



# Fair, Thorough, and Trauma Informed Sexual Violence Investigations

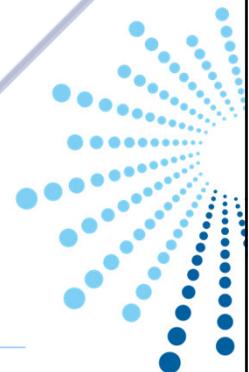
## Day 2

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## Day Two Agenda

- 01 Evidence Collection and Assessment
- 02 Practical Application of the Procedural Requirements
- 03 The Investigative Report and Record



October 2020

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Quick Review!

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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



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## 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



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# Testimony is Evidence

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## Non-Testimonial Evidence

Text Messages	Social Media Posts	Social Media Communications	Emails
Surveillance	Videos	Photographs	Police Body Camera Footage
Swipe Records	Medical Records	Phone Records	Audio Recordings

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# 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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## A Thorough Investigation Permits the Decision Maker to Assess



Relevance



Credibility



Reliability



Authenticity



Weight

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## Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

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## 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

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## “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.”

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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

Lay foundation for the opinion if opinion is relevant.

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# Assessing Authenticity

Investigating the products of the Investigation



Never assume that an item of evidence is authentic.



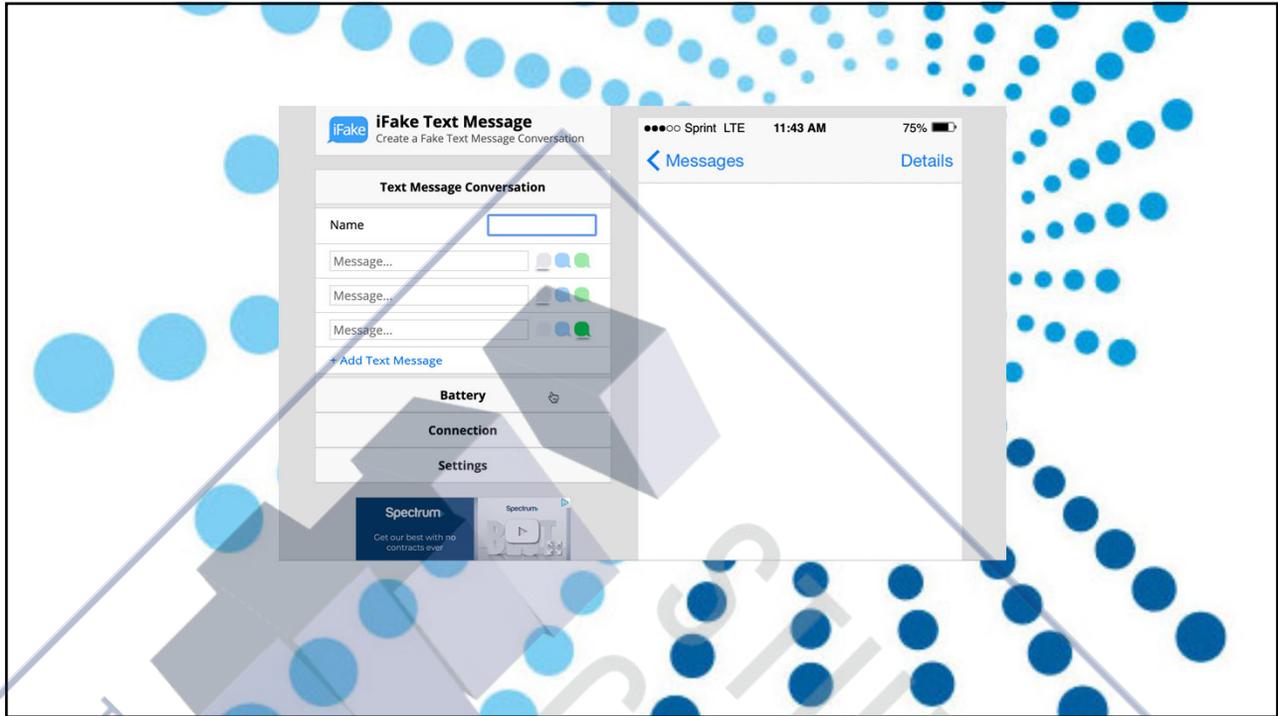
Ask questions, request proof.



Investigate the authenticity if necessary.



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## Assessing Credibility and Reliability

No formula exists, but consider the following:

- Opportunity to view
- Ability to recall
- Motive to fabricate
- Plausibility
- Consistency
- Character, background, experience, and training
- Coaching
- Bias

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## The Practical Application of the Procedural Requirements

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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 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

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## 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



10 days to provide a written response

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## 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 they will have 10 more days to comment

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**“Directly Related” and  
“Relevant Evidence”**



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## Who Decides?

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



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

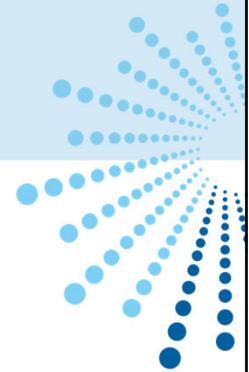


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## The Investigative Report and Record

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## Relevancy Standard

### 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."

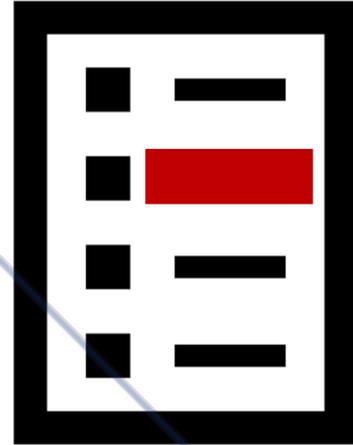
### Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions
- Legally recognized and un-waived privilege.
- Records related to medical, psychiatric, psychological treatment

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# Redactions



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## 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

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# The Purpose of the Report

To allow for advance Review

To allow for advance Preparation

- By the Decision Maker
- By the Parties

Reduce likelihood of bias in final outcome



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## Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel



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## Other Recipients?

Friends of the parties

Parents

Law enforcement

Attorneys

Judges

Media

Social media

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## Essential Elements

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format



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## Examples of Appendices

Appendix A:  
witness testimony  
only (e.g.,  
transcripts,  
statements  
summaries, etc.)

Appendix B:  
relevant  
documentary  
evidence (e.g., text  
messages, SANE  
reports,  
photographs, etc.)

Appendix C:  
the remaining  
evidence deemed  
irrelevant, but  
directly related to  
the allegations in the  
formal complaint

Appendix D:  
the procedural  
timeline



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## Structure of the Report

Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

Conclusion



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# Questions?

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