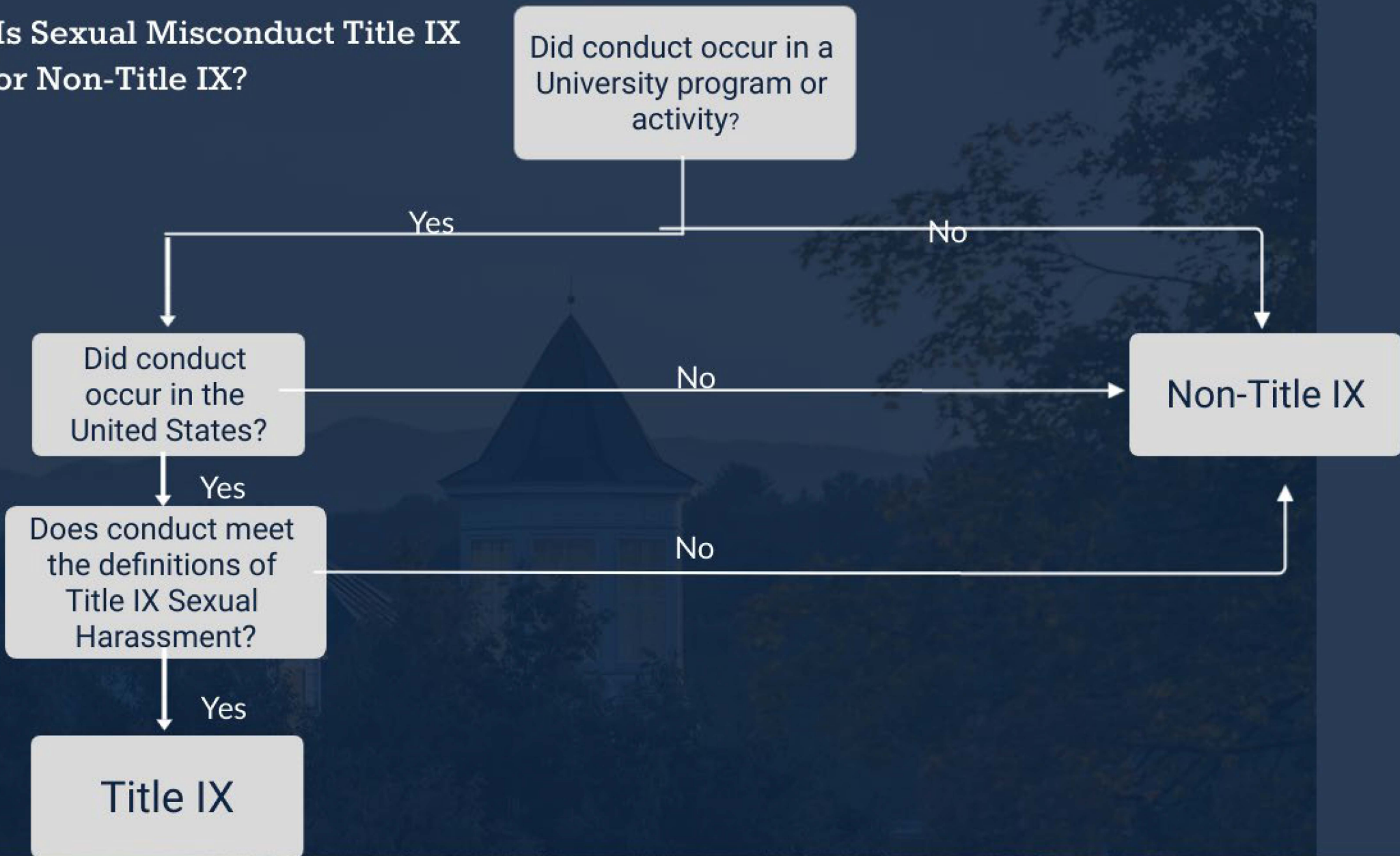


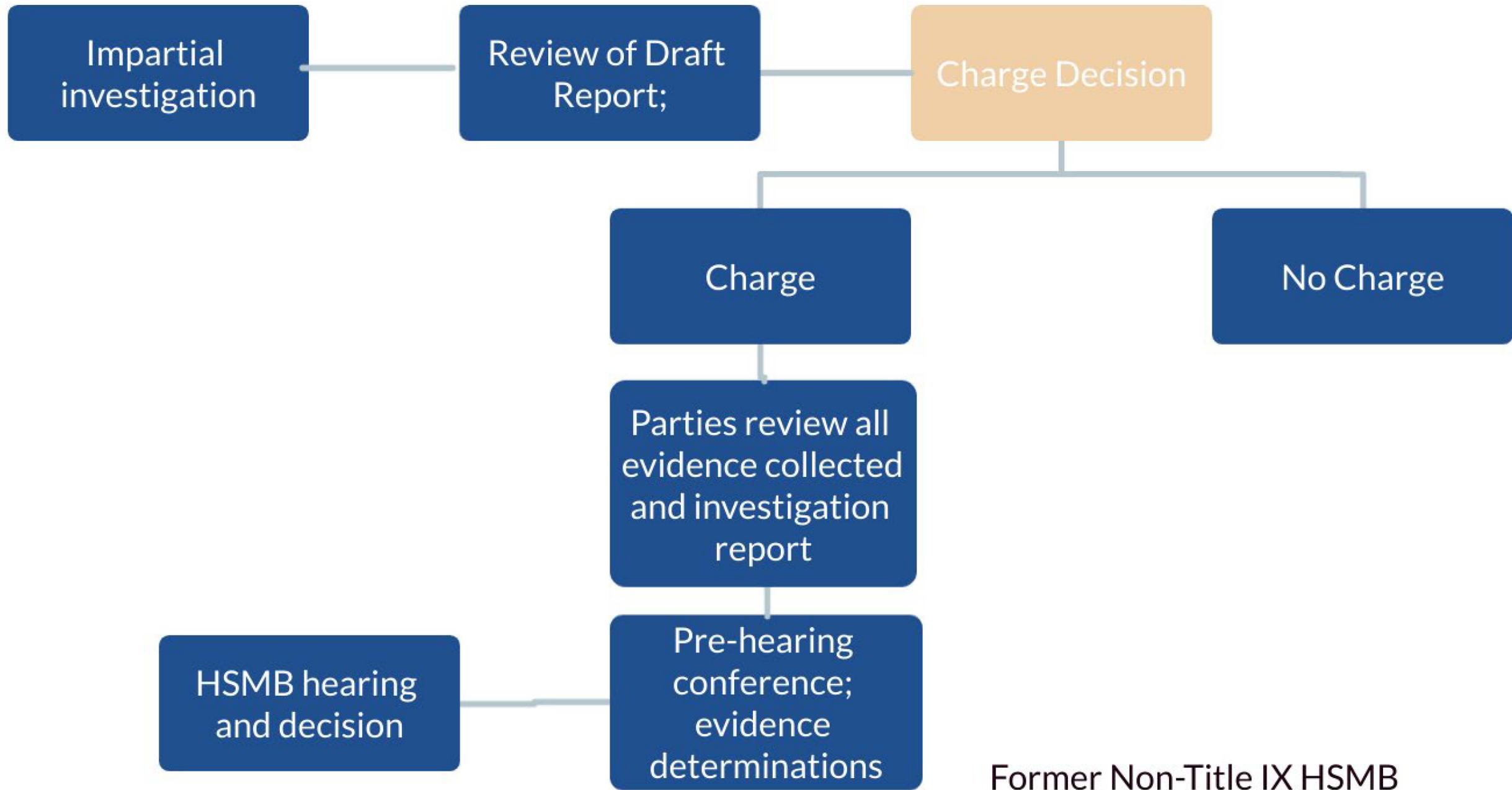


# HSMB TRAINING

August 27, 2021

# Is Sexual Misconduct Title IX or Non-Title IX?





Former Non-Title IX HSMB Process



Current Formal Complaint investigation and hearing process for Title IX AND Non-Title cases

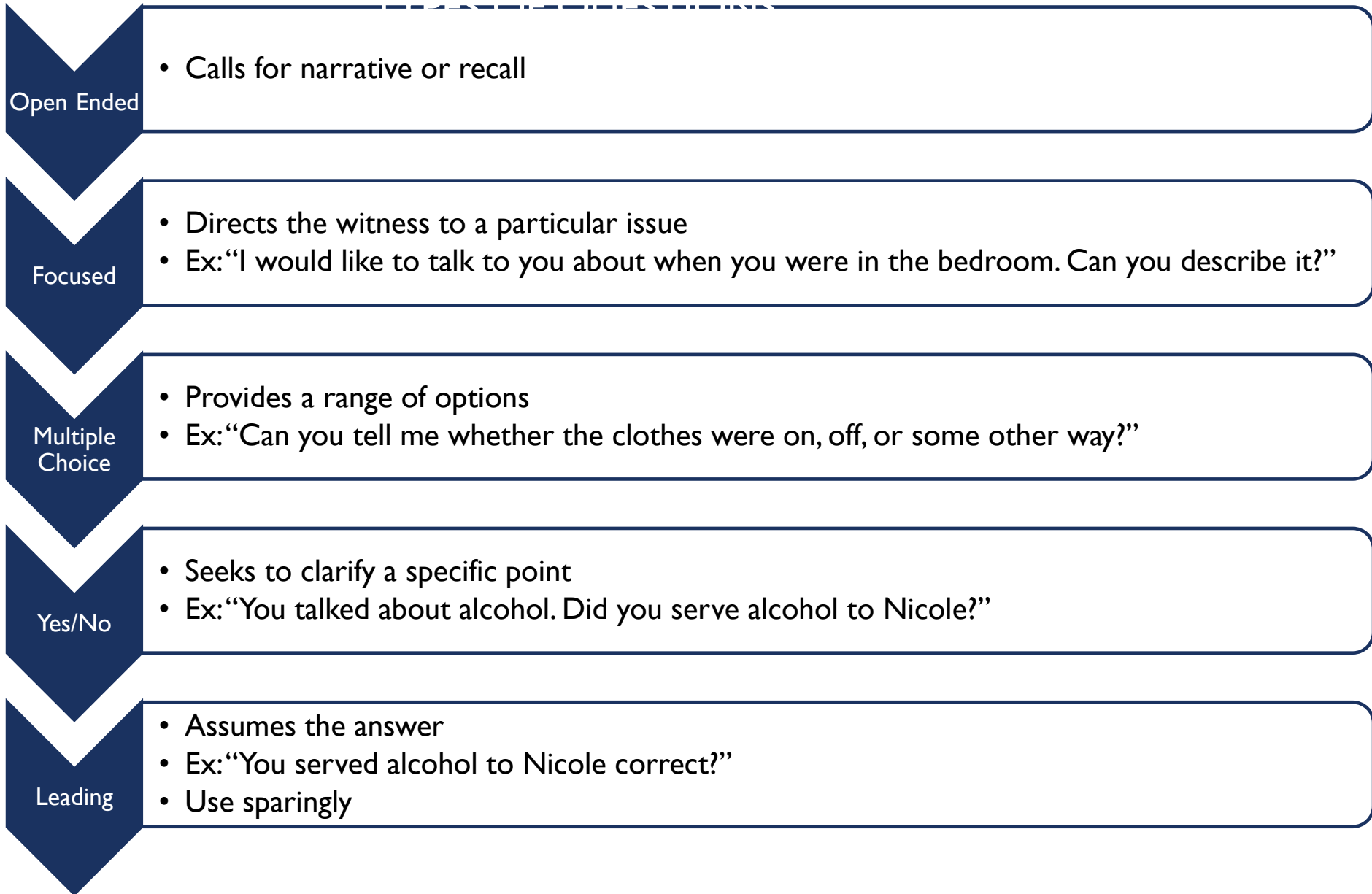
## CHANGES TO TITLE IX REGULATIONS

Court upheld most provisions of 2020 amendments, BUT found one arbitrary and capacious and vacated that part.

OCR stated will immediately cease enforcement of that part

## CHANGES TO TITLE IX REGULATIONS

May now consider statements made by parties or witnesses that do not participate in cross examination at the live hearing (assuming relevant and not prohibited under Policy)



## INTERVIEW TECHNIQUES

- Think about:
  - What do I need to know?
  - Why do I need to know it? (is it relevant?)
  - What is the best way to ask the question? (how can I phrase the question appropriately)



## INTERVIEW TECHNIQUES

- Ask for definitions of any terms/adjectives: “Hooking up” “making out” “cuddling” “belligerent”
- Avoid compound questions
- Know elements of alleged violations and focus questioning on those issues
- Ask hard questions in a non-accusatory way
  - “Why didn’t you report right away?”
    - “What brought you to report at this time? Did you consider reporting it after the incident? Why or why not?”

## RELEVANT EVIDENCE: PANEL MUST ONLY CONSIDER RELEVANT EVIDENCE

- Relevant evidence must be:
  - Probative
  - Material

## RELEVANT EVIDENCE: PROBATIVE

*Any* tendency to make the existence of *any* fact more or less probable than it would be without the evidence.



## RELEVANT EVIDENCE: MATERIAL

Evidence is “material” if it is being offered to prove an element of a policy violation or defense that needs to be established for one side or the other to prevail.

## TITLE IX: MUST CONSIDER RELEVANT EVIDENCE WITH FOLLOWING EXCEPTIONS

- Complainant's prior sexual behavior (with two exceptions)
- Information protected by legally recognized privilege
- Party's treatment records cannot be used without party's voluntary, written consent
- Evidence that is duplicative of other evidence

## PRIOR SEXUAL HISTORY

In general, questions and evidence about the sexual predisposition or prior sexual behavior of the complainant are not relevant and will not be admitted as evidence during an investigation and/or hearing

## PRIOR SEXUAL HISTORY: EXCEPTIONS

1. Where the sexual behavior is used to show that someone other than the respondent committed the conduct alleged by the complainant; or
2. Where if the questions and evidence concern a specific incident of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

## PRIOR SEXUAL HISTORY: EXCEPTIONS

- The prior sexual activity must have the potential to explain specific physical evidence at issue.
  - Ex. Respondent alleging not cause of semen in Complainant; Complainant engaging in heavy petting with boyfriend w/o penetration before would not be relevant as to whether or not semen was present and could be excluded.
  - Ex. Conduct must be close enough in time to explain injuries/evidence. Sexual activity with another person months before alleged assault would not be admissible under exception.



## PRIOR SEXUAL HISTORY EXCEPTIONS

Even if a respondent is entitled to introduce evidence of the complainant's prior sexual history with him/her, it does not follow that every detail of that sexual history is relevant.

The evidence may be limited to that which is relevant to the consent issue; superfluous details of the sexual activity may be excluded.

## PRIVILEGED INFORMATION

- Cannot require, allow, rely on, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege (attorney client; priest penitent; doctor patient; spousal)
- An individual may disclose his or her medical and/or counseling records voluntarily, but the University will not request consent for the release of any medical or counseling records, nor will the University require any individual involved in the processes set forth in this policy to release any such medical and/or counseling records.

## TITLE IX CROSS EXAMINATION

Before party/witness answers, the Chair of the HSMB informs whether the question is relevant. If not relevant, the Chair will explain the decision.

Questions, even if relevant, may be excluded if prior sexual history or privilege. Additionally, repetition of the same question may be deemed irrelevant.

## TITLE IX CROSS EXAMINATION: MUST EXPLAIN DECISION TO EXCLUDE ANY QUESTION

Sufficient to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.



# SAMPLE EXERCISE TO PRACTICE DETERMINING RELEVANCY OF CROSS EXAMINATION QUESTIONS