STUDY GUIDE:
ASSESSING CREDIBILITY: PART 2

20-Minutes-to... *Trained*

PRESENTED BY:

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Learning Outcomes

- Participants will understand how credibility relates to evidence.
- Participants will be able to identify elements that affect the credibility of evidence.
- Participants will be able to articulate the elements that bolster or diminish the credibility of evidence.
- Participants will be able to use evidence identification and collection techniques like corroboration and triangulation to test the credibility of evidence.

20-Minutes-to…*Trained*:
Assessing Credibility: Part 2
Discussion Questions

- How does assessing the credibility of evidence relate to making a determination of responsibility?
- How can investigators aid decision-makers by the way they strategize and collect evidence to allow for a sufficient credibility assessment?
- What is the best way to establish the credibility of testimonial evidence? How should that inform investigative techniques?
- What kinds of information are often provided in investigations that do not actually affect credibility?
- How should demeanor affect credibility? How does bias impact credibility?

20-Minutes-to…*Trained*:
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Case Studies

Harriet

Harriet is the dean of the college. Her son, Bob, just took a job as a maintenance technician for the boiler room. Bob works the night shift and rarely sees Harriet at work. Most people don't even know the two are related. A month after Bob started, Harriet was accused of sexually harassing an employee in her office. Bob happened to be in the outer office working on ventilation at the time the incident allegedly occurred. Harriet vehemently denies the allegation, and Bob is a critical witness. Bob can testify to the demeanor of the reporting party before and after the meeting, and to what he did or did not overhear during their meeting.

Jim

Jim is an openly gay junior student at the college. He is president of Sigma Nu, a social fraternity, and very active in the student Presbyterian church. Jim and Sarah have been friends since freshman year. Sarah texted Jim and they met up at Sarah's apartment before a Sigma Nu party one weekend and pre-gamed. They did several shots. Sarah felt comfortable with Jim because he was gay, and she asked Jim to help her pick out her outfit for the evening, taking all of her clothes off in front of him multiple times as she tried different combinations. Jim would also pull on and adjust her clothes as he scrutinized each outfit, but Sarah wasn't bothered by the physical contact, even when he pressed her breasts together to try to improve the appearance of her cleavage in one shirt.

Sarah accused Jim of groping and grinding on her without her consent at the party. Sarah said Jim was very drunk, and even though she continued to pull his hands away from her he wouldn't stop. Sarah alleges Jim put his hand down the front and back of her pants and up her shirt, but not underneath her bra. At one point in the evening Sarah even took Jim's face in both of her hands and said "Jim, please stop grabbing me" while making eye contact with him because he was so drunk, but he barely seemed to register she was talking to him. Eventually Jim's groping became so aggressive that when Sarah finally got away from him, she went outside and one house over before calling a friend for a ride. She told the friend she was a little scared and that they should hurry. While she waited, she worried that Jim would find her outside. There were other people milling around, but she didn't think they would pay much attention if Jim did find her and continued groping her out there. Sarah's friend arrived about ten minutes later. They drove around for a little while Sarah "decompressed," and then the friend dropped her off at home. She talked to the same friend a little the next day, and they agreed she should report Jim.

There are no witnesses at the party who remember seeing anything out of the ordinary – several said grinding and groping between two people who will eventually hook-up is not uncommon, but no one specifically remembers seeing Jim and Sarah's interactions. Jim texted Sarah several times after she left that night, but she didn't ever respond to him. Jim eventually passed out sitting in a corner on the dance floor, and several fraternity members remember seeing him there and laughing at him, but that's all.

20-Minutes-to…*Trained*:
Assessing Credibility: Part 2
Case Studies Question & Answer

Harriet

For Discussion:

- How is Bob's testimony corroborative of Harriet's testimony? What elements add/detract from Bob's credibility?
    - While Bob cannot attest to what actually happened inside the office, his description of the reporting party's demeanor may diminish the credibility of the reporting party's allegation.
    - Because Bob is Harriet's son, his motive to lie may detract from the credibility of his statements.
- How might the reporting party bolster their credibility?
    - If the reporting party sent an email to Harriet shortly after the meeting expressing their feelings about being harassed.
    - If the reporting party communicated with a third party after the encounter and the communication was consistent with the allegation. In this case, the third party is called an "outcry" witness.
    - If the reporting party could demonstrate it was unlikely Bob could accurately assess their demeanor or explain why no visible evidence was present.
- In the absence of additional, obvious evidence, what other information might help determine Bob's credibility?
    - Accuracy of Bob's physical description of the reporting party, including clothing.
    - Assessment of Bob's ability to observe the reporting party's demeanor based on the physical characteristics of the outer office.
    - Assessment of Bob's ability to hear anything going on inside Harriet's office.
    - Email/phone documentation of communication between Bob and Harriet after the incident.

Jim

For Discussion:

- What parts of the fact pattern potentially lend credibility to Sarah's allegation?
  - Sarah left the party abruptly and worried about her safety (inherent plausibility).
  - Sarah did not respond to Jim's texts after the party (inherent plausibility).
  - Jim passed out, making Sarah's statement that he was drunk to the point of incoherence plausible.
  - Sarah called a friend and said she was scared.
- What information should not affect either party's credibility?
  - Jim is openly gay.
  - Jim is a church member.
  - Jim is a fraternity member.
  - Sarah let Jim see her naked and touch her body earlier in the evening.
  - Sarah did not cry out or ask for help at the party.
  - Jim was very drunk.
- What additional evidence would you attempt to gather to assess credibility?
  - Text message logs from Jim and Sarah's phones.
  - Interview with friend who picked Sarah up.
  - Interview with friend regarding conversation next day.
  - Interview with anyone Jim might have spoken to the following day about Sarah.
  - Sarah's party outfit to ascertain if all alleged groping was possible as described.

Daniel Jackson

In his first interview, Jackson was also very credible. However, because his accounting of his relationship with Alison Smith and the alleged incident on 2/14/15 diverged so dramatically from hers, the respective credibility of the parties became the primary focus. He seemed genuinely surprised that Smith made a complaint about their interactions on 2/14/15 and with how she characterized their relationship, particularly their sexual relationship, which he characterized as mutually enjoyable and loving. Because his account was so different from Smith's, and because she and her witnesses also seemed to be very credible, he decided to provide documentary evidence to support his statements.

Jackson's credibility increased because many of his witnesses supported his version of events and of his relationship with Smith. Jackson's credibility was bolstered by Tom McHenry's credible account. McHenry said that Jackson was his best friend and he saw Jackson and Smith together on various occasions when she visited Jackson at [College], including the night of 2/14/15 when Jackson checked Smith out of the residence hall. Jackson's credibility was enhanced when witness Ashley Meditte, Jackson's freshman roommate, corroborated Jackson's statement that Meditte was not in their room on 2/14/15, while Smith alleged Jackson fingered her in Meditte's presence.

Jackson produced a great deal of documentary evidence in the form of letters, poems and a scrapbook from Smith which are direct evidence reflecting her feelings for him, how much she loved him, enjoyed the mutually satisfying relationship, and even noted she enjoyed making love to him. This evidence provides significant evidence that Smith very much appreciated and enjoyed her relationship and time with Jackson. This directly contradicts her statements that Jackson was mean and abusive to her and did not care about her. Her statements about wanting to make love were inconsistent with her statement in her first interview that she cried every time after she had sex with him – an allegation she softened slightly in her second interview – and that she did not want to have sex with him.

His written statement gave much more detail than he previously provided, but it was materially consistent with his previous accounts, as well as evidence provided by the writings of and exchanges between Smith and Jackson in the weeks and months following the 2/14/15 incident.

Of particular note for Jackson are the seemingly conflicting messages in the Facebook Messenger messages from 4/1/16-4/2/16. In one message he seems to apologize for sexually assaulting her, "And I can only from the bottom of my heart truly apologize to you for doing that and for making you feel the way that you do. I can honestly say that it was not my intention and although I don't recall it as specifically as you may, I just want to truly apologize and say that I'm sorry for how our relationship ended." In another he shifted, stating that he does not remember much from that day and that "I honestly recall stopping when you asked but we both remember that experience differently." He then shifts a bit towards the middle, indicating that whatever he did was not intentional, "All I can say is that was not my intention. But that doesn't excuse the fact that's

how it made you feel. And for that I wish that you find peace and love in your next partner who will treat you better than I was able to treat you back then." He added that he was "no longer that individual at all. I'm [sic] no way shape or form."

Asked what that meant, he responded, "The person that was responding to her was an out, gay boy…I was very different. I was sexually assaulted in April myself; I couldn't tell my family about being out…Her and I were still friends all throughout the summer – that boy was not who I am anymore….When she messaged me, I was out in public dating a boy" attending a poetry slam.

When asked further about the range of explanations and answers in his text message responses on 4/1/16-4/2/16, he said that he was overwhelmed by her text messages and, as a former sexual assault victim himself, identified with and was trying to validate her feelings, though he said he remembers the experience as being entirely consensual. He also said he was responding more directly to her texts, where she said, "wherever you were on that day…the person you were," and that she was reflecting how she felt about the incident. He stated that how people feel and what actually happened can be different, which he was trying to recognize in his responses. In his interview, he said, "I never want to minimize someone's experience – as visible in my Facebook Messenger messages – I wouldn't lie about the experience I have; my version is truth." His responses, he alleges, reflect that stance and position.

His statements in the exchange also indicate that he remembered very little of the alleged incident; when asked during his interview about why his recollection now – three years later – is so much more detailed than it was just a year later, Jackson said that since her text message caused him to think about the alleged incident a lot and that since speaking with police in Fall 2017, he has given the matter even more significant thought. He said he was overwhelmed by her texts and the emotion in them, and was focusing on responding and supporting her, versus thinking through each detail of the encounter. He added that over the span from the text messages, to the police investigation, to the current investigation, his memory has also been prompted by details that Smith provided.

Jackson was very credible in interviews and this credibility extended and was bolstered by the documentary evidence that he provided, others' views and statements about Jackson's and Smith's relationship, and his recounting of what happened on 2/14/15.

The ATIXA Playbook Excerpt: Assessment, Analysis, & Resources-Credibility

ASSESSMENT, ANALYSIS, AND RESOURCES

Credibility

The next section of this *Playbook* turns us from the models of proof to additional information that will aid in your assessment and analysis of policy violations from an evidentiary perspective, specifically: how to assess credibility.

Don't Lie to Me: Common Errors in Assessing Credibility Effectively

According to the Equal Employment Opportunity Commission's (EEOC) *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* dated June 18, 1999,[93] the five factors to include in assessments of credibility are:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

In the context of investigations, credibility is the accuracy and reliability of evidence. To assess credibility, you have to evaluate the source, the content, and the plausibility of the information offered. When source, content, and plausibility are strong, credibility is strong. Credibility can be thought of existing on a 100 point scale, with the most credible evidence being 100%, and the least credible evidence being worth 0%. Evidence is rarely 100% credible or 0% credible; most evidence falls somewhere in between. Your job is to figure out where credibility falls on the scale of 0-to-100%, especially where evidence is evenly split and the finding hinges on the credibility of the parties.

As you weigh evidence to determine whether a preponderance of evidence supports a finding of responsibility, each and every piece of relevant evidence must be evaluated for its credibility. If a piece of evidence is more credible than not, then it is considered credible and can impact, at least to some degree, the broader preponderance analysis. If evidence is not credible (i.e., less than 50% credible), it does not tip the preponderance scale in favor of that evidence. Importantly, regarding a piece of evidence as not credible does not mean the evidence has no impact on the finding. Evidence that is not credible may tip the scale in the opposite direction if it undermines the credibility of other evidence. For example, if one of the parties puts forth a witness who provides testimony that is patently false, depending on how far along the continuum the witness's

testimony is toward zero percent, that witness's testimony may also have a negative impact on the credibility of the party who provided the witness. Evidence often interlinks to form a complex web of interrelated parts. When one piece lacks credibility, that can impact the credibility and weight of the other pieces. But, credibility is not an on/off switch; usually witnesses provide evidence that is a mixture of credible and not credible. One false statement does not mean you can't believe anything the witness tells you.

Credibility is best established through corroboration, which is obtained through sufficient independent evidence supporting the fact(s) at issue. Corroboration is not merely another witness who agrees with the first witness, as they could be lying to support each other. Rather, corroboration consists of *evidentiary support* for the information the original witness presented. For example, if a witness testifies that several people took a Lyft™ home from the bar, corroboration might consist of a Lyft™ receipt.

Credibility is multidimensional, in that a witness's location and position can impact the credibility of their statement(s). Could a witness actually hear what they say they heard? See what they say they saw? Know what they claim to know? Some aspects of credibility are based on credentials, knowledge, and expertise, but these factors need to be established through verification and foundation, not assumed. Other aspects of credibility are based on neutrality, impartiality, and objectivity. Neutral witnesses (who have no loyalties to the parties) may be more objective than partisan (biased toward a specific party) witnesses. The more loyal witnesses are based on their relationships to one party, the more biased their evidence may be.

Lack of temporal proximity or proximity to the source of information detracts from credibility and is relevant to both you and those you interview. What someone witnessed in person is most valuable. What they heard from the responding party about the incident after the fact is less valuable, and what they learned after the fact from the responding party's best friend about what the responding party told her is even less valuable.

Temporal proximity can also affect credibility, particularly since incidents are often not reported until days, weeks, months, even years later. Be mindful of witnesses using qualifiers like, "I think," "I'm pretty sure," and "I seem to remember," particularly when a significant period of time has elapsed since the incident. Through follow-up questioning, you need to distinguish between those details the witness is sure of from the details the witness remembers less clearly. Inconsistencies, memory errors, or contradictions in recall regarding details the witness is admittedly unsure about may be less damaging to that witness's credibility than if the witness had stated that they were absolutely sure. Involved parties may also write down certain events in a diary, blog, or letter/email/text to a friend or family member. This type of written memoranda may serve as corroborating evidence for that witness's eventual statement to an Investigator. Documents such as diaries, calendar entries, journals, notes, texts, emails, or letters describing the incident(s) can add to credibility, but can also be manufactured after-the-fact. The adage, "Trust, but verify," is a good rule to live by.

Another important aspect of credibility is the inherent plausibility of the evidence offered. Given what you know, does the story make sense? One way to articulate inherent plausibility is to use logical connections and extensions, known as abductive reasoning, to support a plausibility argument. Plausibility stems largely from triangulation, which means using two (or more) data points to extrapolate or infer that a third data point is more likely than other possibilities. If X and Y are true, Z is more likely to be true than W, another alternative possibility. The result is a belief in the inherent plausibility of the information.

Example of Triangulation

Henry, a male student, fondled the breasts of a female student without consent, and admitted it. This is our X. Henry also tried to give a hand job to a male student, and claimed he had consent, but it was determined by a preponderance of the evidence that he did not have consent. This is our Y. Z, a third potential victim, then came forward and alleged that he believed his penis was fondled by Henry one night while sleeping in Henry's room, but isn't positive, because he was asleep and believes that Henry likes girls.

Given the above, what does the information we know about X and Y allow us to conclude about Z's allegation? By triangulating X and Y, we can believe the inherent plausibility of Z's allegation.

As the Investigator, we know that Henry likes to touch female breasts but we also know that he likes to touch penises. We have no idea if that means he likes men, and that is not of concern to us as the Investigator. But I know X does not rule out Z. Y makes Z more plausible than W, an alternative explanation we might have. We also know that Henry has fondled a penis before without consent, and that Z has no idea about X and Y. Thus, Z's belief that he was fondled while sleeping is not influenced by anything but his own belief. He can't fully self-corroborate, because he can't say for sure that the conduct occurred, because he was asleep. But, triangulating from X and Y makes Z more likely than not, because both are part of a pattern that Henry has exhibited before, and Y occurred under very similar circumstances to Z.

This is how abductive reasoning assists in assessing the inherent plausibility of the alleged assault on Z: We don't depend on the weight of Z's evidence, itself; and, while we may not have a complete set of facts, we use what we know about X and Y to make a determination about Z. Similarly, we can use triangulation to adduce inherent implausibility, when X and Y triangulate to W, and not Z, making Z inherently implausible.

Below are additional considerations that are useful in assessing credibility:

Consideration of bias, overt and subtle, of which the witness may not even be aware, is also important. Bias may include: victim-blaming attitudes, group defensiveness (think: teams and fraternities), and fear of possible repercussions. The presence of bias must be considered when assessing credibility.

Analysis of micro-expressions and gesticulations should be avoided unless you are an expert and have discovered someone's tell for deceit. Otherwise, do not consider the act of crossing limbs, looking up to the right, and other so-called "tells" as evidence. If a person's body language changes significantly from their established body language when you ask a question or raise a certain topic (we call this a departure from baseline), that is typically a prompt to ask more questions. It is not necessarily evidence of deceit, rather an indication there may be more to examine.

Inconsistencies and contradictions in testimony should be evaluated. Major inconsistencies in testimony are more likely to (but do not necessarily) detract from credibility than minor inconsistencies. Sometimes, inconsistencies and contradictions can result from one's memory evolving over the telling of a story, as questions are asked of the witness, more details are recalled, and additional intellectual connections are made in the witness's mind. Other times, inconsistencies and contradictions might be the result of unconscious fabrication of "recall" on the part of a vulnerable or fearful witness who is especially concerned with pleasing the investigator or concealing memory gaps. And still other times, inconsistencies or contradictions may indicate conscious lying.

Lying itself, through commission or omission, is not an outright credibility killer, because people may lie in one area while being honest in another. The job of the investigator is to determine whether the lie is material to the allegations (e.g., lies about facts that tend to prove or disprove the underlying allegations) or about a peripheral matter and potentially motivated by other concerns (e.g., lies about alcohol consumption motivated by a desire to avoid an alcohol violation), or if the lie otherwise reveals critical information about the overall credibility of that witness.

A delay in reporting does not *necessarily* detract from credibility. Individuals may delay reporting for a variety of reasons that do not damage their credibility, including: fear of retaliation, not knowing or trusting the policy or the individuals in charge of implementing the policy, fear of being blamed, shame, or not recognizing the behavior for what it was. Alternatively, reporting parties may decide to report as retribution for a more recent circumstance, such as after a nasty breakup or upon discovering a partner's infidelity. While these circumstances do not inherently damage the credibility of the reporting party, they do add another piece of evidence that must be evaluated against all other available evidence. There may be multiple pieces of credible evidence supporting that the reporting party is overstating or sensationalizing the incident, which, taken with a witness's statement about the reporting party's desire to harm the respondent as reprisal for a bad breakup, may render the evidence of the recent breakup more impactful to credibility. Alternatively, there may be credible evidence demonstrating that the alleged misconduct more likely than not occurred, such that testimony regarding the reporting party's retributive intent may explain why they reported, but not support any kind of fabrication. Evidence regarding a delay in reporting should be evaluated in totality, along with other evidence regarding credibility.

Changes in the behavior of the reporting party after the incident might add to credibility, including: avoiding class, meetings, or certain areas on campus; struggling to keep up academic performance; and seeking psychological counseling. While the lack of these behaviors may detract from credibility, it also may not. All such evidence should be taken in totality with other evidence.

Individuals are affected differently and will react with varying degrees of intensity and complexity to the events that they experience. A reporting party could be displaying the "classic" symptoms of traumatic response because they *believe* an incident occurred, not because it actually did. A reporting party may exhibit signs consistent with the "classic" traumatic response because they want you to think it occurred, not because it actually did.[94] Or, a reporting party telling the absolute truth may not exhibit outward signs of trauma at all.

"The fact that a relationship was consensual at one time, in some aspects, or for certain interactions, does not detract from credibility nor is this a defense against a subsequent allegation of sexual misconduct."

The existence of witnesses who were told immediately about the incident may add to credibility because the account provided to such witnesses by the reporting party is often unfiltered by time, reflection, and bias. But if the accounts provided to others vary significantly, these reports can undermine credibility.

The raising of additional allegations by witnesses about the responding party could add to credibility of the reporting party's allegations, depending on the context and plausibility of the additional allegations. If other individuals have made similar allegations about the responding party in the past, this should be explored to the degree necessary to determine if these past allegations support the credibility of the present allegation. On the other hand, piling on rumors about past conduct by the responding party which cannot be substantiated could undermine the investigators' belief in the validity of the reporting party's allegations at all.

The fact that a relationship was consensual at one time, in some aspects, or for certain interactions, does not detract from credibility nor is this a defense against a subsequent allegation of sexual misconduct. Consensual relationships can be followed by sexual misconduct, such as when one person tries to end the relationship and the other individual exploits the power dynamics to intimidate the former partner into staying in the relationship or engaging in certain behavior. People can also be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted. Neither is uncommon.

The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility, nor should it make you think differently about the reporting party. There are many legitimate reasons a reporting party might not have communicated a feeling of offense to the responding party, including disparity in power between the reporting and responding parties. The test for harassment does not require the reporting party to inform the responding party that behavior was offensive. That said, if you can establish that the harassing behavior continued after the responding party was informed that the behavior was unwelcome, this information would corroborate the reporting party's claim that the responding party's conduct was "unwelcome."

Explanations for why the misconduct occurred do not add to credibility. Individuals who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions and should not add to their credibility. To the contrary, these excuses or "explanations" should be considered admissions of having engaged in a pattern of sexually harassing behaviors. For example:

- *"I didn't know it was against the rules."*
- *"I was just joking around."*
- *"She flirts all the time."*
- *"I was just flirting with him."*
- *"She was asking for it. She was leading me on!"*
- *"You have to understand, we guys have special needs."*
- *"It's no big deal. I don't know why he is so upset."*
- *"I wasn't lying. She really is a slut (or bitch, whore)."*
- *"She's a snitch for telling on me."*

The following do not add to or detract from credibility of the responding party because they are irrelevant:

- Character witnesses and the character evidence they provide. (*"I've known him for fifteen years, he is such a good kid; I know he would never do that."*)
- Popularity with staff and other students. (*"Everybody likes him; I just don't believe he would do that."*)
- No history of past problems. (*"She's never been in trouble before."*)
- Academic performance. (*"But he's a really good student. His professors really like him."*)
- Importance to a team or program. (*"He's our best athlete/trainer/tutor."*)

The following do not add to or detract from credibility of the reporting party:

- Clothing. (*"Just look at what she was wearing."*) Clothing does not cause sexual harassment, nor does it give anyone permission to touch or make sexual remarks.
- Appearance. (*"She is so pretty, no wonder he did it,"* or *"She is so unattractive! I don't believe anyone would do that to her."*)
- Flirting behavior. (*"He's always flirting with the boys, what did he expect?"*)
- Male victims. (*"He should have realized she meant it as a compliment."*)
- Sexual orientation of victim (*"Listen, he came out of the closet and told everyone. He should have expected that people would act like this."*)

Questions to consider in assessing credibility:

- How might a reasonable person react to the incident(s)?
- What was the effect of the behavior on the reporting party?
- Did the individual have a particular reason not to tell the truth?

- Is the evidence offered inherently plausible?
- Is there evidence corroborating the information provided by a witness?
- Is there anything missing from the testimony that the witness/party may be omitting?
- Did the individual have the opportunity and ability to observe the things they discussed?
- Is there relevant past conduct (i.e. similar allegations) that needs to be considered?
- Was the witness/party under the influence of any substance that may impact the credibility of their testimony?

Past History. We investigate in the real world every day. In the real world, the past sexual history between the parties matters to context, and sometimes is the most compelling determining factor in an investigation. So, OCR's declaration that past sexual history should not be admitted is over-protective at best and fundamentally naïve at worst. The past sexual history of the responding party is relevant to establishing pattern abuses of others (even the EEOC says so, above), but the same is true for establishing pattern within a relationship. Many cases hinge on consent and if the parties have a sexual history together, how consent is given or received in their interactions can be critical.

We agree that the reporting party's general past sexual history should normally be out-of-bounds, but if he has a history of alleging sexual misconduct after bad breakups, we need to know that. The sexual history between the parties is fair game for the investigators' inquiry, but they may come to realize that it is irrelevant once they analyze it. Still, they must analyze it to determine whether it is relevant or not. It goes fundamentally to credibility if, as we stated above, there is a motive for bringing the allegation other than the desire to report misconduct. That motive may not destroy credibility, but fairness to the responding party demands that investigators explore that motive to determine how it impacts on the credibility of the reporting party. Rather than hard-and-fast rules in the admissibility of past sexual history, we want investigators to be able explore it fully between the parties, but to only go more widely outside of that context when there is a compelling justification to do so. Fishing expeditions and character assassinations by "slut shaming" are not permitted.

"OCR's declaration that past sexual history should not be admitted is over-protective at best and fundamentally naïve at worst. The past sexual history of the responding party is relevant to establishing pattern abuses of others."

Importantly, a decision of preponderance can be made that misconduct occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the misconduct. Put another way, a preponderance can be established simply because you believe one party and not the other, based on assessment of credibility of the parties and the evidence provided.

ATIXA Common Errors in Assessing Credibility Effectively
"Don't Lie to Me"

Credibility is the process of weighing the accuracy and veracity of evidence. To assess credibility, you have to evaluate the source, the content, and the plausibility of what is offered. When source, content, and plausibility are strong, credibility is strong. Credibility exists on a 100 percent point scale, with the most credible evidence being 100 percent, and the least credible being zero percent. Most evidence lies somewhere in between. Your job is to figure out where, especially where believing one party and not the other is enough to establish that policy has been violated.

If credibility dips below 50 percent, the witness or evidence is less credible than more. That doesn't weight the scale as you are trying to determine where the preponderance of the evidence lies, where whatever tips the scale one way or the other is enough to establish a preponderance. Evidence has to be more credible than not to weight the scale at all.

Some aspects of credibility are positional/locational. Could witnesses hear what they say they heard? See what they say they saw? Know what they claim to know? Some aspects of credibility are based on credentials/knowledge/expertise, but those factors need to be established, not assumed. Some aspects of credibility are weighted based on neutrality, impartiality, and objectivity. The more loyal a witness is based on relationships to one party, the more biased their evidence may be. Neutral witnesses may be more objective than partisan witnesses.

Credibility is best established through corroboration, which is provided through sufficient independent evidence to support the fact at issue. Corroboration is not merely another witness who agrees with the first witness (they could be lying to support each other), but evidentiary support for what the witness contends, evaluating source, content, and plausibility together. Also, look for subtle bias, which the witness may not even be aware of, including victim-blaming attitudes, group defensiveness (think teams and fraternities), or whether the witness fears getting in trouble. Lack of proximity detracts from credibility. What you saw in person is most valuable. What you heard from the responding party about the incident after the fact is less so, and what you learned after the fact from the responding party's best friend about what the responding party told him/her is even less so.

Credibility can also be assessed by triangulation, which means using two (or more) data points to extrapolate or infer that a third data point is more likely than other possibilities. If X and Y are true, Z is more likely to be true than A, B or C. This is an example of what is known as abductive reasoning.

Generally, avoid micro-expression analysis and gestics unless you are an expert and have discovered someone's tell for deceit. Otherwise, crossing limbs, looking up to the right, and other so-called telltales are not evidence. Let's explore credibility assessment in context to get a better feel for it.

The harassing behavior continued after the responding party was informed that the behavior was unwelcome. If established, this would add credibility to the reporting party's account as corroborative.

Major inconsistencies in testimony would likely detract from credibility. Minor inconsistencies usually would not detract from credibility. Even lying is not a 100 percent credibility killer. We all lie. The job of the investigator is to determine why the witness is lying, or what the lie is about. Lying about alcohol consumption to avoid an alcohol violation does not prove or disprove the underlying interpersonal violence allegation.

A delay in reporting harassment does not detract from credibility. Individuals may delay reporting because of fear of retaliation, not knowing or trusting the policy, fear of being blamed for causing the harassment, not understanding it was harassment, etc.

Changes in the behavior of the reporting party after the harassment might add to credibility. For example, after being harassed, the reporting party cried; was upset; avoided class, meetings, or certain areas; the student's grades or performance deteriorated; etc.

However, if none of these things occurred, it would not mean that the allegation was not credible, only that the individual who complained perhaps was affected differently, less intensely than others might, or did not express emotions openly. Similarly, the reporting party could be displaying the classic symptoms of traumatic response because that individual thinks an incident happened, not because it did, or because the person may want you to think it happened, but it didn't. This is infrequent, but still must be accounted for by investigators.

Documents such as diaries, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility, but can also be manufactured after-the-fact. The adage, "Trust, but verify," applies.

Telling another person about the harassment may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility.

Other allegations about the responding party could add to credibility of the allegation.

The fact that a relationship was at one time or in some aspects consensual does not detract from credibility nor is it a defense against a subsequent charge of sexual harassment. Consensual relationships can be followed by sexual harassment when one person tries to end the relationship and the other person uses his/her power to intimidate the former partner into staying in the relationship. People can be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted.

The fact that the responding party did not intend to harass the reporting party is not a defense to an allegation of sexual harassment. It is the act itself that is important, not the intent of the person who engaged in the behavior. Exceptions might include accidental or incidental sexual contact, or causing your intimate partner accidental physical harm.

Not knowing that the behavior was offensive and unwelcome is not a defense to an allegation of sexual harassment. The standard is whether a reasonable person would deem the behavior offensive and unwelcome.

The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility. Many people are fearful of doing so. Additionally, there is no obligation for the reporting party to inform the responding party that behavior is offensive.

Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity or accuracy.

Questions to consider in assessing credibility:

1. How might a reasonable person react to the incident(s)?
2. What was the effect of the behavior on the reporting party?

A decision can be made that harassment occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the harassment. Put another way, a preponderance can be established simply because you believe one party and not the other, based on assessment of credibility of the party and the evidence provided.

Explanations of why the harassment occurred do not add to credibility.
People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions and should not add to their credibility. To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors. For example:

- *"It was an accident. I didn't do it on purpose* (from a student who put his hands on a female student's crotch)."
- *"I didn't know it was against the rules."*
- *"I was just joking around."*
- *"She flirts all the time."*
- *"I was just flirting with her."*
- *"She was asking for it. She was leading me on!"*
- *"You have to understand, we guys have special needs."*
- *"It's no big deal. I don't know why he is so upset."*
- *"I wasn't lying. She really is a slut* (bitch, whore, etc.)."
- *"She's a snitch for telling on me."*

The following do not add or detract from credibility of the responding party because they are irrelevant:

- Character witnesses. (*"He is such a good kid; I know he would never do that."*)
- Popularity with staff and other students. (*"Everybody likes him; I just don't believe he would do that."*)
- No history of past problems. (*"She's never been in trouble before."*)
- Academic performance. (*"But he's a really good student. His professors really like him."*)

The following do not add or detract from credibility of the reporting party:

- Clothing. (*"Just look at what she was wearing."*) Clothing does not cause sexual harassment, nor does it give anyone permission to touch or make sexual remarks.
- Appearance. (*"She is so pretty no wonder he did it,"* or *"She is so unattractive! I don't believe anyone would do that to her."*)
- Flirting behavior. (*"He's always flirting with the boys, what did he expect?"*)
- Males being victims. (*"He should have realized she meant it as a compliment."*)
- Sexual orientation of victim (*"Listen, he came out of the closet and told everyone. He should have expected that people would act like this."*)

Finally, politics, including athletics participation, concern about the team, concern about "getting a good student in trouble," whether someone is a last semester senior, etc., cannot impact decisions about whether a policy has been violated.

Q: How do you articulate inherent plausibility when discussing credibility in an investigation report?

A: You need to use abductive reasoning to support a plausibility argument. Plausibility results from triangulation, which means using two (or more) data points to extrapolate or infer that a third data point

is more likely than other possibilities. If X and Y are true, Z is more likely to be true than A, B, or C. This is an example of what is known as abductive reasoning. The result is a belief in the inherent plausibility of the information.

For example, a student (let's call him Handsy) fondled the breasts of a female student without consent, and admitted it. This is our X. Handsy also tried to give a hand job to a male student, and claimed he had consent, but we determined that he did not have consent. This is our Y. Z, our third potential victim, then came forward and alleged that he believed his penis was fondled by Handsy one night while sleeping in Handsy's room, but isn't positive because he was asleep and knows that Handsy likes girls. So, what does what we know about X and Y allow us to conclude about Z's allegation? By triangulating X and Y, I can believe the inherent plausibility of Z's allegation.

I know that Handsy may like girls, but also wants to touch penises (I have no idea if that means he likes boys, and that is not of concern to me, as the investigator). Therefore, X does not rule out Z. It makes Z more plausible than A,B and C (alternative explanations we might have). I also know that Handsy has fondled a penis before without consent, and that Z has no idea about X and Y. Thus, Y's belief that he was fondled while sleeping is not influenced by anything but his own belief. He can't fully self-corroborate, because he can't say for sure that the conduct occurred, as he was asleep. But, triangulating from X and Y makes Z more likely than not, because both are part of a pattern that Handsy has enacted before, and Y occurred under very similar circumstances to Z.

This is how my reasoning for the inherent plausibility of the assault on Z comes from what we know about X and Y, not really because of the weight of Z's evidence, itself. Similarly, you can use triangulation to adduce inherent *im*plausibility, when X and Y don't make Z more likely but Z is asserted as the logical inference if X and Y are true. Z will fail as a straw-man (straw person) when X and Y triangulate to A, not Z.

ATIXA Tip of the Week
Newsletter
June 15th, 2017

Key Take-away from *The ATIXA Playbook*: Assessing Credibility Effectively

This week's Tip is an excerpt of the recently published ATIXA Playbook, an indispensable resource tool for those who are charged with making the right decisions on sexual misconduct allegations on college and university campuses.

According to the Equal Employment Opportunity Commission's (EEOC) *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, the five factors to include in assessments of credibility are:

- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?

In the context of investigations, credibility is the accuracy and reliability of evidence. To assess credibility, you have to evaluate the source, the content, and the plausibility of the information offered. When source, content, and plausibility are strong, credibility is strong. Credibility can be thought of existing on a 100 point scale, with the most credible evidence being 100%, and the least credible evidence being worth 0%. Evidence is rarely 100% credible or 0% credible; most evidence falls somewhere in between. Your job is to figure out where credibility falls on the scale of 0-to-100%, especially where evidence is evenly split and the finding hinges on the credibility of the parties.

As you weigh evidence to determine whether a preponderance of evidence supports a finding of responsibility, each and every piece of relevant evidence must be evaluated for its credibility. If a piece of evidence is more credible than not, then it is considered credible and can impact, at least to some degree, the broader preponderance analysis. If evidence is not credible (i.e., less than 50% credible), it does not tip the preponderance scale in favor of that evidence. Importantly, regarding a piece of evidence as not credible does not mean the evidence has no impact on the finding. Evidence that is not credible may tip the scale in the opposite direction if it undermines the credibility of other evidence. For example, if one of the parties puts forth a witness who provides testimony that is patently false, depending on how far along the continuum the witness's testimony is toward zero percent, that witness's testimony may also have a negative impact on the credibility of the party who provided the witness. Evidence often interlinks to form a complex web of interrelated parts. When one piece lacks credibility, that can impact the credibility and weight of the other pieces. But, credibility is not an on/off switch; usually witnesses provide evidence that is a mixture of credible and not credible. One false statement does not mean you can't believe anything the witness tells you.

Credibility is best established through corroboration, which is obtained through sufficient independent

evidence supporting the fact(s) at issue. Corroboration is not merely another witness who agrees with the first witness, as they could be lying to support each other. Rather, corroboration consists of evidentiary support for the information the original witness presented. For example, if a witness testifies that several people took a Lyft™ home from the bar, corroboration might consist of a Lyft™ receipt.

Credibility is multidimensional, in that a witness's location and position can impact the credibility of their statement(s). Could a witness actually hear what they say they heard? See what they say they saw? Know what they claim to know? Some aspects of credibility are based on credentials, knowledge, and expertise, but these factors need to be established through verification and foundation, not assumed. Other aspects of credibility are based on neutrality, impartiality, and objectivity. Neutral witnesses (who have no loyalties to the parties) may be more objective than partisan (biased toward a specific party) witnesses. The more loyal witnesses are based on their relationships to one party, the more biased their evidence may be.

ATIXA Tip of the Week
Newsletter
March 31st, 2016

Inherent Plausibility and Credibility

Tip of the Week authored by Brett A. Sokolow, J.D., Executive Director, ATIXA

How do you articulate inherent plausibility when discussing credibility in an investigation report?

You need to use abductive reasoning to support a plausibility argument. Plausibility results from triangulation, which means using two (or more) data points to extrapolate or infer that a third data point is more likely than other possibilities. If X and Y are true, Z is more likely to be true than A, B, or C. This is an example of what is known as abductive reasoning. The result is a belief in the inherent plausibility of the information.

For example, a student – let's call him Handsy – fondled the breasts of a female student without consent, and admitted it. This is our X. Handsy also tried to give a hand job to a male student, and claimed he had consent, but we determined that he did not have consent. This is our Y. Z, our third potential victim, then came forward and alleged that he believed his penis was fondled by Handsy one night while sleeping in Handsy's room, but isn't positive because he was asleep and knows that Handsy likes girls. So, what does what we know about X and Y allow us to conclude about Z's allegation? By triangulating X and Y, I can believe the inherent plausibility of Z's allegation.

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ATIXA Tip of the Week Newsletter
April 16th, 2015

The Intersection of Inconsistency and Credibility

Tip of the Week authored by Brett A. Sokolow, J.D., Executive Director, ATIXA

What is the impact of inconsistency by a reporting party on his/her credibility?

Inconsistency by the reporting party is the rule in sexual misconduct cases, not the exception. As many of us have seen over the years, trauma often creates what can appear to be inconsistent accounts. The question is whether the inconsistency hurts credibility (it can when lack of certainty results), or helps it (the more confused a victim is, the more likely trauma or incapacity are evidenced).

I generally find that victim inconsistency that is additive (more details over time) is consistent with trauma (emerging from denial phase), and does not damage evidence significantly. But, wildly varying stories, while potentially the actual result of trauma, can impact the ability to find a preponderance, not because we do not believe the victim, but because we cannot ascertain which version of events is more likely than not. Spending the time with the reporting party, and her counselor, to understand what information was known when (a timeline is helpful), revealed how, and with what level of detail can really help an investigator to get their brains around how to weigh such evidence.

Also, novice investigators need to learn to minimize the weighting of minor inconsistencies, which tend to be an area of hyper-focus for less experienced investigators (She said she had two beers, then later claimed it was three. Which was it?). For example, I have had cases where a reporting party revealed additional information after hypnosis, or upon visiting the scene. I have had counselors describe to me the look of surprise on a reporting party's face when she came to terms with a new revelation. That helps the investigator to understand the context.

One of the common mistakes is having the reporting party complete their own reporting form or account. We then tend to hold them to this statement when it is not taken by a professional, does not result from probing questioning, and is not elicited from someone who knows what information to provide, that it needs to be full and complete, or that everything they say thereafter will be compared to that statement. Inconsistent accounts, therefore, happen less when the investigator takes the first statement rather than when the reporting party volunteers it.