Title IX Administrator and Investigator Training

July 31, 2020

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

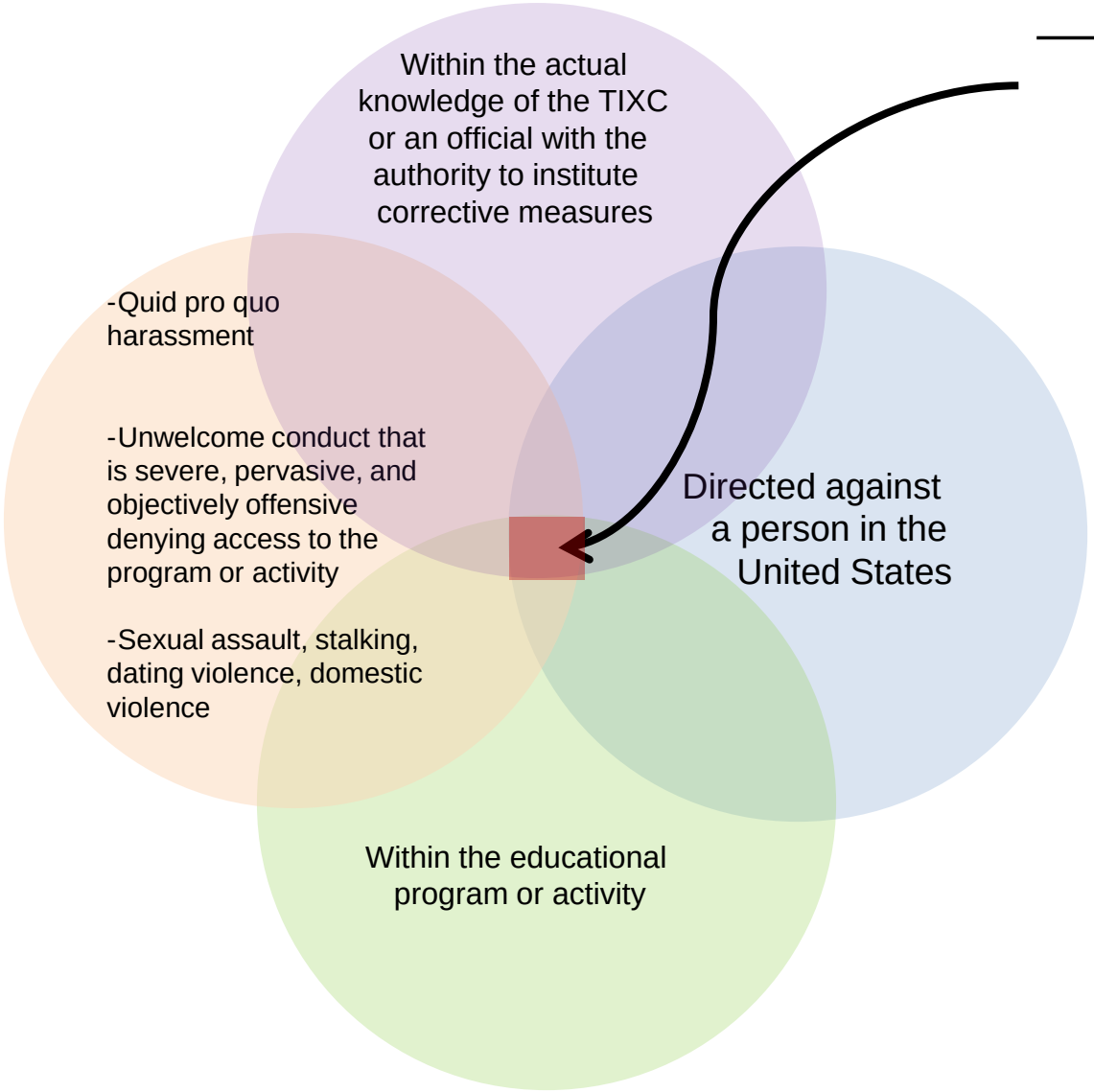
TITLE IX FOUNDATION

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

The Foundation

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Scope: Sexual Harassment

Sexual Harassment means: conduct that satisfies one or more of the following

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Sexual Harassment

Sexual assault . Sexual assault means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes the following:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Sexual Harassment

Rape: The carnal knowledge of a person, 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 or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, 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 or physical incapacity.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Sexual Harassment

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.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Sexual Harassment

Dating violence . Dating violence means any act of violence committed by a person who is or has ( )]cceJ1.6 0.502 g /TT0 pSinn7

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Sexual Harassment

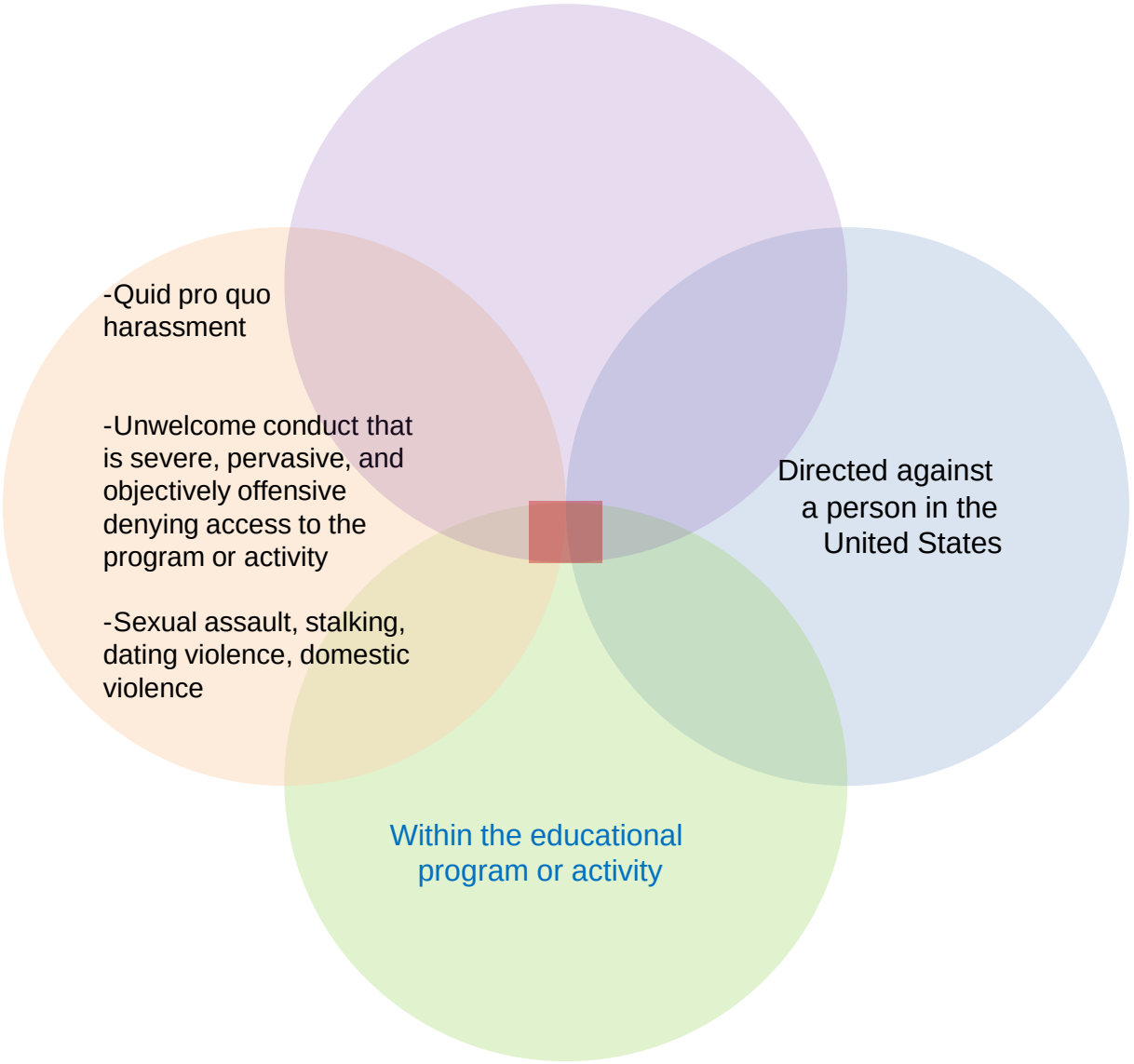
Domestic violence . Domestic violence means a felony or misdemeanor crime of violence committed by a *current or former spouse or intimate partner* of the victim, by a person with whom the victim *shares a child in common*, by a person who is*cohabitating with or has cohabitated with the victim as a 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 receiving grant monies, 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.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Sexual Harassment

Stalking . Stalking means engaging in a course of conduct directed at a specific person that would cause a *reasonable person to fear for his or her safety or the safety of others* or *suffer substantial emotional distress.*

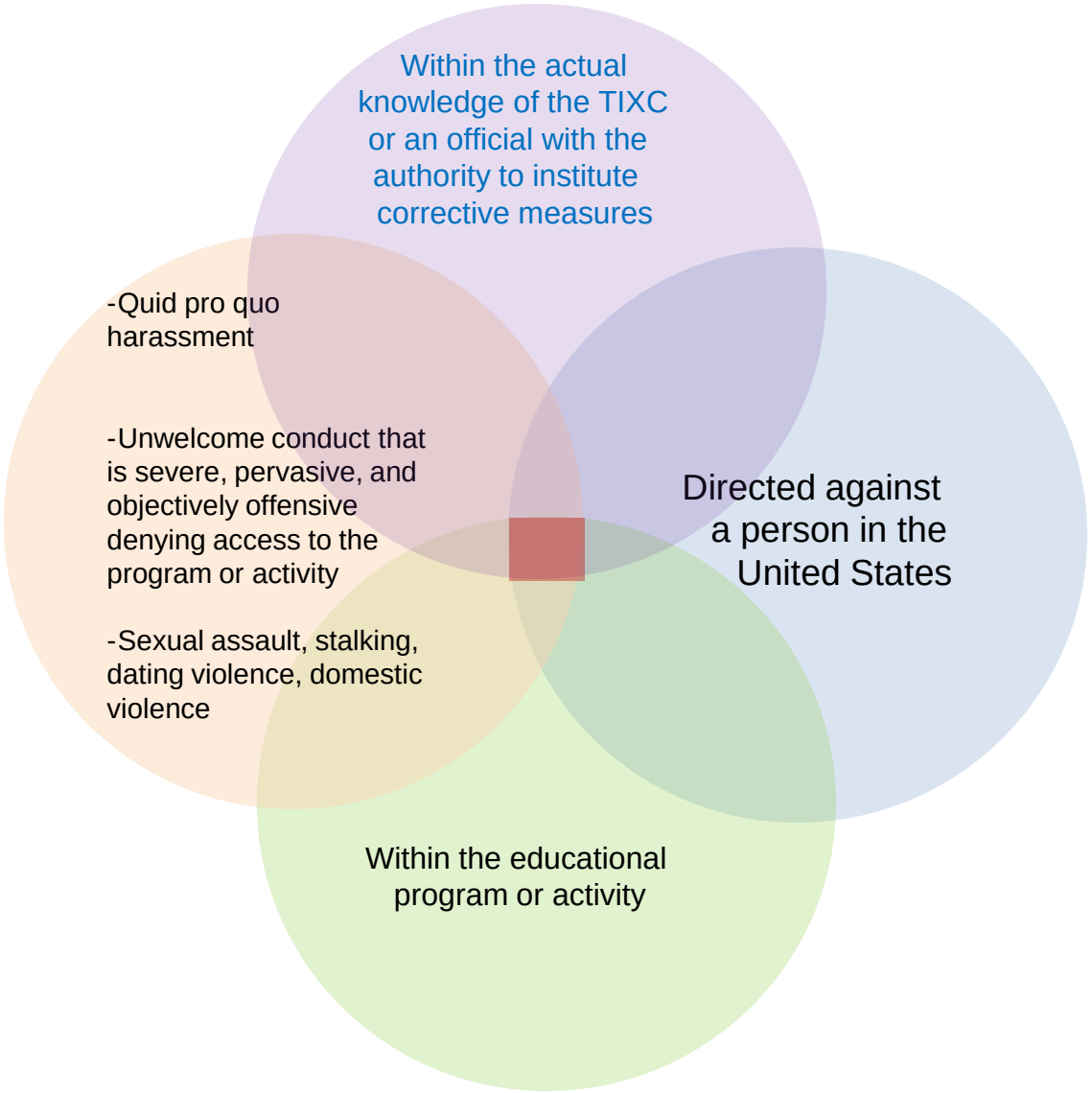
' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Jurisdiction

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

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 the authority to institute corrective measures* on behalf of the recipient

§ 106.30

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

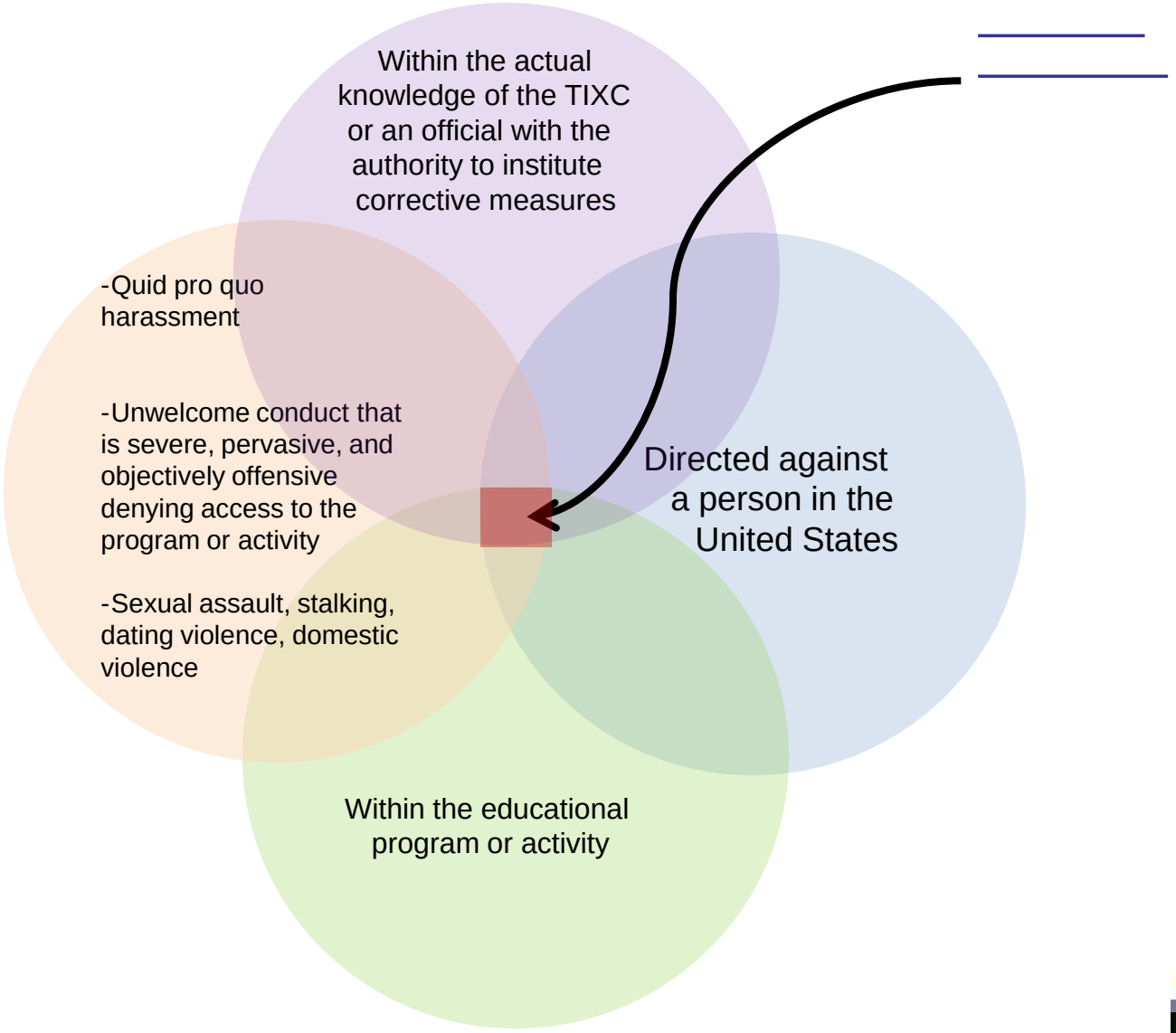
Officials with Authority

Mere ability or obligation to report sexual harassment does not make you an official with authority.

Having been trained to report sexual harassment does not make you an official with authority.

§ 106.30

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Response Obligations

Once the institution has actual knowledge the Title IX Coordinator must :

1. promptly contact the complainant to discuss the availability of supportive measures
2. consider the complainant s wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Supportive Measures

Measures designed to restore or preserve equal access to the recipient s education program or activity without unreasonably

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Supportive Measures

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Emergency Removal & Administrative Leave

A recipient may employ an emergency removal process if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment.

A recipient may place a non-student on administrative leave during the pendency of a grievance process.

§ 106.44(c), (d)

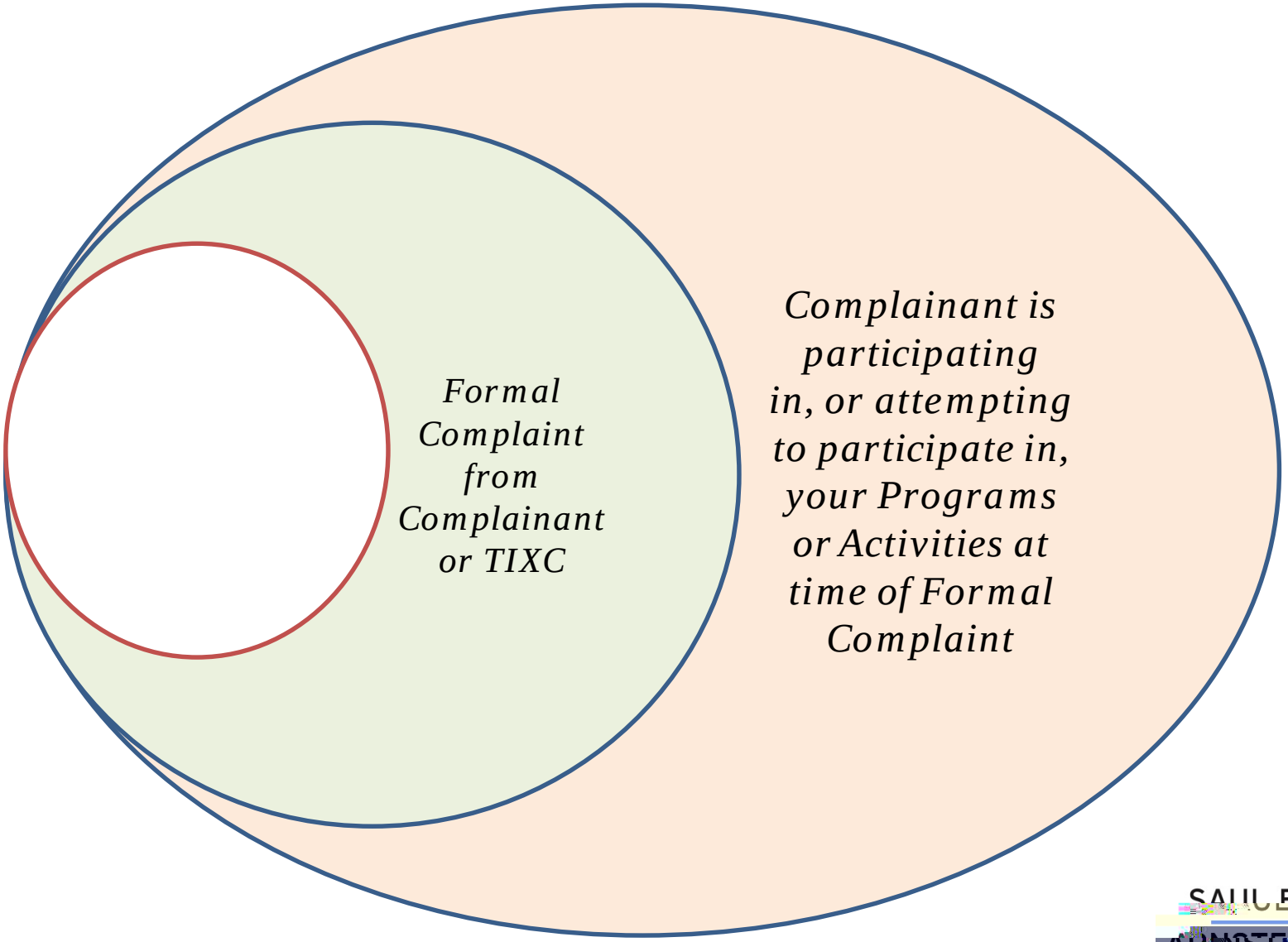
Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Formal Complaints and the requirements of

THE GRIEVANCE PROCESS

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

§



' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Formal Complaint

Definition:

[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.

§ 106.30

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Formal Complaint

How to File:

A formal complaint may be filed with the Title IX Coordinator in person , by mail , or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient .

§ 106.30

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Formal Complaint

Who can file?

Complainant

(§ 106.30)

Complainant s parent or guardian

(§ 106.6(g))

Title IX Coordinator

(§ 106.30)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Formal Complaint

A formal complaint cannot be filed unless the complainant assents or the Title IX Coordinator believes it is necessary .

The formal complaint requirement ensures that a grievance process is the result of an intentional decision on the part of either the complainant or the Title IX Coordinator.

85 FR 30130

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Formal Complaint

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Grievance Process: Basic Requirements

Equitable treatment of the parties

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Written Notice

Upon receipt of a formal complaint, recipients must provide the parties with written notice that explains the recipient s grievance process .

Written notice must include details known at the time , including the identities of the parties, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident.

106.45(b)(2)(i)(A), (B)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Written Notice

Recipients are required to include a warning about false statements in the initial written notice to the parties only if the recipient s code of conduct prohibits students from making false statements or submitting false statements during a disciplinary proceeding.

Punishing a party for making a false statement is permitted when the recipient has concluded that the party made a materially false statement in bad faith . A recipient may not conclude that a complainant made a false statement solely because there was a determination of no responsibility.

106.45(b)(2)(i)(B), 85 FR 30576

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Gather & fairly summarizing evidence

INVESTIGATIONS

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Notice of Meetings

Parties must be given written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings where the party s participation in such meetings is invited or expected. The written notice to the parties of such meetings must be provided with sufficient time for the party to prepare to participate.

§ 106.45(b)(5)(v)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Right to Discuss Investigation

The institution may not restrict either party s ability to (1) discuss the allegations under investigation or (2) gather and present relevant evidence.

§ 106.45(b)(5)(iii)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Advisors Participation

Both parties must have the same opportunity to be by the advisor of their choice to any meeting or proceeding during the investigation process. The institution may limit the of an advisor at any meeting.

§ 106.45(b)(5)(iv)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Advisors Participation

The institution establish restrictions regarding the extent to which the parties advisors may in the meetings or other parts of the proceeBTf 0 Tw 18iy.s c3.4

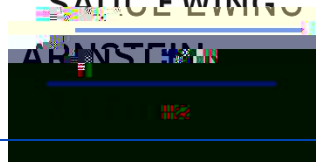
' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Step One: Gathering Evidence

The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

§ 106.45(b)(5)(i)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



Step One: Gathering Evidence

Each party must have an equal opportunity to present witnesses, which includes both fact witnesses and expert witnesses.

Similarly, each party must have an equal opportunity to present inculpatory and exculpatory evidence.

§ 106.45(b)(5)(ii).

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Step One: Gathering Evidence

Cannot require, allow, rely upon, other use . . . Evidence that constitute[s] or seek[s] disclosure of, information protected under a legally recognized privilege , unless the person holding such privilege has waived the privilege

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

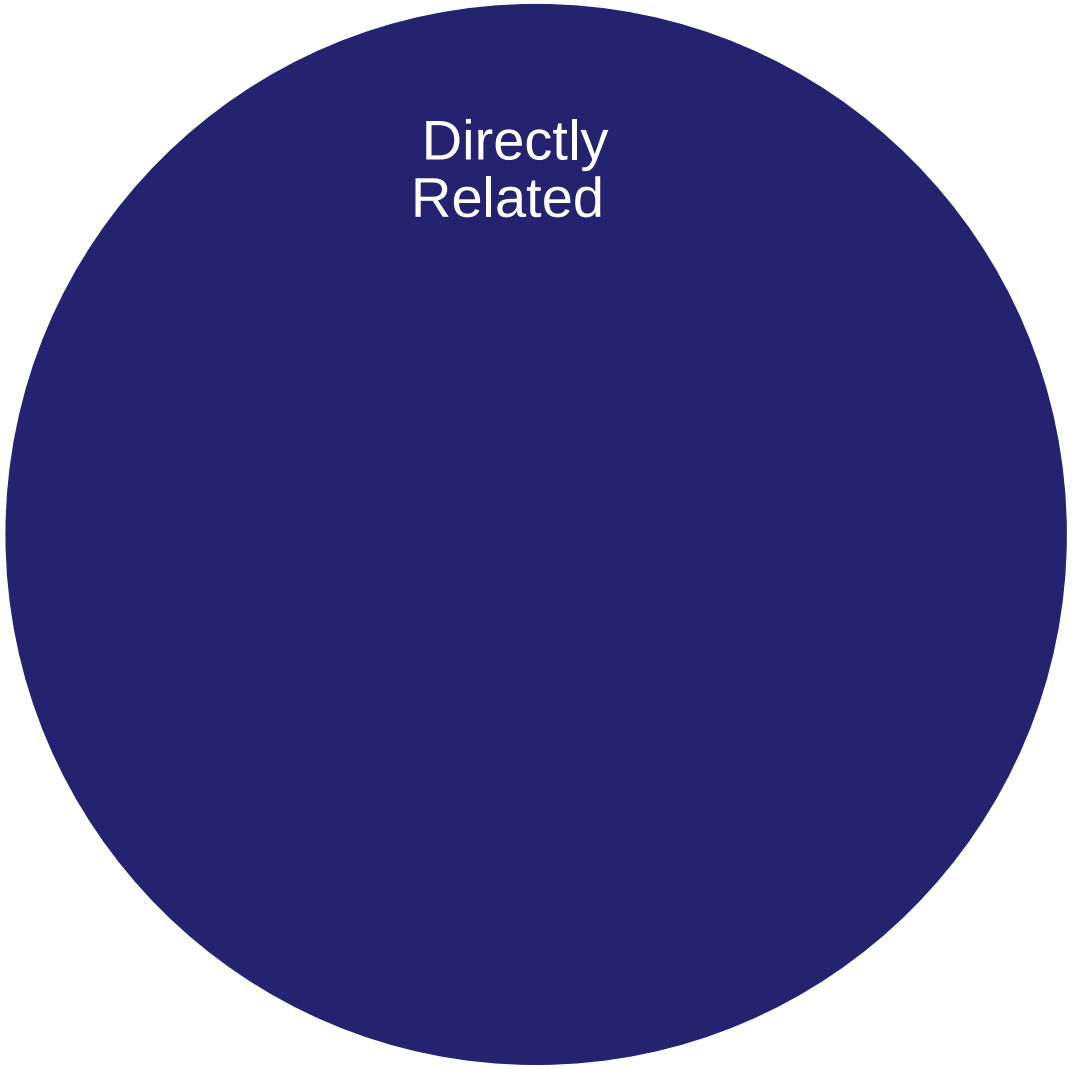
Step Two: Review of and Response to Evidence

Evidence that must be shared includes:

- evidence upon which recipient does not intend to rely in reaching a responsibility determination
- Inculpatory & exculpatory evidence, whether obtained from a party or other source

Note: all of the evidence that subject to review and response must be made available at the hearing

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Step Two: Review of and Response to Evidence

Parties must have at least 10 days to respond in writing to the directly related evidence

The investigator must consider any written responses before finalizing the investigative report

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Step Three: The Investigative Report

After the parties have had the opportunity to inspect, review, and respond to the evidence, the Investigator must

Create an investigative report that fairly summarizes relevant evidence and,

At least 10 days prior to a hearing, send the report to each party and their advisor (if any) for their review and written responses.

(Hard copy or electronic format)

§ 106.45(b)(5)(vii)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Step Three: The Investigative Report

[T]hese final regulations do not prescribe

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Step Three: The Investigative Report

All evidence gathered

↓

Evidence directly related to the allegations in the formal complaint

(Evidence sent to parties/advisors)

↓

Relevant evidence

(Evidence included in the Investigative Report)

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Prohibition on Exclusion of Relevant Evidence

[A] recipient may not adopt evidentiary rules of admissibility that contravene [the] evidentiary requirements prescribed under 106.45

85 FR 30294

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Prohibition on Exclusion of Relevant Evidence

[A] recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice

85 FR 30294

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Prohibition on Exclusion of Relevant Evidence

[A] recipient may not adopt rules excluding certain types of relevant evidence(*e.g.* lie detector test results, or rape kits) where the type of evidence is not either deemed not relevant (as is, for instance, evidence concerning a complainant s prior sexual history) or otherwise barred from use under 106.45 (as is, for instance, information protected by a legally recognized privilege.

85 FR 30294

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Relevant Evidence?

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

85 FR 30247 n. 1018

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Relevant Evidence?

The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.

85 FR 30343

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Relevant Evidence?

rel• e•vant | \ re-l %v %t \ adj.

a: having significant and demonstrable bearing on the matter at hand

b: affording evidence tending to prove or disprove the matter at issue or under

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Relevant Evidence?

The requirement for recipients to summarize and evaluate relevant evidence, . . . appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether

(i.e., on what is relevant).

85 FR 30294

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Relevant Evidence?

Evidence may be relevant whether it is inculpatory or exculpatory . 85 FR 30307

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Not Relevant?

The following is considered per se not relevant (or otherwise excluded):

Compn &is2/C2_y " " £ *51Ì,˙CC˙" £ *£ v) l C£B$£

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is Not Relevant?

An institution may deem duplicative evidence irrelevant .

85 FR 30337

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Rape Shield Provision

[Q]uestions and evidence subject to the rape shield protections are not relevant, and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not. [The regulation] requires review and inspection of the evidence directly related to the allegations that universe of evidence is *not screened for relevance*, but rather is measured by whether it is directly related to the allegations. However, the investigative report must summarize relevant evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Challenges to Investigator s Relevancy Determinations

A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party s response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]

85 FR 30304

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

EXPECTATIONS

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Impartial and Unbiased Investigations

A recipient s grievance process must require that the investigator not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Grounds for Appeal

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient s dismissal of a formal complaint or any allegations therein, on the following bases:

> (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

The Goal

The investigation and adjudication of allegations must be based on an objective evaluation of the relevant evidence available

Even where there is little or no evidence other than the statements of the parties themselves

Not the same as a requirement of "objective evidence"

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Bias: what does it mean?

Whether bias exists requires examination of the
of a situation . . .

. . . and the Department encourages recipients to apply
(whether a reasonable person would believe bias exists),
to evaluating whether a particular person serving in a Title IX role is biased[.]

85 FR 30248.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is defined as bias?

Treating a party differently on the basis of the party s sex or stereotypes

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Impermissible Bias

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Investigative Reports

Consider whether credibility determinations should be included in investigative reports.

The core purpose of the investigative report is to summarize relevant evidence.
To avoid the perception of bias, the investigator may choose to keep the report strictly factual.
In reaching the outcome on responsibility, Hearing Officers (decision-makers) must make credibility determinations.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Investigative Reports

Example A:

The Respondent states *in interview one with the Investigator* that there were four people present in the room

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is not defined as bias?

2. Title IX Coordinator Signs Formal Complaint

When a Title IX Coordinator signs a formal complaint, it does not render the Coordinator biased or pose a conflict of interest.

The Department has clarified that this does not place the Title IX Coordinator in a position adverse to the respondent because the decision is made on behalf of the recipient and not in support of the complainant or in opposition of the respondent.

85 FR 30372

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is not defined as bias?

3. Professional experiences or affiliations

The prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.

85 FR 30252

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

What is not defined as bias?

Not *per* se bias; exercise caution not to apply generalizations that might unreasonably conclude that bias exists :

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

It is not a conflict of interest for

A

Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.

Any recipient, *irrespective of size*, may use existing employees to fill Title IX roles, as long as these employees do not have a conflict of interest or bias and receive the requisite training[.] 85 FR 30491-92.

Even a student leader of the recipient may serve in a Title IX role. 85 FR 30253.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

It is not

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Conflict of Interest: Who can serve which function?

Title IX Coordinator

Investigator ¿

Informal resolution facilitator ¿

Decision-maker or appeal decision-maker

Copyright 2020 Saul Ewing Arnstein & Lehr LLP

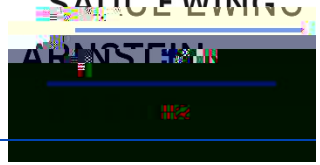
Conflict of Interest: Who can serve which function?

Investigator

Title IX Coordinator

Appeal 0 rg 6?7.97 (n?)]TJ EMC /ArisXC-T3 1 Tw 1.772 Tw 9.777 rg /1[(

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP



Avoiding Prejudgment of the Facts at Issue

Title IX Coordinators and other personnel should not apply a start by believing approach

Doing so would violate the requirement to "serve impartially. 85 FR 30254.

"The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment must not be prejudged and must be based on objective evaluation of the relevant evidence." 85 FR 30254.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Avoiding Prejudgment of the Facts at Issue

Necessitates a broad prohibition on

Decisions be based on individualized facts, and not on stereotypical notions of what men and women do or not do

85 FR 30254

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Avoiding Prejudgment of the Facts at Issue

The Department permits institutions to apply trauma-informed practices, so long as it does not violate the requirement to serve impartiality and without bias

It is possible, albeit challenging, to apply trauma-informed practices in an impartial, non-biased manner

Any trauma-informed techniques must be applied equally to all genders

85 FR 30256, 30323

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Avoiding Prejudgment of the Facts at Issue

Any and all stereotypes about men and women must be checked at the Title IX door.

- Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.

Approach the allegations (of both parties) with neutrality at the outset

Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP

Avoiding Prejudgment of the Facts at Issue

Bottom Line: The fact that an individual is

' Copyright 2020 Saul Ewing Arnstein & Lehr LLP