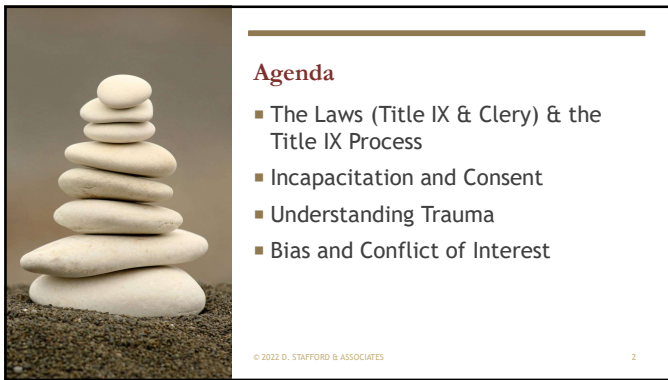





 **D. STAFFORD**
& ASSOCIATES

Title IX Training
Yeshiva University
April 27, 2022

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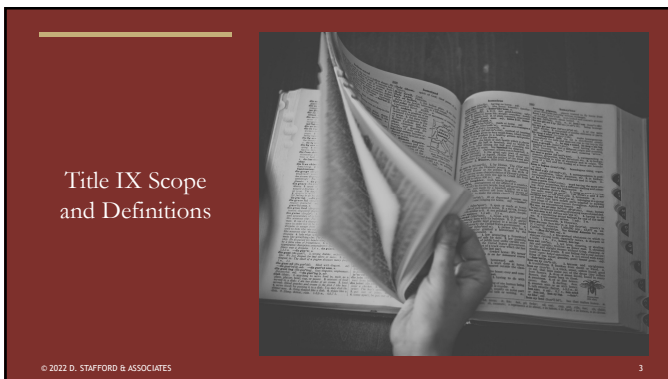


Agenda


- The Laws (Title IX & Clery) & the Title IX Process
- Incapacitation and Consent
- Understanding Trauma
- Bias and Conflict of Interest

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Title IX Scope and Definitions



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Definition of Sexual Harassment 


Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).


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Title IX Jurisdiction – Activity/Location 



Occurred in the context of educational program or activities



In the United States




"Locations, events, or circumstances" -- Could include online behaviors







buildings owned or controlled by recognized student organizations

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Jurisdiction of Person 

-  "At the time of filing a formal complaint...the complainant must be participating in or attempting to participate in the education program or activity"
-  The institution must exercise control over the Respondent
-  All regulations apply to students and employees
-  Applicants? Alumni?

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Title IX or Non-Title IX



For it to be covered under Title IX, it must meet:

- New Definitions
- Jurisdiction of person
- Jurisdiction of activity

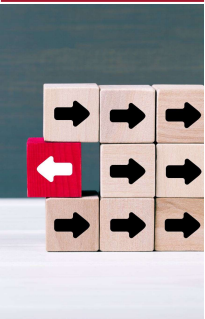
If it does NOT meet these requirements...

- Mandatory dismissal
- Can go to different resolution process

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Non-Title IX Cases



Where do they go?

- Student Code of Conduct
- Employee Guide

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Responding to Reports



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Report vs. Formal Complaint





Report




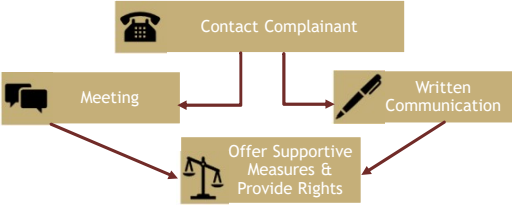
Formal Complaint

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Actual Knowledge (Report)--Next Steps






```

graph TD
    A[Contact Complainant] --> B[Meeting]
    A --> C[Written Communication]
    B --> D[Offer Supportive Measures & Provide Rights]
    C --> D
    
```

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Actual Knowledge



“Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”

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§106.30 Actual Knowledge 

- Title IX Coordinator
- Official with authority
- Any employee at K-12
- Beyond vicarious liability and constructive notice
- Allows for flexibility

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Response to a Report (“Actual Knowledge”)

-  "Promptly Contact"
-  Discuss available Supportive Measures
-  Consider the Complainant's wishes with respect to Supportive Measures
-  Inform do not need to file a Formal Complaint to receive Supportive Measures
-  Explain the process for filing a Formal Complaint

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SUPPORTIVE MEASURES



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Definition: Supportive Measures 

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- To the Complainant and/or the Respondent
- Before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access without unreasonably burdening the other party
- Must maintain as confidential to the extent it would not impair the ability to provide

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Supportive Measures 

Counseling	Extensions of deadlines or other course-related adjustments	Modifications of work or class schedules	Campus escort services	Mutual restrictions on contact between the parties
Changes in work or housing locations	Leaves of absence	Increased security and monitoring of certain areas of the campus	and other similar measures	

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Emergency Removal and Administrative Leave 



Emergency removal



Administrative leave

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Process for a Formal Complaint

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Definitions: Parties/Witnesses

Complainant

Respondent

Witnesses

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Definitions: Title IX Personnel

Title IX Coordinator

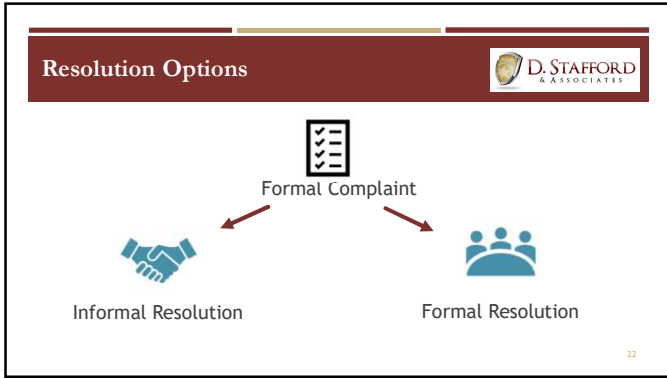
Investigator

Decision-Maker

Informal Resolution Facilitator

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§106.30 Formal Complaint

- “... a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”
- “Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party.”

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Formal Complaint

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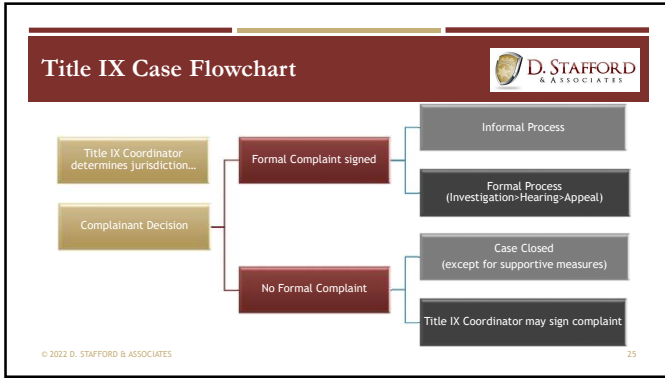
Filed/Signed

Alleging sexual harassment

Requesting an investigation (or informal option)

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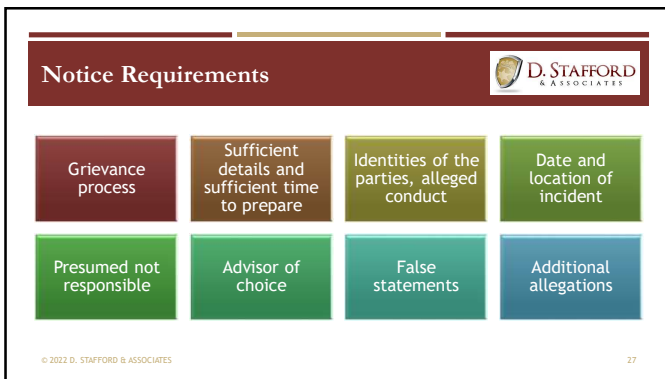
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Investigations and Evidence Gathering 



- Burden of proof on the recipient
- Equal opportunity to present witnesses and facts
- No restrictions on discussing allegations

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Basic Steps for an Investigation 

- 1**
Interview Parties
- 2**
Identify and Interview Witnesses
- 3**
Collect Evidence
- 4**
Draft Report(s)

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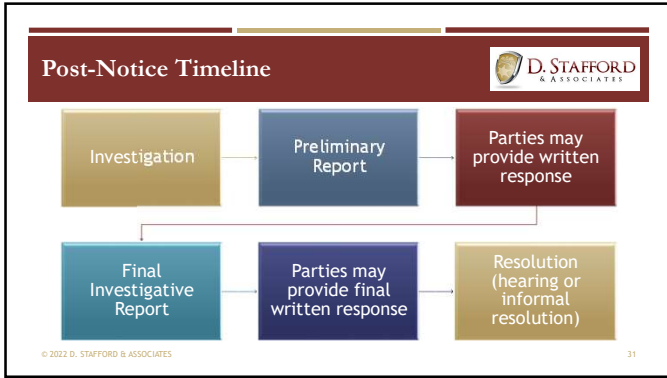
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Evidence Collection 



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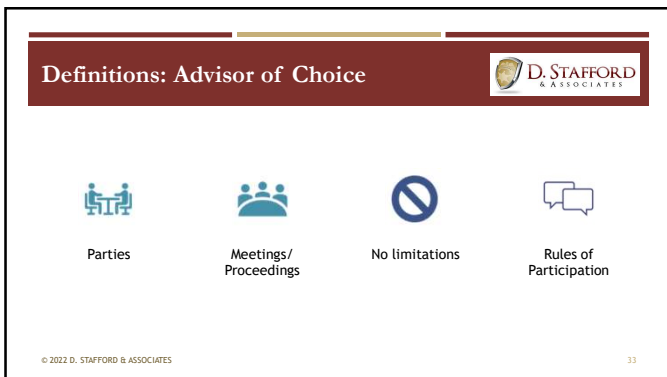
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Advisors 

<p>Investigation</p> <ul style="list-style-type: none"> ■ May accompany party to investigation meetings ■ Receives preliminary and investigative reports 	<p>Hearing</p> <ul style="list-style-type: none"> ■ Institutions must provide an advisor if a party does not have one at hearing ■ Conducts cross examination of witnesses and opposing party
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Hearings 

			
Live hearing	Cross-examination	Advisors	Decision-Maker(s)

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The Regs on Relevancy

	
Relevant Evidence In Investigation	Relevant Questions At Hearing

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From the Regs...

"must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decisionmaker finds particular evidence to be"

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Fact Considerations



Weight



Credibility

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Not Relevant (from the Regs)

- Past Sexual Behavior
- Complainant's sexual predisposition or prior sexual behavior unless...
 - Offered to prove that someone other than the respondent committed the conduct alleged or
 - Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent


- Privileged Information
- Physician, psychiatrist, psychologist records in connection with the provision of treatment to the party unless
 - Voluntary, written consent

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Written Determination 

- Determination regarding responsibility
 - Written by decision-maker(s)
 - Issued after the hearing
 - Contains steps, findings, sanctions, and remedies
 - Includes information about appeals



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THE CLERY ACT

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Key Clery Act Requirements (part 1) 

-  Collect, classify, and count crime reports/statistics
-  Public disclosures
-  Publish Annual Security Report
-  Submit crime statistics to the Department

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Key Clery Act Requirements (part 2) 

- Provide educational programs and campaigns on dating/domestic violence, sexual assault, & stalking (DV/DV/SA/S)
- Have procedures for institutional disciplinary action for DV/DV/SA/S
- If you have a campus police or security department: Publish Daily Crime Log
- If you have residential facilities: Fire Log, Fire Safety Report, Missing Persons Procedures

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Campus Security Authorities (CSA) 

- Campus police/security
- Security responsibility
- Individual or organization where crimes should be reported
- An official with responsibility for student and campus activities

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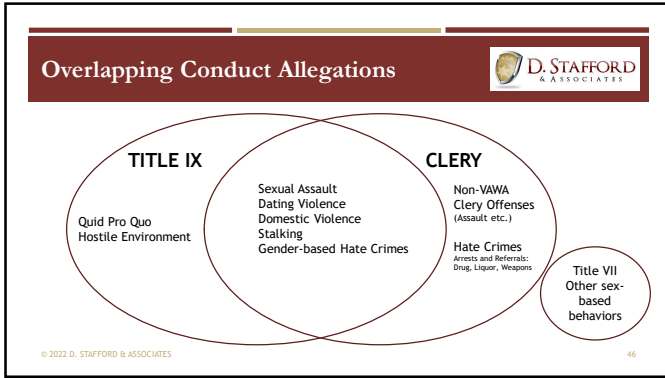
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Reporting Considerations 

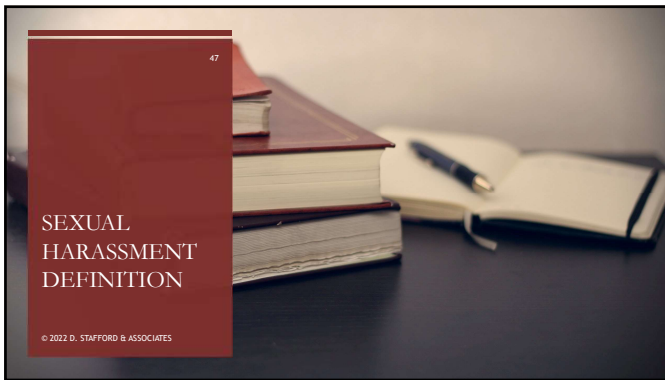
Title IX - "Officials with authority"	Clery Act - CSAs
<ul style="list-style-type: none"> Title IX Coordinator Official(s) who can institute corrective measures on behalf of the school Any other person who is designated by the institution as a person who shall report 	<ul style="list-style-type: none"> Campus police department Responsible for security Individuals to whom crimes should be reported "Officials with significant responsibility for student and campus activities" Local law enforcement

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Definition of Sexual Harassment

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1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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PRONG 1: Quid Pro Quo 

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

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PRONG 1: Quid Pro Quo 

-  Must be an employee respondent (not volunteer, visitor, student)
-  "This for that" harassment
-  When favorable professional or educational treatment is conditioned on a sexual activity

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PRONG 2: Hostile Environment+ (The Davis Standard) 




Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

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**PRONG 2: Hostile Environment+
(The *Davis* Standard)**




-  No specific definition of consent required
-  Not the same Title VII "hostile environment" or 2001 Guidance
-  First Amendment protections

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PRONG 3: The VAWA Offenses



"Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

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Sexual Assault (part 1)

Rape - The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Fondling - The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

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Sexual Assault (part 2)

Incest - Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape - Sexual intercourse with a person who is under the statutory age of consent.

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Domestic Violence – Clery Act

- A felony or misdemeanor crime of violence committed by
 - a current or former spouse or intimate partner of the victim
 - by a person with whom the victim shares a child in common
 - by a person who is cohabitating with, or has cohabitated with the victim, as a spouse or intimate partner
 - by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred
- OR
- by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred

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Dating Violence

The term “dating violence” means violence committed by a person -

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- (i) The length of the relationship.
- (ii) The type of relationship.
- (iii) The frequency of interaction between the persons involved in the relationship.

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Stalking (Title IX): 34 U.S.C. 12291(a)(30)

The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to -

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

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Additional Clery Act Definitions

(ii) For the purposes of this definition -

(A) **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(B) **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.

(C) **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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CONSENT

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Consent

Mutually agreed upon Informed and freely given Initiator responsibility Positions of power

Silence and prior relationships Verbal consent Withdrawal

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Consent cannot be given due to...

Force

Incapacitation

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Force

Physical Coercion Intimidation Threat

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Physical Force

Holding down Forced to touch Level of violence

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Intimidation

Physical Verbal

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Threats

Physical harm

Reputational harm

Veiled threats

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Incapacitation

Incapacitation is the physical and/or mental inability, whether temporary or permanent, of an individual to make rational, reasonable decisions, or judgments regarding one's well-being or welfare.

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Incapacitation Causes




Alcohol Drugs Disability Other

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Incapacitation Results



Lack understanding Physically helpless Blackout Unconscious

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Levels of Consumption

Impairment

Intoxication

Incapacitation

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Two-Step Determination

Was the complainant incapacitated?

Did the respondent (or would a reasonable person) know?

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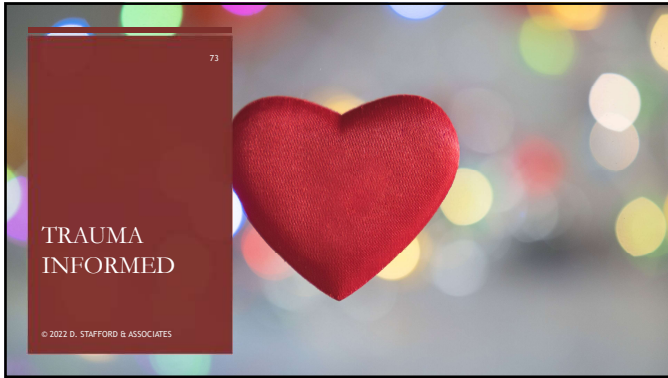
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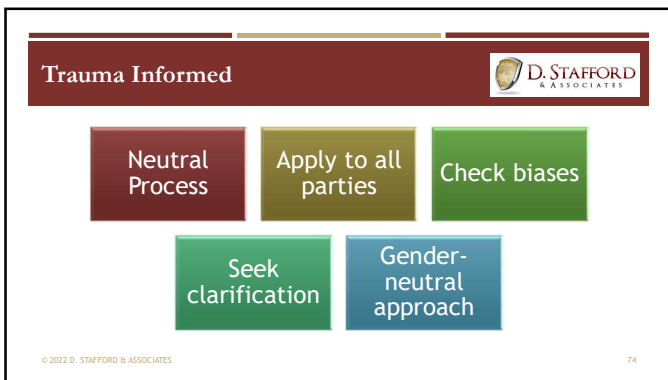


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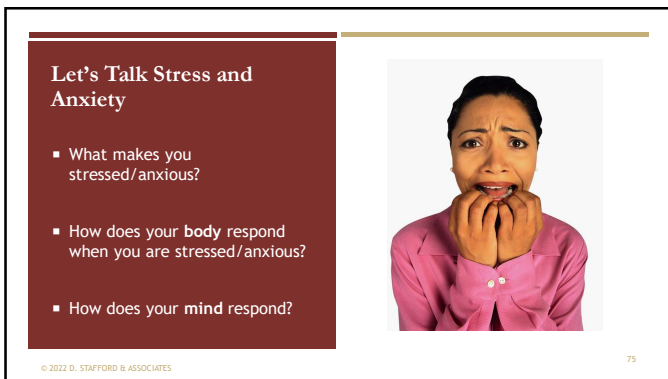
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Impact of Trauma

During the Traumatic Event

Immediately Following the Event

Long-Term Response

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The Limbic System and Stress

Hippocampus

Prefrontal Cortex

Amygdala

Hormones

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The Body's Response to Fear

Heart

Lungs

Muscles

Brain

Eyes

Stomach

Skin

Nerves

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Degraded Prefrontal Cortex 




  

Alcohol Age Prolonged stress exposure

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Memory 

Encoding Storage Retrieval

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Memory Encoding 

Central Details Peripheral Details Time and Context

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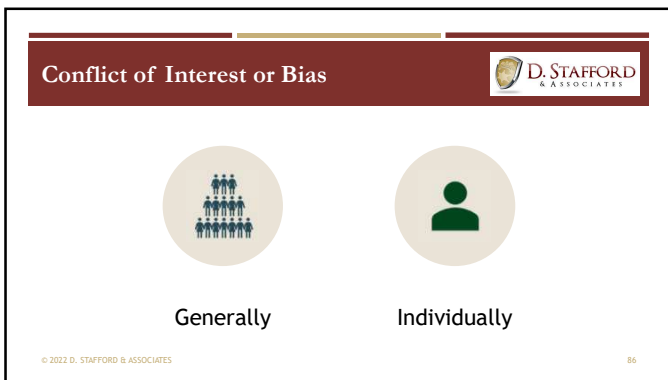
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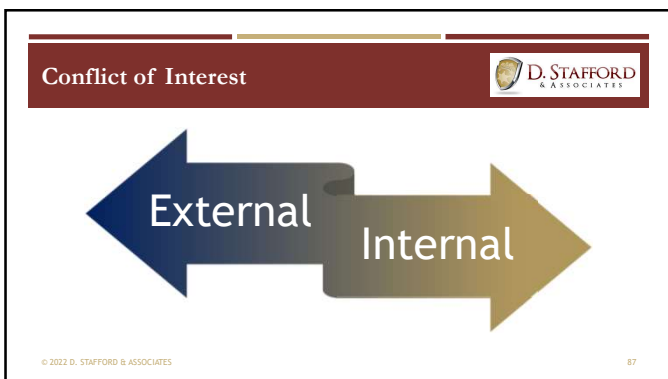
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Bias

- Being in favor of or against a particular person or thing in an unfair way
- Influences a person's judgment from being balanced
- Bias often comes from stereotypes or incomplete information

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Bias



Personal experience

Personal identity

Social identity

Theoretical perspective

Professional identity

Religious perspective

Political perspective

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Confirmation Bias	Confirmed preconceived opinion	Types of Bias
Availability Bias	Most important to the memory immediately recalled	
Hindsight Bias	See things as more predictable than they were	
Foresight Bias	Ability to predict future events	
Identity Bias	More likely to believe one group over another	
Personal Experience Bias	Believe similar experience (or disbelieve the dissimilar)	

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Avoiding Prejudgment of Facts 

Open mind Listen Objective Neutral

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