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Reluctant Witnesses: Best Practices for Engaging Individuals in Challenging Title IX Investigations

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RELUCTANT WITNESSES

BEST PRACTICES FOR ENGAGING INDIVIDUALS IN CHALLENGING TITLE IX INVESTIGATIONS

Rowan University 2019 Title IX Summit

June 3, 2019



SEXUAL MISCONDUCT AND TITLE IX INVESTIGATIONS PRACTICE



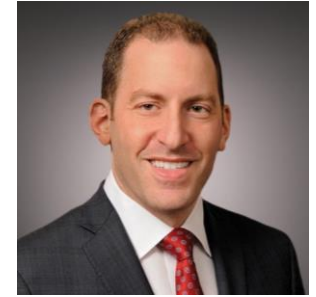
expertise

- Independent Investigations of Sexual Assault & Harassment Reports
- Lookback Audits
- Policies and Procedures Reviews
- Employee & Student Trainings

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Dan Schorr is a Managing Director at Ankura, based in New York. A former criminal prosecutor and municipal inspector general, he has more than 20 years of legal and investigative experience. Dan manages a variety of complex assignments, from investigations into major fraud, internal issues at corporations and governmental entities, and sexual misconduct and Title IX violations to litigation support, threat management, construction quality concerns, labor-law compliance, and independent monitorships. Dan began his legal career as an assistant district attorney, specializing in the investigation and prosecution of sex crimes, domestic violence, child abuse, and homicides. He also worked for several years as a vice president in the law division at Morgan Stanley, where he conducted investigations into claims related to client investments. He has appeared as a commentator on legal issues for television news programs on ABC, Fox News, CNN, and the BBC, among others. Dan conducts investigations at educational institutions, corporations, governments, and other entities. He has trained university investigators on best practices when handling Title IX matters and is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.

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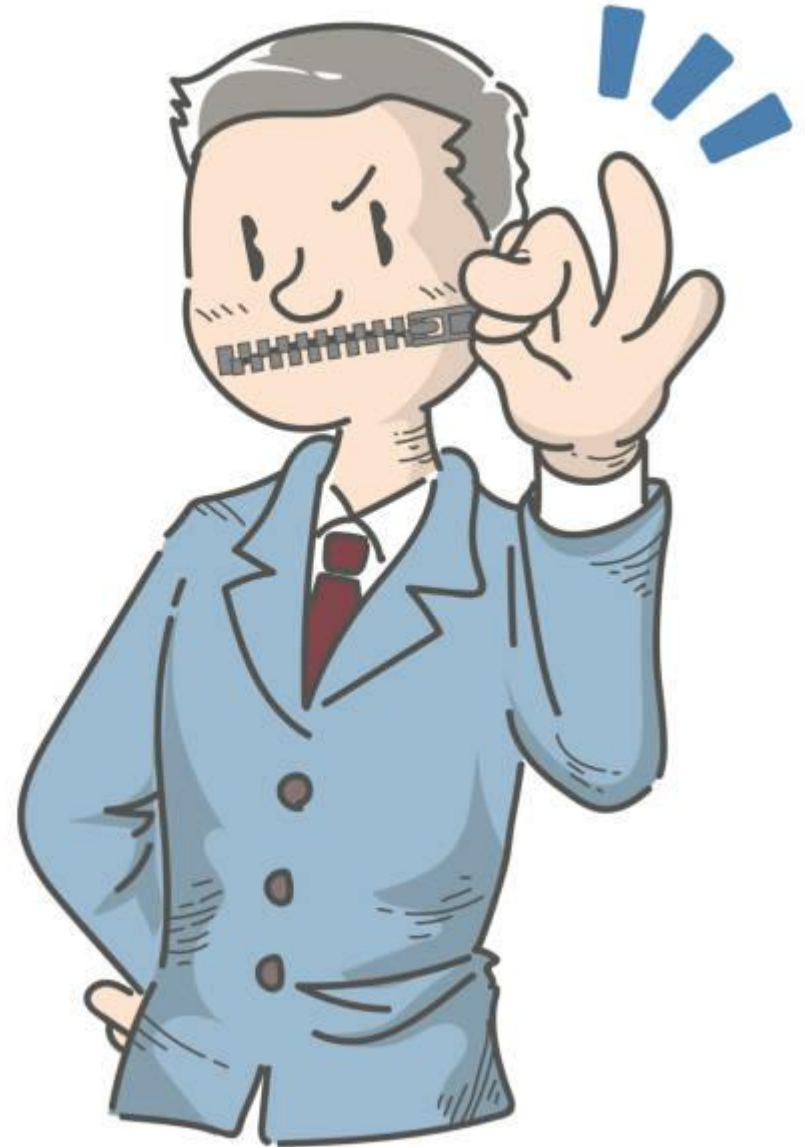
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Alyssa-Rae McGinn is a Senior Associate with five years of experience leading and conducting a variety of complex investigations, including monitorships of a large international bank and a governmental child welfare agency. Alyssa-Rae is an ATIXA-certified Civil Rights Investigator. Additionally, she is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit. Alyssa-Rae conducts investigations at educational institutions and corporations into allegations of sexual misconduct and gender-based harassment involving students, faculty, staff, and corporate leadership. These investigations include communication with parties in accordance with school or company policy and Title IX and Title VII regulations, interviews with parties and witnesses, analysis of relevant evidence, and consultation on findings of liability and sanctions.

WHY ARE INTERVIEWEES RELUCTANT?

REASONS FOR RELUCTANCE

- **Mistrust** of the organization, the investigation process, the interviewers, or the system in general
- **Discomfort** with strangers/interviewers
- **Discomfort** with subject matter
- **Fear** of retaliation
- **Fear** of not being believed
- **Fear** of retraumatization
- **Fear** of getting in trouble



WHY SHOULD WE INTERVIEW RELUCTANT COMPLAINANTS?

- Complainant may have important information related to their own or others' safety, even if they act difficult or hesitant in interview
- Complainant may have reasons for being reluctant that are significant to analyzing their report:
 - Discomfort or trauma
 - Pressure not to report
 - Wanting to protect the respondent
 - Concern that their report will not meet violation threshold
- Complainant's reluctance may be based on a misunderstanding of the investigative process, which can be addressed in the interview

BEST PRACTICES & TIPS



BEFORE THE INTERVIEW

- Make initial contact in a way that is professional, respectful, and equal for all involved
 - Each party and witness may respond differently – choose your means of communication and how often you follow-up with unresponsive participants based on what you know about them
- Do your homework before each interview
- Choose an appropriate location, or allow the participant to choose an appropriate location in which they are comfortable

CONTROL WHO IS IN THE ROOM

- Who is in the room can impact the interview
- Two investigators
- Advisors should not be:
 - A witness
 - A significant other
 - A parent/guardian
 - Anyone who may impede the honest, full story
- Set ground rules with advisors, but be flexible



BE TRANSPARENT

- Clearly introduce yourself and your role as an independent investigator
- Explain how you will be conducting a comprehensive, prompt, and fair investigation
- Be clear that you are there to listen to everything they have to say, review their evidence, and speak with their witnesses
- Do not make promises you cannot keep and keep your promises
- Set realistic timelines and keep them apprised of the process as it progresses
- State upfront that you may need to follow up with them or re-interview them
- Be clear about school policies regarding activities like drug & alcohol use

BE KIND

- Treat the interviewee with **respect, empathy, and kindness**
- Recognize that this is difficult for all involved
- Offer services/resources to both parties, as well as witnesses if needed
- Be open-minded and non-judgmental
- Remember that many cases are in gray areas, and most people are telling you some version of their truth
- Make your body language reflect your listening stance:
 - Make eye contact
 - Soften your demeanor
 - Demonstrate active listening
 - Smile or frown as appropriate for their story
- If an interviewee becomes confrontational, don't mirror their demeanor – keep calm, take a break, redirect
- **ENSURE YOU ARE EQUALLY KIND TO ALL PARTICIPANTS**

BE COMFORTABLE

- Be/act comfortable with sexual terms, behaviors, and choices
- Do not judge or be surprised by things they say
- If you are uncomfortable, they will be uncomfortable
- Allow them to speak in their own language (crude language, etc.), but clarify
- You are there to listen to their story and determine whether policy was violated, not to evaluate their lifestyle
- If there is something that makes you uncomfortable:
 - Do research
 - Practice talking about it
 - Re-evaluate whether you are the right person for the interview
- Be aware of unconscious bias and the power positions & identities you bring into the room

HAVE A REAL CONVERSATION



- Bring your real personality into the interview and engage in a conversation: **listen** and **respond**
- Don't be afraid to be personal – talk about something you have in common, laugh with them
- Be true to your own style of speaking
- Be flexible and let the conversation take its natural course
- Guide the conversation, but let them set their own pace and tell their story in their way
- Utilize silence, especially when you ask hard questions
- In cross-examination, make those questions part of the conversation and ask them in your own voice

ASKING THE HARD QUESTIONS

- Wait to push back until they have finished telling their story
- **“Let’s go back through that slowly:”** Return to parts of their story that require clarification or questions or that are disputed by physical evidence
- Wait to confront with adverse evidence – may make an interviewee less willing to continue talking
- When asking the hard questions:
 - Phrase your questions so that they are respectful of the story you’ve heard
 - Don’t be accusatory
 - Explain the motivation for your question
- Let them know that as an investigator, you are trying to figure out what doesn’t track and why

AFTER THE INTERVIEW

- The relationship does not end after the interview is completed
- Parties and witnesses can become difficult or drop out of the process at any stage
- Be accessible and make them feel comfortable to reach out to you
- Pay attention to responses to interview summaries and reports – can tell you important things necessary for your analysis



CONCLUSION



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- Most important: **BE HUMAN**
- Treat interviewees as you would want to be interviewed
- Use these techniques equally for both parties

If you're using these techniques effectively, you will rarely encounter someone reluctant or challenging. The combination of these approaches builds trust and comfort, which can head off the feelings that lead interviewees to become difficult.



Q&A

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