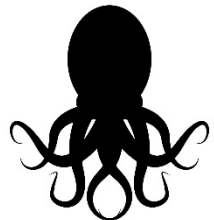
- Potential conflicts of interests should be identified and removed at the beginning of a case (when possible)
- Institutions should have a plan in place in case of a conflict of interest by any member of the Title IX Team (no matter how small the team is)
- Each position (Title IX Coordinator, investigator, decision maker and informal resolution officer) each has an independent role and should not serve in multiple roles on the same case.



Mahalo!

Any Questions?

End of Day 4 of 4



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