

Implementing the Informal Resolution Option

A Practical Guide to Integrating The Informal Resolution Option in Your Title IX Program



Presenters

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What We Will Cover

- History of Informal Resolutions under various guidance
- Selecting an Informal Resolution Facilitator
- Adding Informal Resolution to your existing Title IX Process
- How Texas A&M Approaches Informal Resolution
- Special Considerations for Informal Resolution



Obama Era Guidance

In the Obama-era, the resolution of sexual misconduct and/or sexual assault allegations thru mediation was not encouraged and, in some situations, was prohibited. The DOE maintained the position that sexual assault cases were not appropriate for mediation, even though many sexual assault cases became lawsuits that were eventually settled through mediation.

Trump Era Guidance

In September of 2017, after the DOE withdrew Obama-era guidance documents, OCR issued an interim Q & A, which stated:

Question 7: After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer: If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

2020 De Vos Final Rule

The final rule expressly authorizes informal resolution options such as mediation or restorative justice:

(1) Parties must give **voluntary, written, informed consent** to attempt informal resolution; and

(2) Facilitator must be **well trained**...

Voluntary, Informed, Written Consent

Provide BOTH parties with a written **Notice of Allegations** and obtain their signature on **Written Consent to Informal Resolution**, that states:

- Presumption that Respondent is “Not Responsible” for policy violations
- Right to an advisor – but no duty to provide
- Conduct code provision against making false statements
- Consequences of participating in Informal Resolution (i.e., what records are kept, how long, and who can access them)

Facilitator Must be Well Trained

The regulations require a “well-trained” facilitator to:

- serve impartially without pre-judging the facts
- set aside bias
- have no conflict of interest
- not engage in sex stereotypes

Additional Guidance for De Vos Final Rule

- Cannot require participation
- Must have a formal complaint before engaging in an informal resolution
(The 2022 proposed Biden Rule allows informal resolution prior to a written formal complaint)
- Either party may withdraw from informal resolution at any time to resume to formal grievance process
- Cannot use informal resolution to resolve allegations that an employee sexually harassed a student.

What The Guidance Doesn't Say



- What is Informal Resolution Really?
- Why Should I Add it to our Title IX Program?
- Who should be Doing The Facilitation?
- What Does “Well Trained” Mean?
- What Are The Steps to A Successful Facilitation?

What's In It For The Parties?

Complainant

- Less Re-trauma – investigation and cross examination
- Safety
- Empowerment
- Opportunity to Resolve Quickly
- Wider Range of Options
- Opportunity to be heard

Respondent

- Certainty of Outcome
- Opportunity to Negotiate Agreement Language
- Disposition of Case, Pending Criminal or Conduct Cases
- Wider Range of Options

Institution

- May Reduce Legal Liability
- Quicker Disposition
- Reduces Case Manager/Investigator Caseload
- Opportunity to demonstrate that the University “cares” about the parties



Places to Look for an Informal Resolution Facilitator

- TIX Coordinator
- Investigators
- Deans/Faculty/Law School
- HR Staff/Faculty Affairs/Ombuds
- Internal Full-Time Facilitator (TAMU)
- Outsourced Facilitator



Cost

- **FTE vs. External Facilitator**
- **“Trades” with other school**
- **Volunteer Employees**

Weigh

- **Training Burden**
- **Control and Accountability**
- **Knowledge of Institution’s Rules & possibilities for resolutions**
- **Expertise/Skill/personality**
- **Conflicting out staff if IR fails**
- **Burnout**
- **Availability/Scheduling**

Practical Considerations

**What a TIX Coordinator
Should Consider When
Choosing a Facilitator**

Practical Considerations for Incorporating IR Into Your Institution's TIX Framework



Make sure Your Institution Has a Clear Description of Informal Resolution Process in its Regulations?



Who Determines When Informal Resolution Appropriate?



If Informal Resolution fails, then what?

Adequate staff to resume formal process



Established Case File Procedure

Templates

Case Log

Closures

Interacting
with legal

Complex Issues

Criminality

**Parallel Criminal Cases –
Will Findings/Agreement
be Seen as an Admission?
Alternatives?
(Work With Advisor)**

Future

**Will Findings Impact
Party's Future Career,
Post-Graduate Study,
etc.? Alternatives?
(Restorative/Punitive)**

Safety

**Are There Post-Agreement
Safety Concerns? Balance
with Safety of Institution at
Large.
(Facilitator/TIXC Has Veto
power)**

Offering The Informal Resolution Option



- **Offer the Option Early (Case Managers)**
- **Add to All Documents (Complaint/NOA/Website)**
- **Explain Formal vs. Informal Process**
- **Explain Right to Withdraw/Change Process**
- **Explain Range of Options**
- **Explain Empowerment/Control**

**So, You Have a Request
For an Informal Resolution
– Now What?**



An aerial photograph of the Texas A&M University campus, showing a dense cluster of yellow and tan buildings, green lawns, and a central quad area. The text is overlaid on the center of the image.

The **TAMU** Approach to Informal Resolution

Joseph Alfe

Approaches to Informal Resolution:

Mediate the Dispute

Mediating the Actual Controversy

- Looks Back to Prove Facts
- Chance to “Tell Your Story”
- Is There a Benefit?
- Re-Trauma
- Getting Into The Weeds
- Formal Light?
 - All the sanctions, none of the due process



The TAMU Approach



Mediate the Resolution

- Look Forward to Move Forward
- Fully Empower
- Trauma Conscious
- Allegations vs. Facts – Taking Things at Face Value
- Enhanced Cooperation
- Focus on Mutual Betterment
- High Satisfaction
- Provides a Path Forward

**Resolving the Complaint
Vs.**

Reliving the Complaint

How We Do It

A Step-By-Step Guide



**To Shuttle or Not
to Shuttle**

Live or Remote?

Format of IR

- **Safety For All Parties/Staff**
- **Facilitation: Control of Process/Emotional Response**
- **Re-Trauma Concerns**
- **More Efficient Communication**
- **Improved Interaction With Advisors – Lessens Adversarial Stance**

Logistics



Set-Up & Scheduling

- Doodle Poll
- Schedules
- Advisors



Zoom, etc.

- Know How to Use
- Breakout Rooms
- Room Set-Up (Live)



Assistant

- Scheduling,
- Sanction Tracking
- Security



Step One

The Pre-Session Meeting

(Parties are in Individual Meeting Rooms)

Start With The Respondent.

- **Brief Hello**
- **Explanation of Shuttle Process**
- **Acknowledge Advisor**
- **Address Fear of Equality**
- **Thank Them For Their Patience**

Move to Complainant

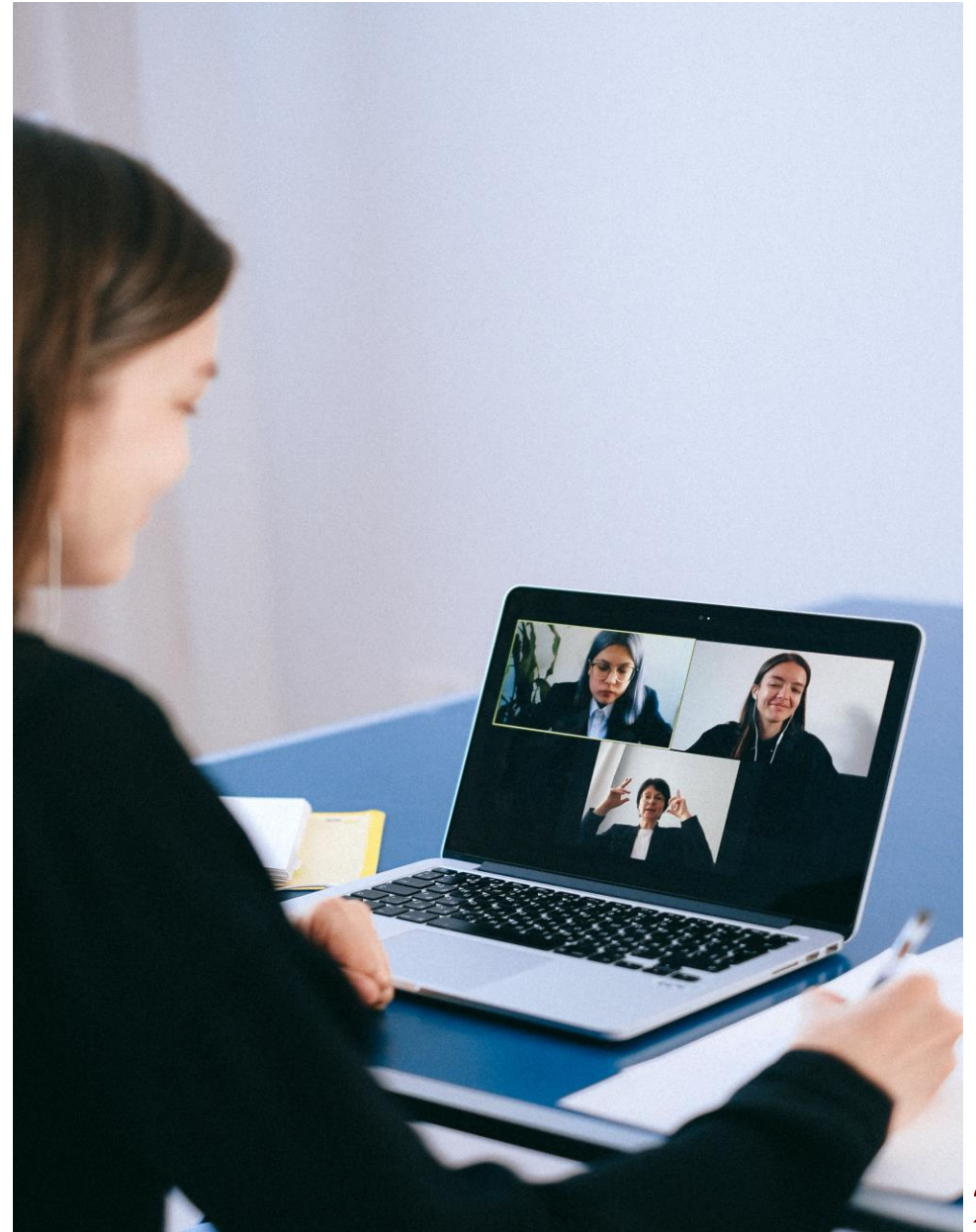
Introduce Yourself

Thank Them For Participating

Ask How to Address

Acknowledge Advisor

Express Hope of Resolution



Express Empathy

Empathy Is Not Apology

- Perspective Shift
- I'm So Sorry You've Had To Experience This

Validation

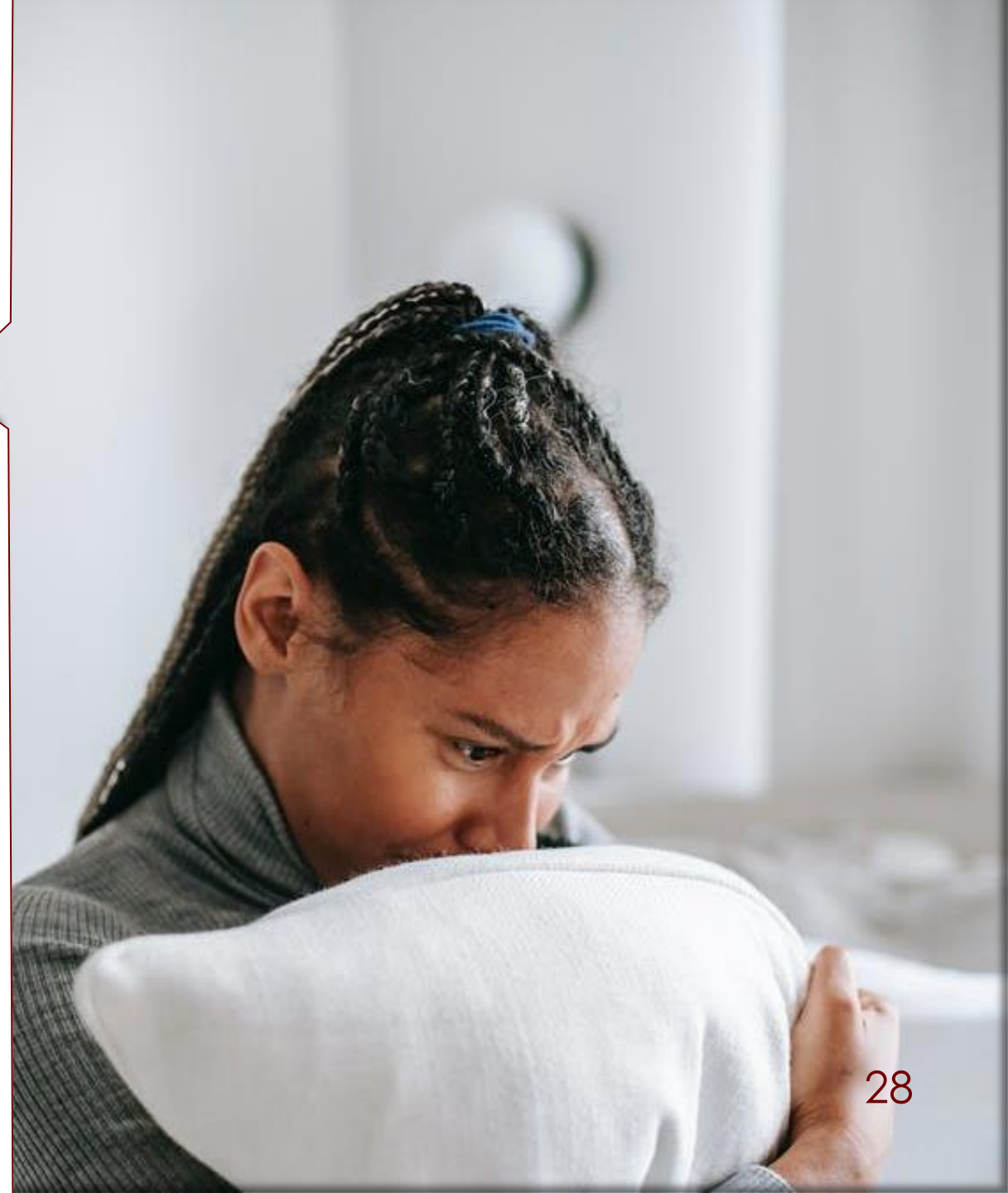
- What You Have To Say Is Important
- You Are Heard

Safety/Retaining Control

- The Respondent Cannot See or Hear You (Choice)
- I Won't Share Context Information Unless Given Permission

Define The Goal of Informal Resolution

- To Feel Safe Enough to Access Your Guaranteed Educational Benefits



Differences: The Formal Process

- Starts From Today, Looks Back to Prove Facts
- Coercive
- You Get To "Tell Your Story" - Relive Trauma
- In Investigation Is Done To Develop Facts, for **Both** Parties
- Can Be a Long, Invasive Process
- Full Due Process Culminating In A Hearing – Subject to Direct/Cross Examination
- Attorney Advisor (May Be Appointed)
- Someone Makes a Decision For You – Little Control
- May Be Subject To Limited Appeal

Differences: The Informal Process

- Starts From Today, Looks To Future To Move Forward
- Non Coercive – May Chose To Return To Formal Process At Any Time
- Empowers Parties to Make Their Own Agreement
- A Safe and Confidential Way to Explore Options
- Complainant Controls Narrative: Punitive/Restorative Outcome
- No Re-trauma
- Facilitator Guided
- Can Choose Advisor, Not Required
- Creative Options
- Certainty of Outcome
- No Appeal/Case Closed
- Enforceable Agreement

Describe The Agreement Process



Describe Draft Agreement/Options



Share Screen



Describe Facilitation Process



End Goal=Written and Signed Agreement

Explain the Two Objectives



Level of Responsibility

Outcome

The 2+2=Success Formula

The 2+2=Success Formula: Part 1

Ask These 2 Questions

1

**Is a Punitive or
Restorative Outcome
Desired? (or both)**

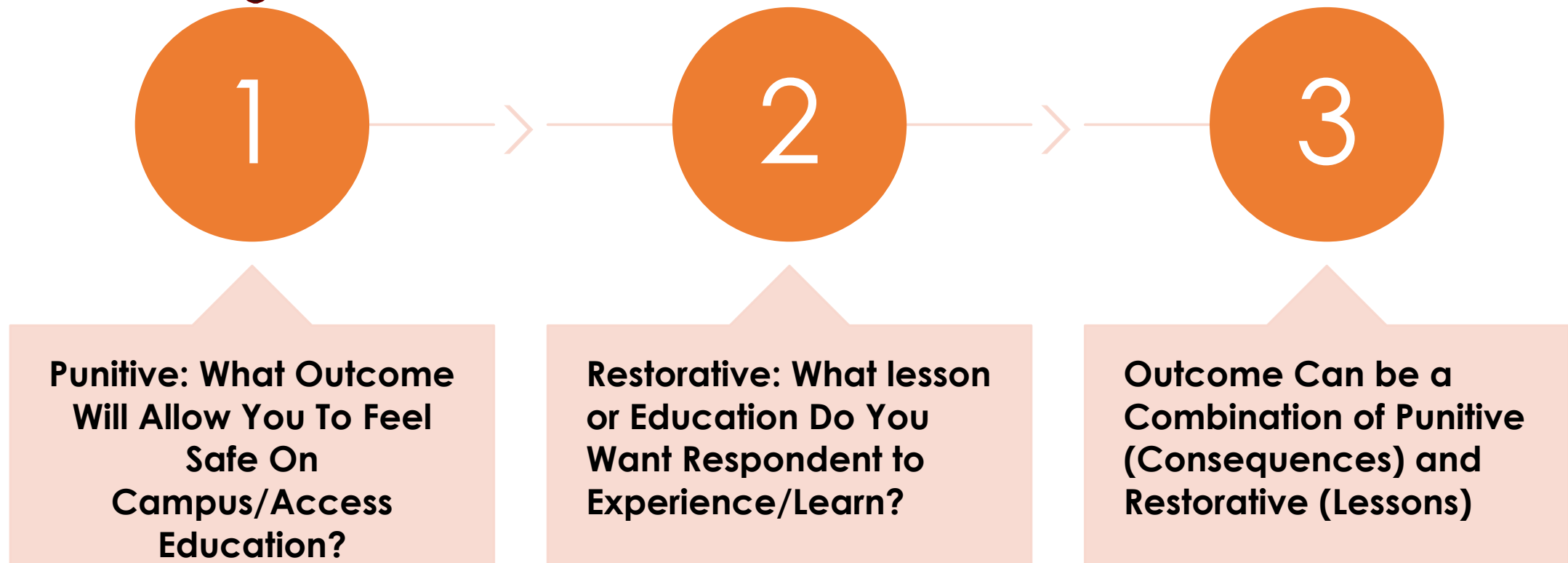


2

**What Does a Successful
Resolution Look Like to
You?**

The 2+2=Success Formula: Part Two

Ask 2 More Questions to Define Success



**Move Back to Respondent -
Repeat Previous Explanation**



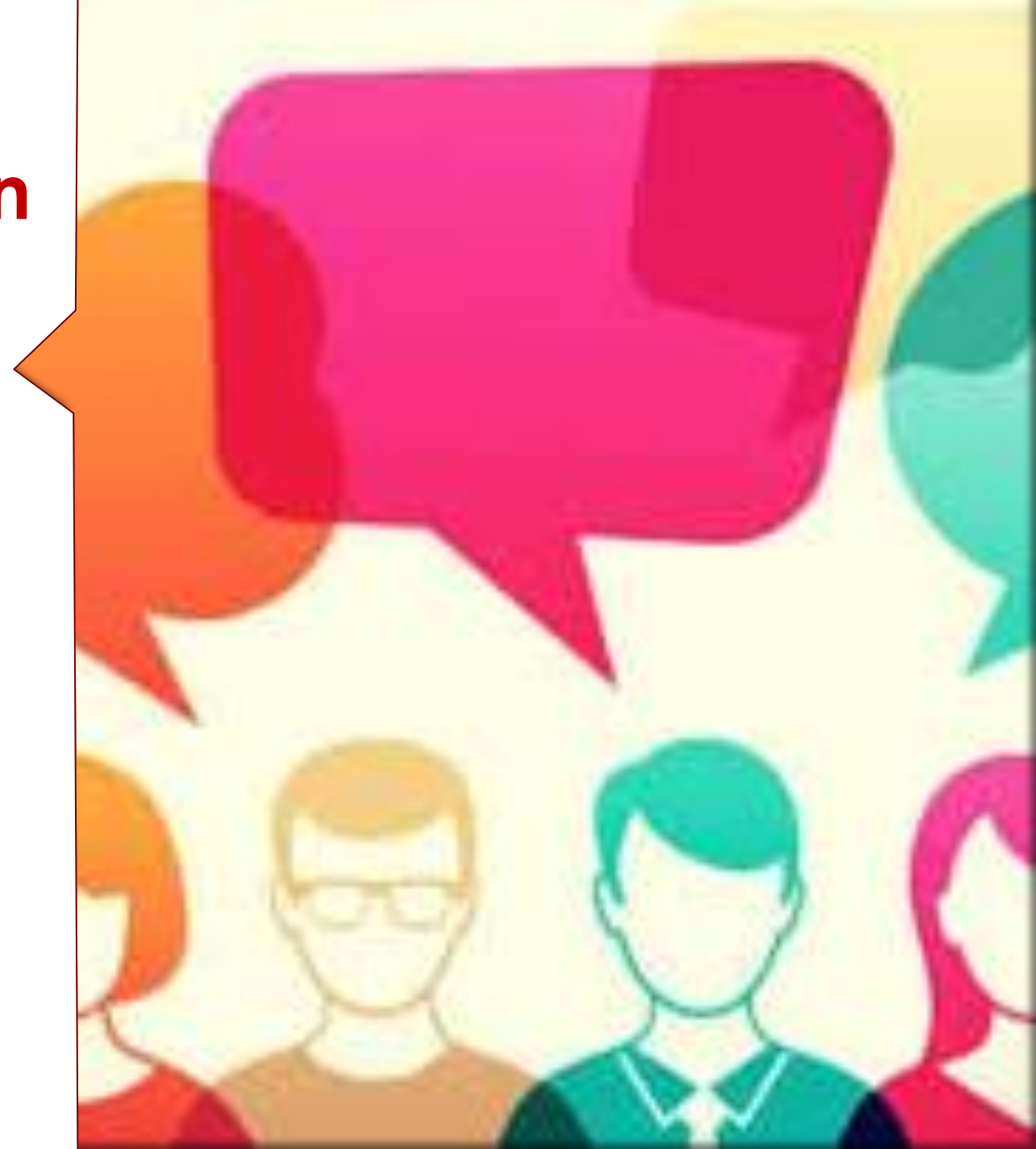
Step Two

Facilitation

- Switch Back to Complainant
- Describe Negotiation Process
- Re-Check Goal of IR (Safety to Access Education)
- Re-Check 2+2 Directive

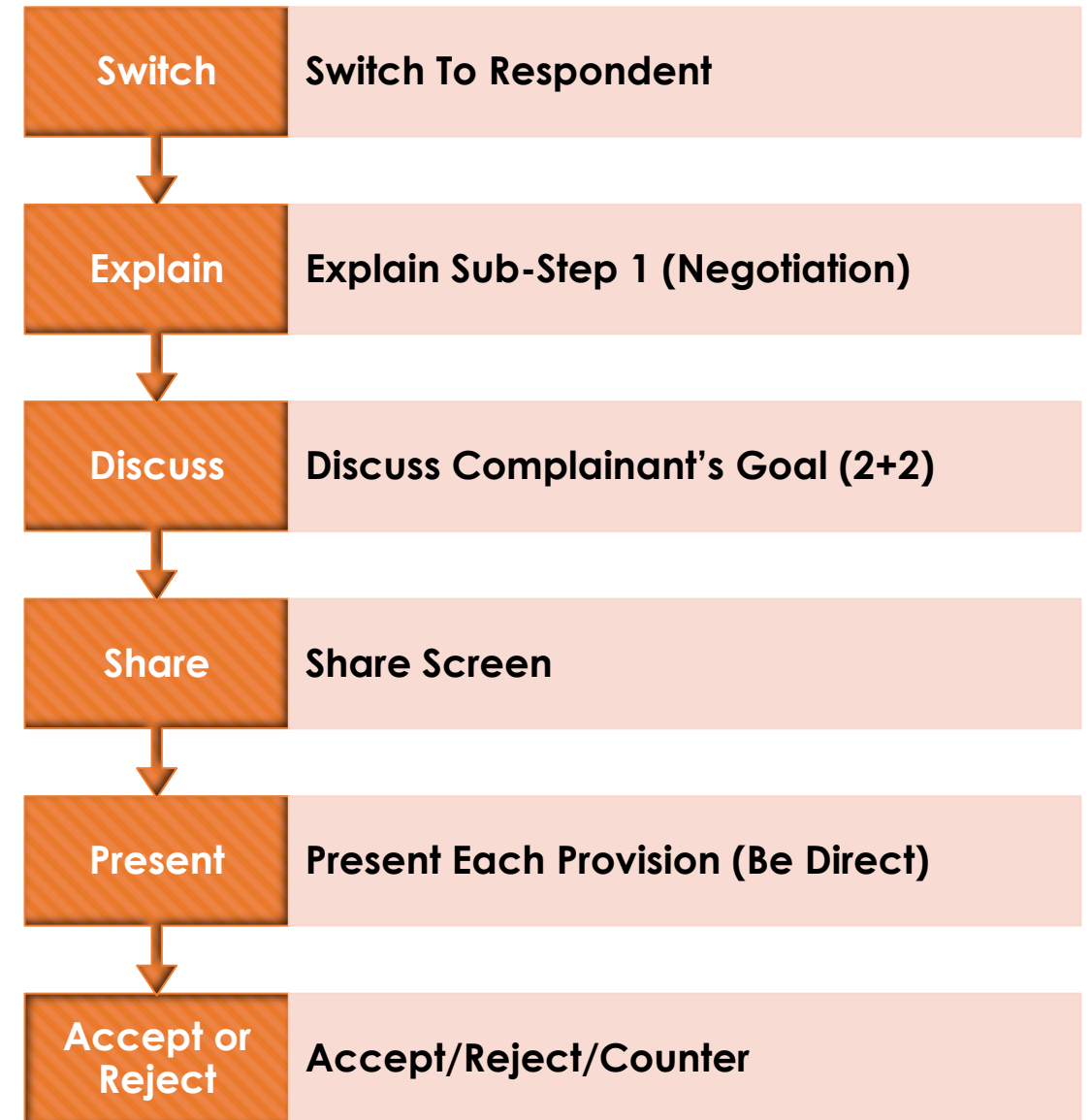
1. Describe Pre-Negotiation Process

- Remember- **Both** Parties Must **Agree**
- Issue Spotting/Peeling the Onion
 - Affect Labeling
- Wants vs. Needs (Remember Goal of IR)
- Firm or Flexible? (Driven by 2+2 Formula)
- Remember Both Parties Must Agree
 - BATNA (Best Alternative)
 - WATNA (Worst Alternative)
- Strategy
 - Rate Each Provision's Importance
 - Give Aways
- Confidentiality (Ask What Can Be Shared)



The Offer Process

Once Complainant Has Agreed to a Proposal



What Should The Facilitator's Role Be?

**Totally Disengaged
vs.**

**Active in Providing
Options/Discussing
Possible Outcomes**

**The Fine Line:
Influencing vs.
Providing Options**

No Advocating

**Balance
Individual/Institutional
Risks**

**Creativity vs.
Formalized**



Share Screen to Show Agreement Draft language



Reaffirm No Advocacy/Equal Rights



Be Respectful



Do you speak Lawyer?

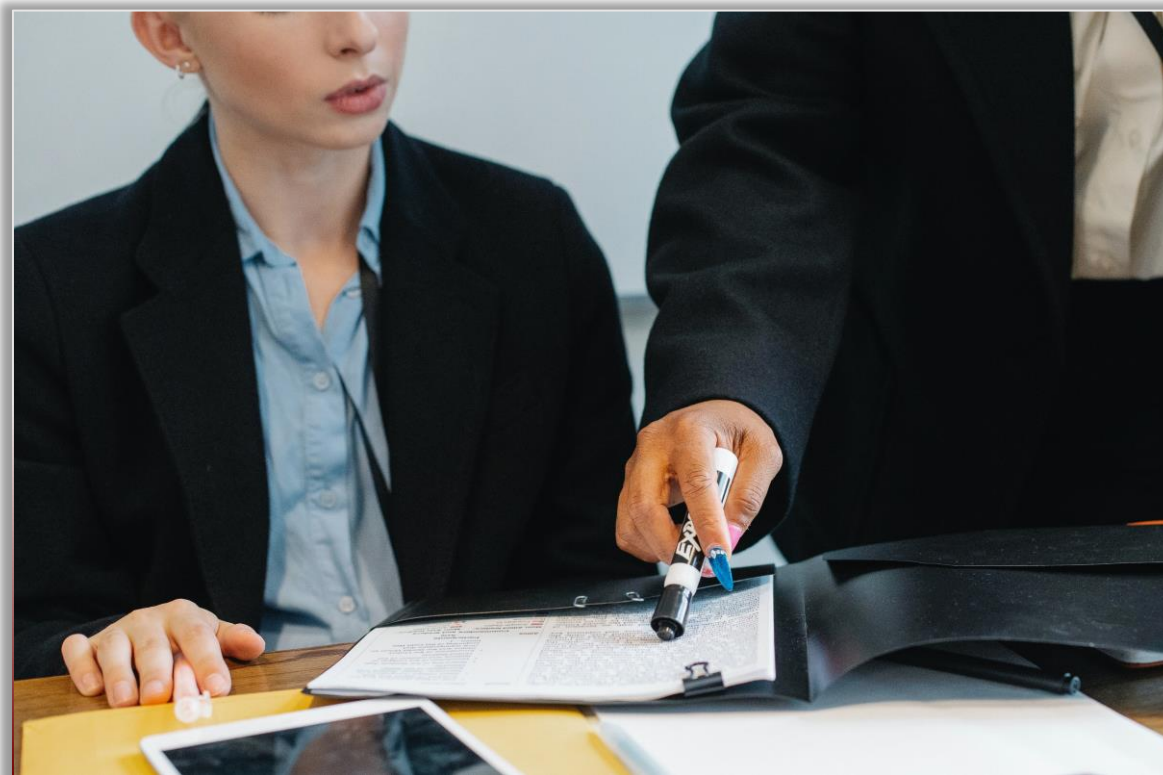


Always Direct Party to Defer to Attorney/Advisor For Advice

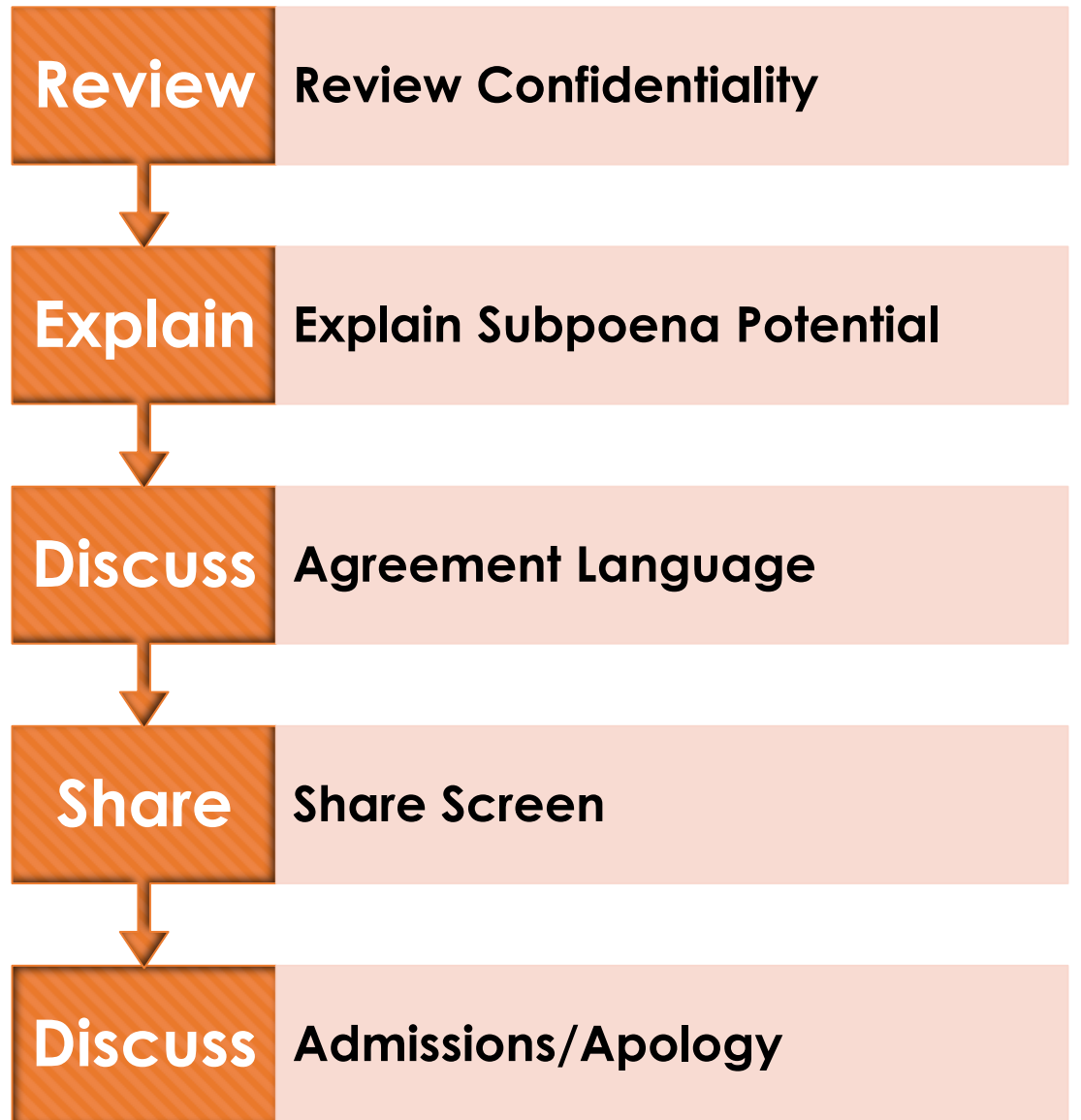


Reinforce Non-Adversarial Process

Attorney Advisors: Special Considerations



Attorney Advisors: Special Considerations: Criminal Concerns



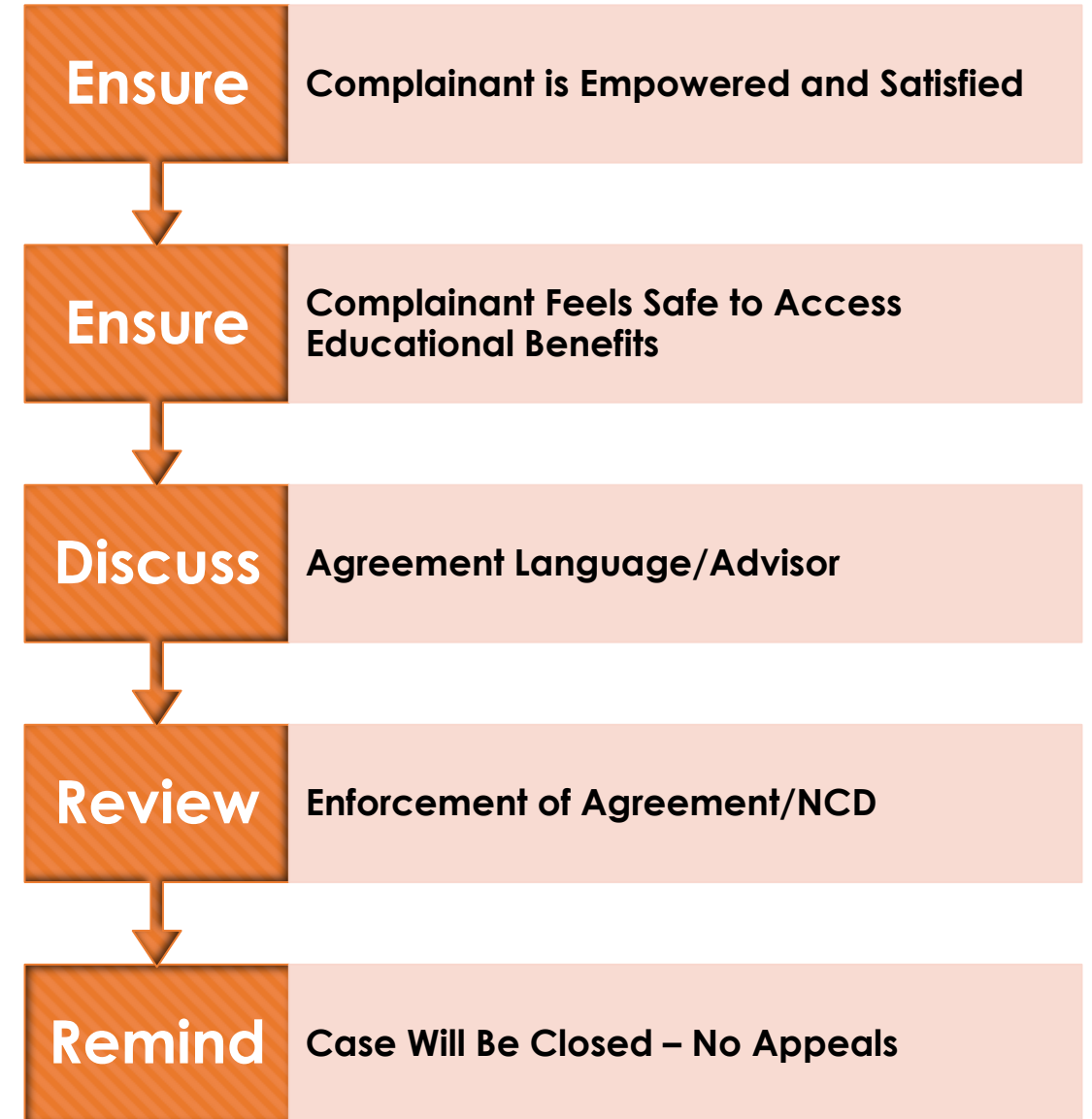


Step Three

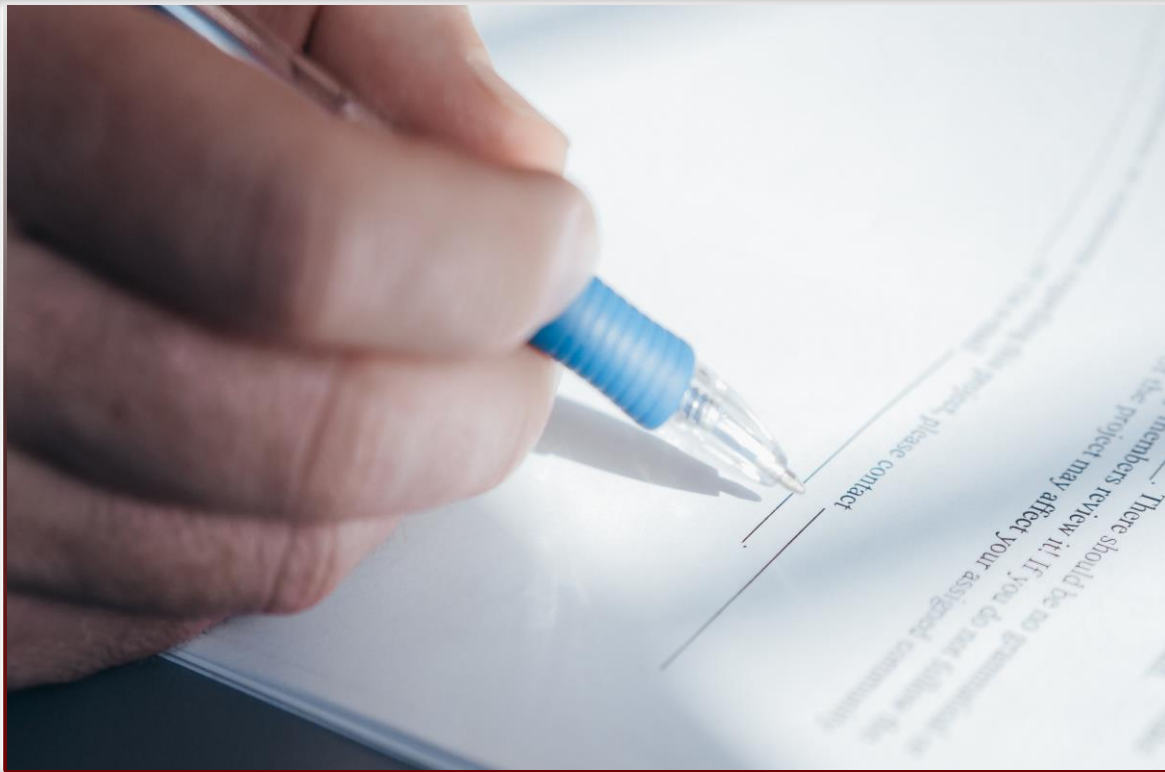
Closure:

Getting The Agreement Signed

Finalizing The Agreement



Signing The Agreement



Convert

- Draft Agreement to pdf

Send

- Draft to Both Party and Advisor (Start Where You End)

Send

- Signed Agreement to Next Party and Advisor

Submit

- Submit Agreement For Approval (If Needed)

Explain

- What Happens Next (Notice/Copy)

End Session

Step Four: Housekeeping

- Send Notice to Parties/Advisors of Approved Agreement
- Develop a Checklist
- Notify Partner Departments re Sanctions/Deliverables
- Create and Update Sanction Tracker
- Update Case Log
- Notify Team Of Agreement/No Agreement
- Save All Correspondence to File
- Case Closure
- Update IR Log





On To The
Next One!