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Conducting Fair and Thorough Trauma-Informed Investigations

August 2022

Chantelle Cleary Botticelli, J.D.

About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

Meet Your Facilitators



Chantelle Cleary Botticelli, J.D.

She/Her/Hers

Director of Strategic Partnerships
and Client Relations

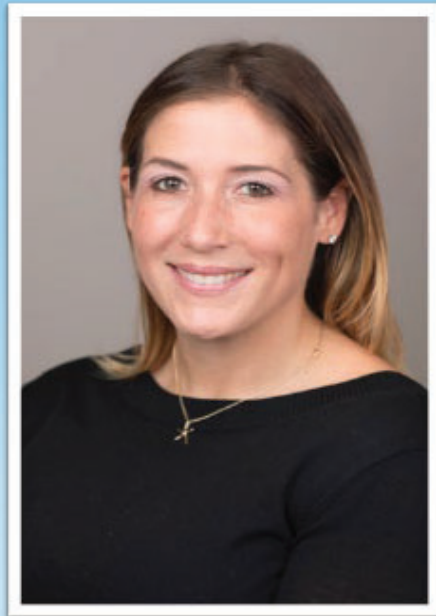


Pari Le Golchehreh

She/Her/Hers

Senior Solutions Specialist

Meet Your Facilitator



Chantelle Cleary Botticelli, J.D.

She/her/hers

Director of Strategic
Partnerships and Client Relations

Meet Your Facilitator

Chantelle Cleary Botticelli is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 15 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.



Day One Agenda

1

Title IX's Requirements

2

**The Proper Application of
Trauma Informed Practices**

3

**The Importance of Understanding
the Potential Impact of Trauma**

4

**Developing an Investigative
Strategy**

5

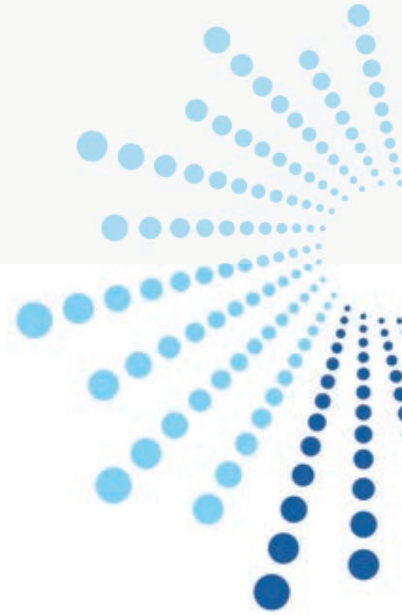
Investigative Interviews: Part 1



01

Title IX's Requirements

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Title IX of the Education Amendments Act of 1972

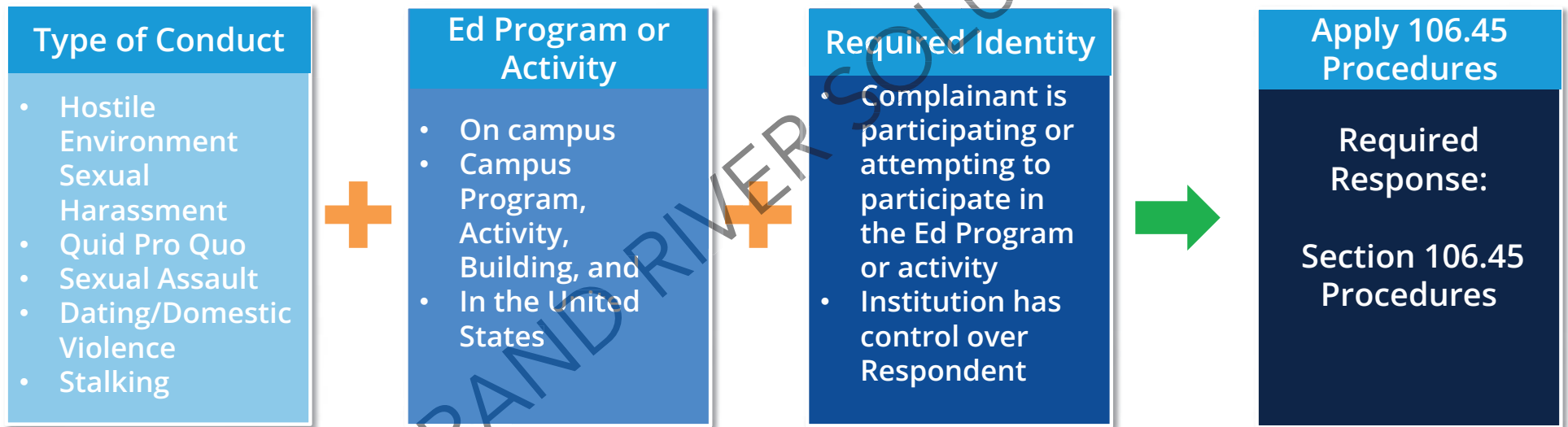
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1972).

The Title IX Regulations

Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

Title IX Application Post May 2020 Regulations



Procedural Requirements for Investigations



Notice TO BOTH
PARTIES



Equal opportunity
to present evidence



An advisor of
choice



Written notification
of meetings, etc.,
and sufficient time
to prepare



Opportunity to
review all directly
related evidence,
and 10 days to
submit a written
response to the
evidence prior to
completion of the
report



Report
summarizing
relevant evidence
and 10 day review
of report prior to
hearing



Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

the identities of the parties involved in the incident, if known,

the conduct allegedly constituting sexual harassment under § 106.30,

and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



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Advisor of Choice During the Investigation

The advisor can be anyone, including an attorney or a witness.

Institutions cannot place restrictions on who can serve.

Institutions can create rules and guidelines for participation in the investigation.

No specific training required.



Written Notification of Meetings and Sufficient Time to Prepare



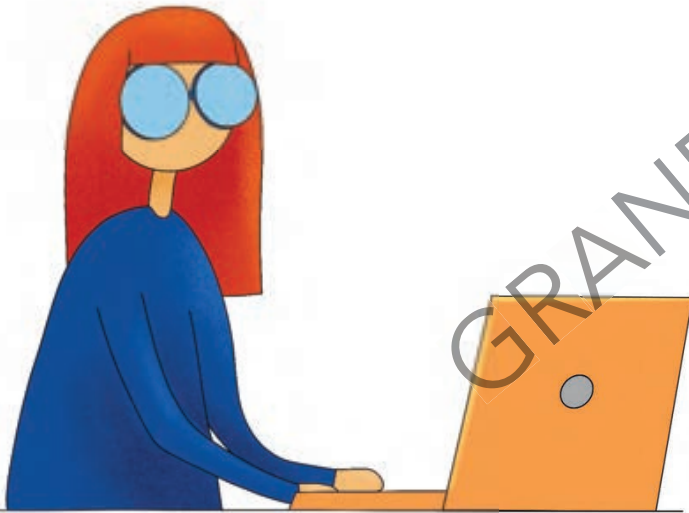


Equal Opportunity to Present Evidence

Evidence Review

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

10 days to provide a written response.



Investigative Report and Review



After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

That report will be shared with the parties and the parties will have another opportunity to respond in writing.

The hearing must occur at least 10 days after the release of the final report.





“Directly Related” and “Relevant Evidence”

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A 3D puzzle with one red piece standing out from the blue and white pieces. The puzzle is composed of several pieces, with one red piece being the central focus. The background is a gradient of blue and white, with the puzzle pieces arranged in a grid-like pattern. The red piece is positioned in the center-right of the frame, and its color contrasts sharply with the surrounding blue and white pieces. The puzzle pieces are arranged in a way that suggests a larger, incomplete picture.

Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

"Relevant" Evidence

The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."

See, e.g., Federal Rule of Evidence
401 Test for Relevant Evidence:

"Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action."

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance at this stage of the process.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.





The Investigator



Can be the Title IX Coordinator, although that is disfavored.



The Investigator may not be a decision maker.



Must be trained in accordance with the requirements in the regulations.



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.

The Requirement of Impartiality

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Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

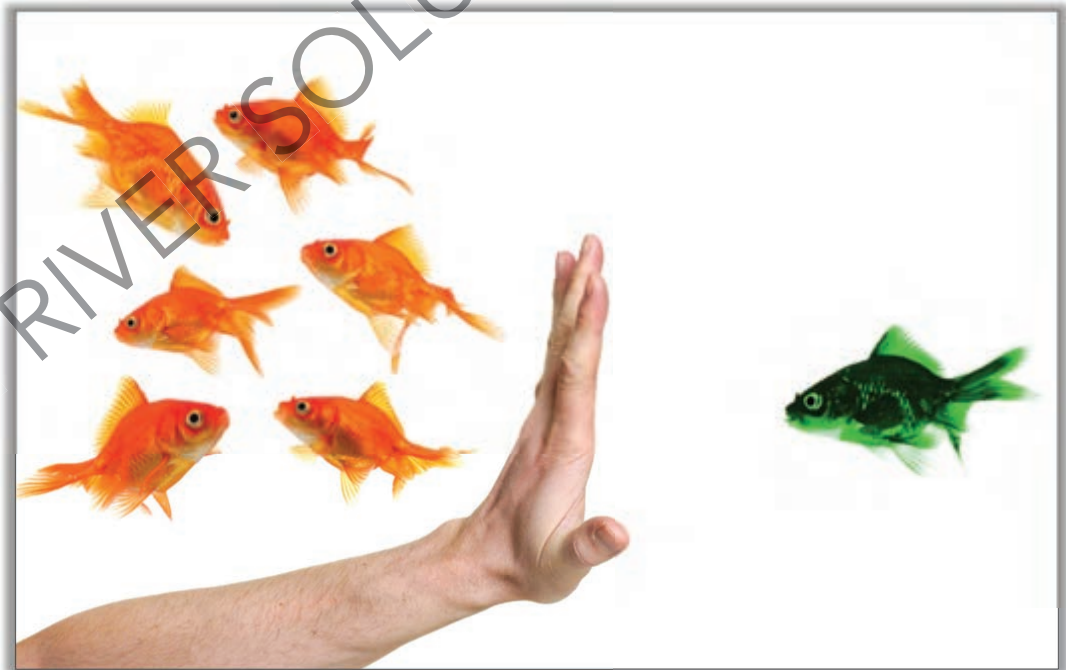
1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts



Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

A photograph of Scrabble tiles on a wooden surface. The tiles are arranged to spell out the word 'CONFLICT' in a row. The tiles are light-colored wood with dark blue letters and numbers. The word 'CONFLICT' is spelled as follows: C (3 points), O (1 point), N (1 point), F (4 points), L (1 point), I (1 point), C (3 points), and T (1 point). Several other tiles are scattered around, including S (1 point), A (1 point), G (2 points), C (3 points), E (1 point), R (1 point), and Z (10 points). A diagonal watermark reading 'GRAND RIVER SOLUTIONS' is visible across the image.

Conflict of Interest



Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

An Impartial Investigation is...

Not influenced by bias or conflict of interest.

Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve.

Truth seeking, not "your truth" confirming.

Trauma Informed Practices

In the preamble, the Department permits the use of trauma informed practices and recognizes that trauma informed practices can be used in an impartial and non-biased manner.

Trauma informed practices must be applied equally to all genders.



02

The Proper Application of Trauma Informed Practices

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Trauma
informed
practices
provide
tools/techniques
for interviewing
and engaging
with the
Complainant,
Respondent, and
Witnesses.



Format/Structure of the
Interview

Format of Questions



Approach to Clarification

Trauma Informed Practices are Designed to:

01

Encourage thorough and complete investigations

02

Assist with recollection

03

Assist with recounting

04

Reduce potential for false information

05

Minimize unnecessary re-traumatization

06

Reduce Bias

Misapplication of Trauma Informed Practices

**It is a misapplication
of trauma informed
principles to allow
potential evidence of
trauma to:**

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.



03

The Importance of Understanding the Potential Impact of Trauma

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Trauma

An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.

Examples of Events that Might Trigger a Traumatic Response

Sexual Assault

Physical Assault
by a Stranger

Physical Assault
by an Intimate
Partner

A Car Accident

Accident that
causes serious
injury or death

Robbery

Significant
medical event



When trauma occurs, there are very real changes in brain function that may affect a person's ability to make memory and to recount their experience.

Common Characteristics of Disclosures by a Trauma Brain

Inconsistent

Non-linear

Fragmented

Lack of detail

New information

Affect is unexpected



Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.

Inconsistencies
Lack of Detail
Non-Linear
Fragmented
New Information



Not Credible



The Historical Conclusion...

False Report
Regretted Sex
Not Provable



Investigation
CLOSED



When an investigator uses “trauma informed” tools, they are less likely to:



CONCLUDE, WITHOUT A THOROUGH INVESTIGATION, THAT THE REPORTING INDIVIDUAL IS NOT CREDIBLE



ASK QUESTIONS OR MAKE DECISIONS FOUNDED IN BIAS



CAUSE ADDITIONAL HARM



JEOPARDIZE FUTURE REPORTING



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The Future

An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.

When presented with the following characteristics in a disclosure,

Inconsistencies
Lack of Detail
Non-Linear
Fragmented
New Information

An investigator who understands trauma will....



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**Continue their
investigation.**



Developing an Investigative Strategy

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Essential Steps of an Investigation



Review Notice of Allegations and Formal Complaint



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow Up Interviews



Report Writing

Understand the Scope of the Investigation



Review the Notice of Allegations
and the Formal Complaint



Ask questions if unsure

Identify the Claims and What Needs to be Proven

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?

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

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?
 1. What is the ground for lack of consent
 1. Did respondent fail to seek and obtain Complainant's affirmative consent?
 2. Did Respondent force Complainant?
 3. Did Respondent coerce Complainant?
 4. Was Complainant incapacitated and therefore incapable of consent?

Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person's safety or the safety of others; or
Suffer substantial emotional distress.

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
 1. Fear for their safety or the safety of others, or
 2. Suffer substantial emotional distress

The Process

Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties?
- Of the Parties?

Incident

- Consent?
- Type of Contact?
- Injuries?

Pre-Incident

- Communications?
- Interactions?
- Conduct?

Post Incident

- Behaviors?
- Communications?



The Importance of Organization

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05

Investigative Interviews

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Interview Objectives



Connect

Build rapport
Build trust
Empower



Listen

Allow interviewee to
share their experience



Clarify

Understand what you
have heard
Seek additional
information



Evidence Preservation

Text Messages
Photographs
Names and contact info
for witnesses



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Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



If interviewing a party, inform them of their right to have an advisor present.



Prepare for the meeting

Areas of focus?

Other evidence?

Go back review what you have



Provide Written Notice of the Meeting

Advise the parties/witnesses that you will be collecting evidence

Set Expectations

What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you
- Prepare the parties for follow up interviews and the "shift"

What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

How do we...



Build Rapport
and Trust?

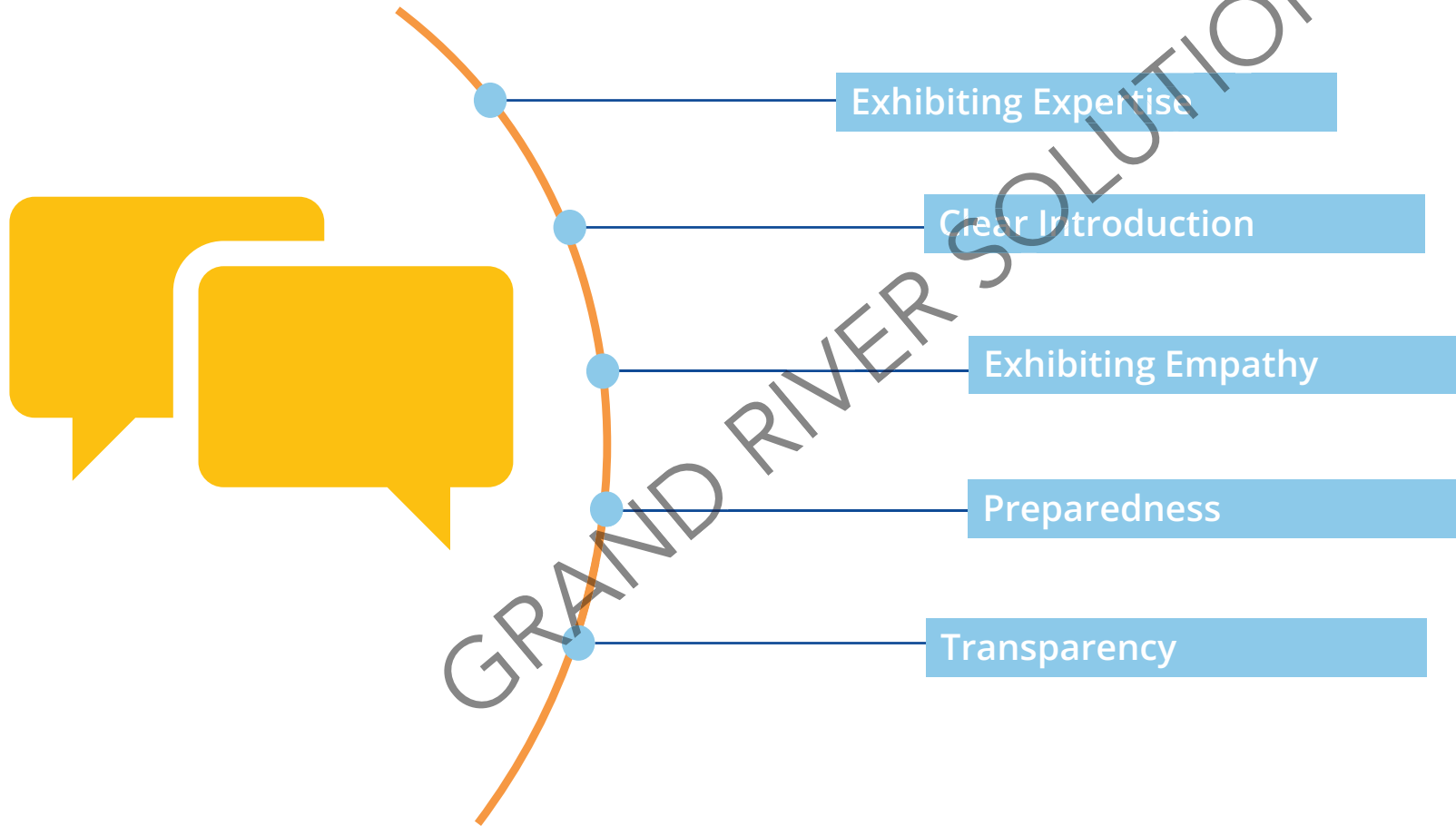


Empower?

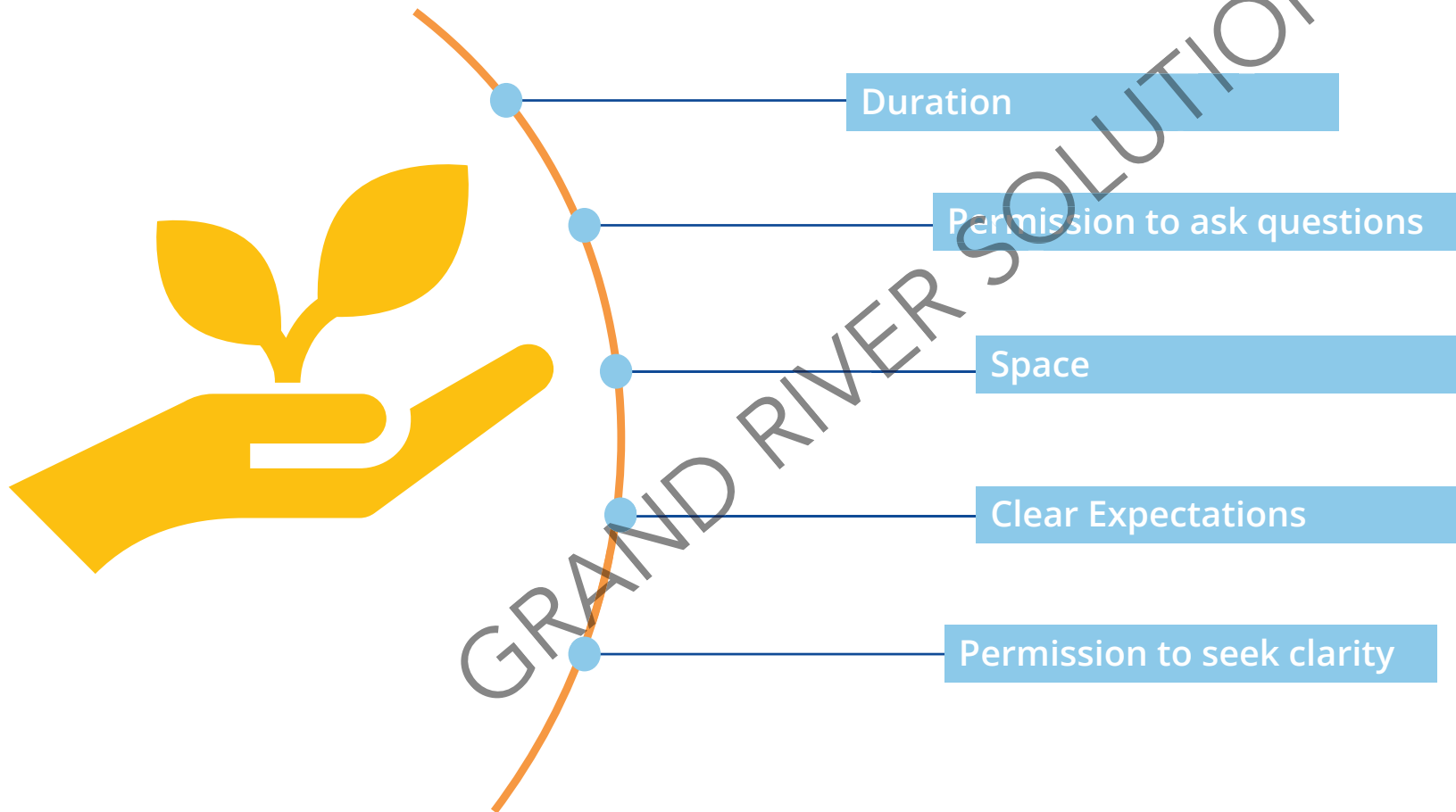


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Rapport and Trust



Empowerment



Investigative Interviews



Start the interview by eliciting a narrative...

Help me understand your experience?

Start where you are comfortable and share what you are able to remember.

What are you able to tell me about your experience?

Allow the person to speak uninterrupted.
This takes patience.



Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

Do Ask:

- Interview for clarification
- Help me understand?
- Can you tell me more about...?
- Is there anything else you can share about...?

Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions

A close-up photograph of a camera lens resting on a dark wooden surface. The lens is the primary focus on the left side of the frame, with its glass element and internal elements visible. The background is a dark, textured wooden surface with a diagonal grain pattern. The overall lighting is low, creating a moody and professional atmosphere.

Capture the Entire Experience

- Ask about the physical and emotional reactions to the incident.
- Conclude with very open-ended questions:
 - What was the most difficult part of this experience for you?
 - Is there something that stands out/that you just can't stop thinking about?
 - Is there anything more that you would like me to know?

The Before

At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.

And The After

It is also important to explore the events following the incident. Oftentimes, the best evidence is produced after the incident.

- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction
 - "Has anyone expressed concern about you since the assault?"
- Communication/contact between the complainant and respondent

Meet Your Facilitator



Pari Le Golchehreh

She/her/hers

Senior Solutions Specialist

Meet Your Facilitator

Pari Le Golchehreh is a Senior Solutions Specialist at Grand River Solutions and has extensive experience in Title IX and Equity work on college campuses. Prior to joining Grand River, Pari served as the Equity and Title IX Office's Lead Investigator at California Institute of Technology where she developed a deep expertise in leading investigations, trained campus community members, and facilitated mediated conversations and remedy-based resolutions. Pari is a certified mediator, and is skilled in aiding parties to resolve disputes in a trauma informed and collaborative manner.



Day Two Agenda

1

**Investigative Interviews
(continued)**

2

**Evidence Collection and
Assessment**

3

**The Investigative Report and
Record**



Quick Review!

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Investigative Interviews: Continued

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Throughout the Interview



Explain your questions,
especially the difficult ones.

How much did you drink? What they
hear: this is your fault because you were
drinking.



Do not ask leading questions.



Watch your tone.



Do not rush.



LISTEN!!!!!!!!!!



Pay attention to and document information that might lead to
additional evidence.



Document questions asked. Especially when a response is not
provided.

At the Conclusion of the Interview



Discuss submission of evidence.



Explain statement review process.



Explain next steps in the process.



Keep the lines of communication open.



Review available support, privacy requirements, and prohibition against retaliation.

After the Interview: Actions



Memorialize the Interview in writing.

Notes
Summary
Transcript



Provide opportunity for the party or witness to review it.



Provide opportunity for party or witness to provide a response.



Incorporate the response.

A Note About Witness Summaries



The reader of any report should not know of the investigator's presence in the report; for example, report should not say "I then asked . . ."



Use interviewee's words and put the words in quotes if it is their words



Avoid conclusory words, or words that suggest that the investigator has an opinion about the information offered

After the Interview: Reflection



Reflect.



Is there something you missed or forgot to ask?



Do you need clarity on any of the information shared?



Has this interview revealed additional evidence that you want to explore or collect?



Has evidence of additional policy violations been shared?

Follow Up Interviews



Seek clarification

Explore inconsistencies

Explore contradictory evidence

Explore difficult issues

Opportunity to respond

Follow Up Interview Approach

1

Explain the purpose of the follow up.

2

Set the stage for the topics you will be covering.

3

Prepare the interviewee for "the shift."

4

Do not avoid asking the hard questions.

The “Hard” Questions

Details about the
sexual contact

Seemingly
inconsistent
behaviors

Inconsistent
evidence/information

What they were
wearing

Alcohol or drug
consumption

Probing into reports
of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions.

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

What Questions Do You Have for Quinn?

“

Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn't want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.

”

What Questions Do You Have for Barri?

“

When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don't remember anything. And then I woke up in Marc's bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn't hearing it. He looked guilty and I could tell he felt bad

”

What Questions Do You Have for Colin?

“

Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.

”



Evidence Collection and Assessment

02

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Evidence

"Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact."

Black's Law Dictionary

Types of Evidence

Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows

Evidence

Testimony

Text Messages

Social Media
Posts and
messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera
Footage

Swipe Records

Medical
Records

Phone Records

Audio
Recordings

Evidence Collection



Identify the items of evidence that you would like to obtain.



Develop an intentional strategy for obtaining that evidence.



Overcome barriers to evidence collection.



Considerations about collecting certain types of evidence.

A Thorough Investigation

is more than evidence collection

Evaluating the Evidence

Is it relevant?

Is the evidence important, or of consequence, to the fact-finding process?



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief and can the decision maker rely on it?



What weight, if any, should it be given?

How important is the evidence to the fact-finding process?

A Thorough Investigation Permits the Decision Maker to Assess



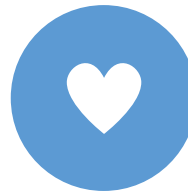
Relevance



Credibility



Reliability



Authenticity



Weight

"Relevant" Evidence

The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

"Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action."

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

Assessing Relevance

Why Does it Matter?

Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.

Character Evidence

Polygraph evidence

Opinion Evidence



Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Opinion Evidence: Try it!

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

"I got to the party pretty late, and Taylor was already lit."

"Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex"



Assessing Authenticity

Investigating the products of the Investigation



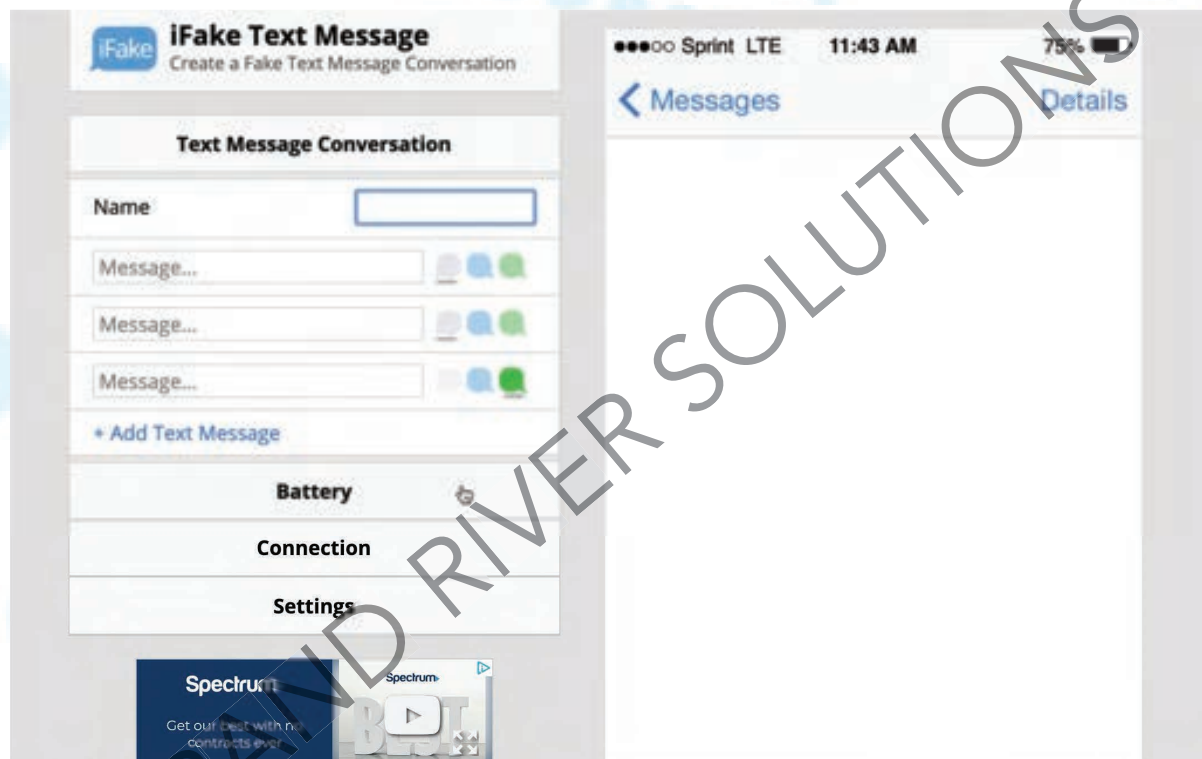
Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.





Is it authentic?



QUESTION THE
PERSON WHO
OFFERED THE
EVIDENCE



HAVE OTHERS
REVIEW AND
COMMENT ON
AUTHENTICITY



REQUEST
ORIGINALS



OBTAIN
ORIGINALS FROM
THE SOURCE



ARE THERE OTHER
RECORDS THAT
WOULD
CORROBORATE?

Assessing Credibility and Reliability

No formula exists, but consider the following:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Character, background, experience, and training

Coaching

Bias

Barriers to Evidence Collection

Non-Participating Parties

Uncooperative Witnesses

Uncooperative Advisors

Identity of party or witness unknown

Refusal to share materials

Materials lost or no longer accessible

Difficult topics



The Investigative Report and Record

03

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At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.



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Relevancy Standard

Relevant Evidence

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions
- Legally recognized and un-waived privilege.
- Records related to medical, psychiatric, psychological treatment

Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage

Redactions



Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



At least 10 days prior to the hearing

The Purpose of the Report

To allow for advance Review

To allow for advance Preparation

- By the Decision Maker
- By the Parties

Reduce likelihood of bias in final outcome

Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

Other Recipients?

Friends of
the parties

Parents

Law
enforcement

Attorneys

Judges

Media

Social media

Essential Elements

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format

Report and Evidence File



Summary of the
Evidence



Compilation of the
Evidence

The Evidence File



Compilation of the evidence



organized intentionally and consistently



Divided into Appendices



Is attached to the report



Includes a procedural timeline

Examples of Appendices



Appendix A

Contains all of the party/witness testimony (e.g., transcripts, statements summaries, etc.) that the investigator deems relevant



Appendix B

Contains all of the documentary evidence (e.g., text messages, SANE reports, photographs, etc.) that the investigator deems relevant



Appendix C

Contains the remaining evidence deemed irrelevant by the investigator, but that is directly related to the allegations in the formal complaint



Appendix D

The procedural timeline

Structure of the Report



Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

Conclusion

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Home Insert Draw Design Layout References Mailings Review View Acrobat Tell me Share Comments

Report Structure Overview

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct

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Share Comments

Report Structure

Statement of Jurisdiction

1. Cite Jurisdictional Elements
2. State all grounds for Jurisdiction

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Report Structure

Identify Investigators

1. Identify the investigators by name

2. Investigator's training belongs in file, not in report

Report Structure

Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.

Report Structure

Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.

2. Include definitions of prohibited conduct from institution's policy/procedures.

Report Structure

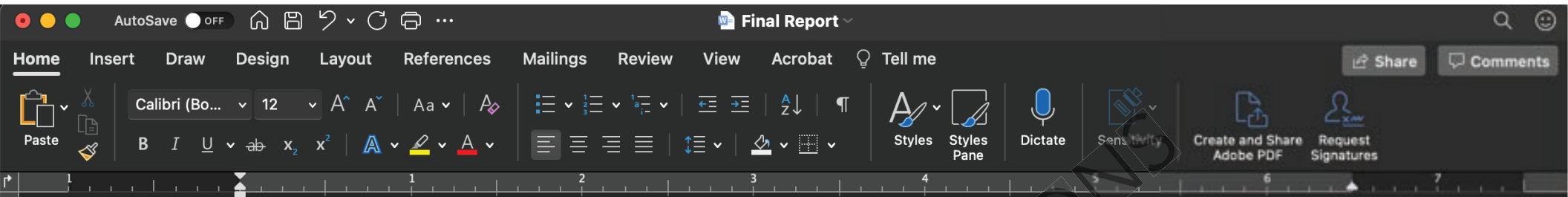
List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List



Example of a Detailed List

Witness Name	Witness identified by:	Information offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.

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Final Report

HomeInsertDrawDesignLayoutReferencesMailingsReviewViewAcrobatTell me

ShareComments

Report Structure

Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices

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Report Structure

Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.

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Home Insert Draw Design Layout References Mailings Review View Acrobat Tell me Share Comments

Report Structure

Conclusion

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.

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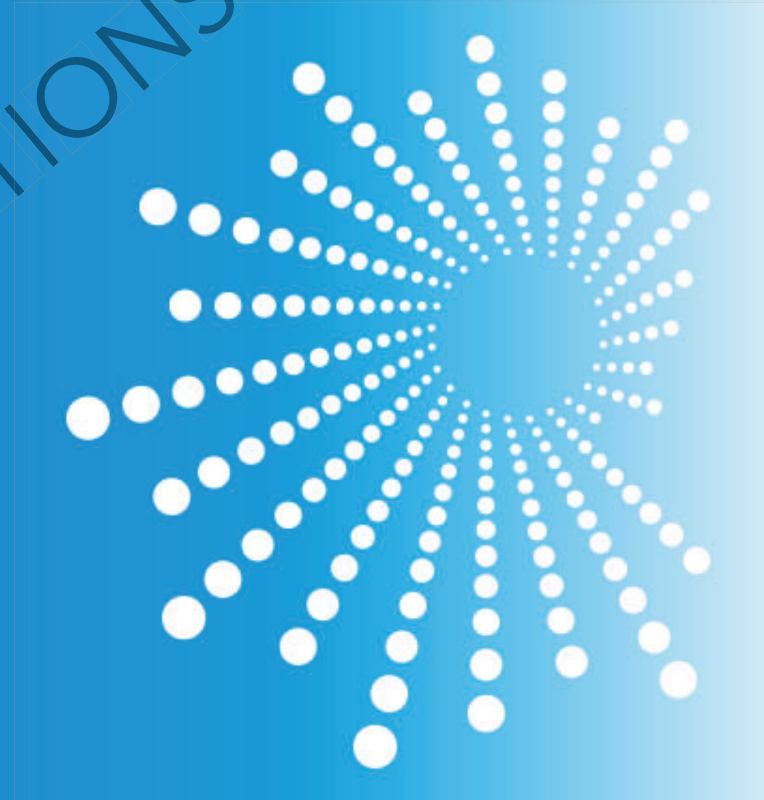


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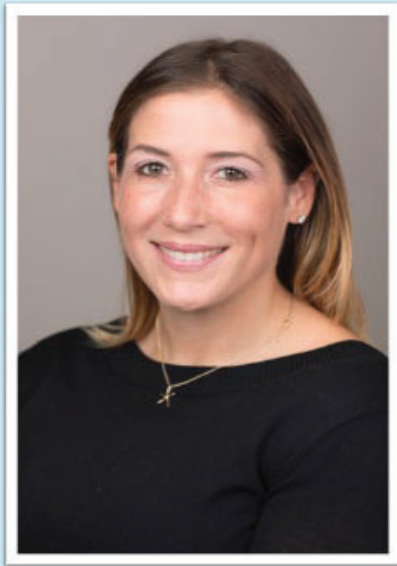


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Report Writing Workshop

Chantelle Botticelli, J.D.
April 2022

Meet Your Facilitators



Chantelle Botticelli, J.D.

She/Her

Director of Strategic Partnerships
and Client Relations



Martha Compton

She/Her

Director of Strategic Partnerships
and Client Relations

About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

Learning Outcomes

Identify relevant information for inclusion in an investigative report.

Identify and exclude irrelevant information from your reports.

Write a report that is understandable by someone without any experience in this space, and that can stand on its own without access to other documents.

Use simple, neutral, unbiased, and accurate language in your reports.

Ensure that the report accurately states policy language and is compliant with institutional policy and procedures.

Understand the importance of using a template that will contribute to the consistency of the reports generated.

Agenda

01

The Regulatory Requirements

02

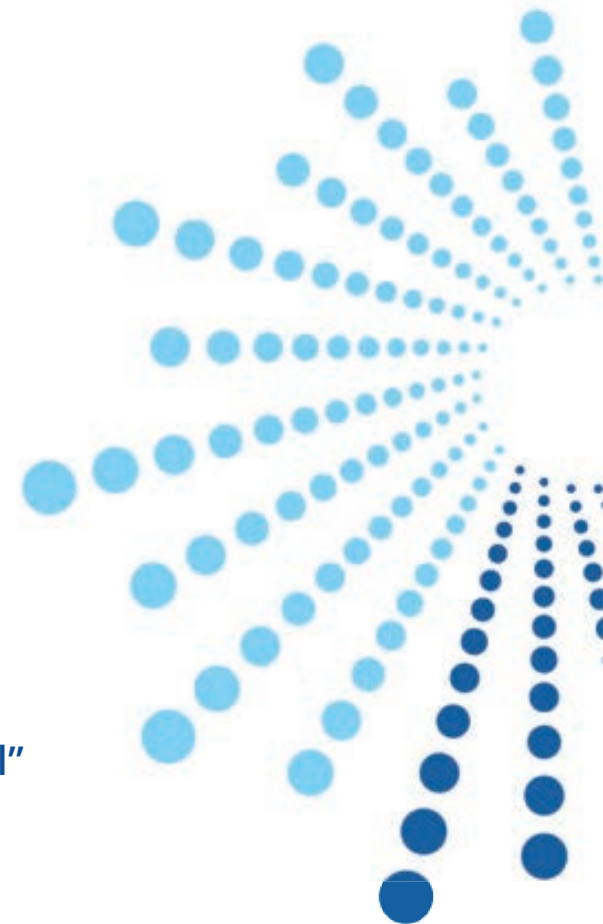
Structure of the Investigative Report and Record

03

Writing the Report: Developing the Content

04

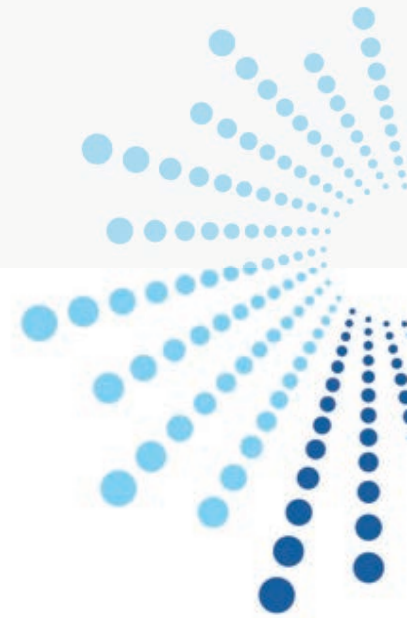
Developing an Investigative File and Report for “The Formal” Hypothetical





The Regulatory Requirements

01



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Essential Steps of an Investigation



Formal Complaint and Notice of Allegations



Investigative Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow-Up Interviews



The Investigative Report and Final Investigative Record

The Products of Each Step of the Investigation



Notice of Allegations

A document that frames the scope of the investigation



Initial Interviews

Transcripts
Summaries of Interviews
Interview Notes



Evidence Collection

Text messages
Social media posts
Medical/police records



Evidence Review

Complainant's written response
Respondent's written response



Additional Evidence Collection/Follow-Up Interviews

More documentary evidence
Additional interview transcripts/summaries



The Investigative Report and Final Investigative File

Report and Evidence File



Summary of the
Evidence



Compilation of the
Evidence

The Investigator must create and provide to the Parties, their Advisors, and the Decision Maker(s) an investigative report that fairly summarizes relevant evidence.



The Investigative File

The Parties, their Advisors, and the Decision Maker(s) must be provided with a final compilation of all of the evidence gathered that is directly related to the allegations in the formal complaint. This includes evidence that Investigator deems relevant and evidence that the Investigator does not deem relevant.



Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

The Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “All relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in the Clery Act.

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

Relevant Evidence

Relevant Evidence

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions:
- Legally recognized and un-waived privilege.
 - Including records related to medical, psychiatric, psychological treatment.

Who Decides?

Department emphasizes repeatedly in Preamble that Investigators have discretion to determine relevance.

- Subject to Parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each Party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at the hearing, not investigation stage.



The Purpose of the Report

- To ensure that the recipient gives the parties meaningful opportunity to understand what evidence the investigator has collected and believes is relevant,
- To allow the parties opportunity to advance their own interests for consideration by the decision-maker.
- To give the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided.
- To allow the decision maker to adequately prepare for the live hearing, where one is conducted.
- To reduce the likelihood of bias in the final outcome by providing the parties and the decision maker(s) an opportunity to identify and explore potential bias by the investigator

See 85 Fed. Reg. 30309 (May 19, 2020).

Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appellate Reviewer

Other Recipients?

Friends of
the Parties

Parents

Law
enforcement
nt

Attorneys

Judges

Media

Social
media



Why is it Important to Write a Solid Report?

All of the reasons given by the DOE, and...

It allows you to recall the details of your investigation long after the event—this is important if there are complaints by or against the parties involved or litigation in the future.

It signals to others that the complaint was taken seriously—that it is important to the institution to get it right.

A well written and comprehensive report shows that the investigation was fair, impartial, and thorough.

A well written and comprehensive report protects you and your institution in case of litigation and helps to limit your liability.



Structure of the Investigative File and Report

02



The Evidence File



Compilation of the evidence .



Organized intentionally and consistently.



Divided into Appendices.



Is attached to the report.

As one PDF?
As several PDFs?
Folders?



Includes a procedural timeline.

Examples of Appendices

Appendix A:

Witness testimony only (e.g., transcripts, statements summaries, etc.)

Appendix B:

Relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.)

Appendix C:

The remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint.

Appendix D:

The procedural timeline.

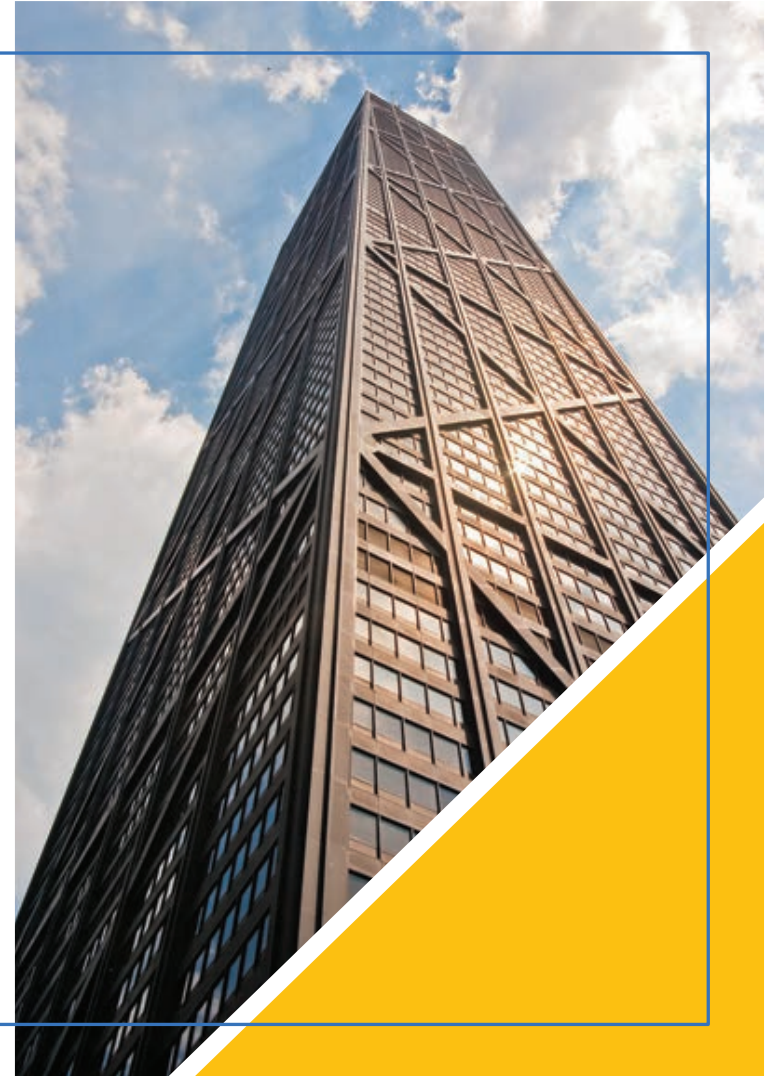


Label the Appendices or Sections

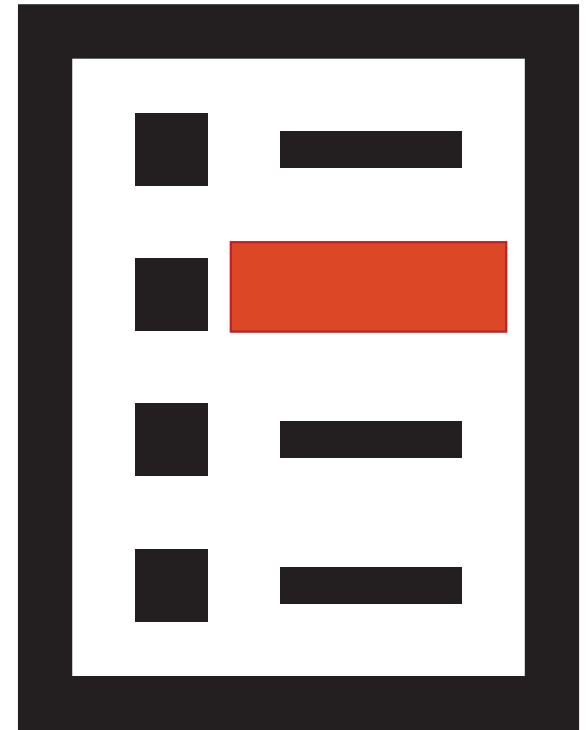
- “Appendix A contains transcripts/summaries of party and witness interviews that the investigator deems relevant, in whole or in part.”
- “Appendix B contains documentary evidence that the investigator deems relevant, in whole or in part.”
- “Appendix C contains transcripts/summaries of party and witness interviews that the investigator does not deem relevant, but that are directly related to the allegations in the formal complaint.”
- “Appendix D contains documentary evidence that the investigator does not deem relevant, but that are directly related to the allegations in the formal complaint.”
- “Appendix E contains a timeline documenting all procedural steps taken from the filing of the formal complaint until the submission of the final investigative file and report.”

Format and Structure of the Record

- Include page numbers
- Include a Table of Contents
 - For the entire record
 - For each appendix
- One document or PDF



Redactions



Essential Elements of the Report

Intentionally organized to enhance
comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format

Structure of the Report



Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

Conclusion



Questions about the Report Template?

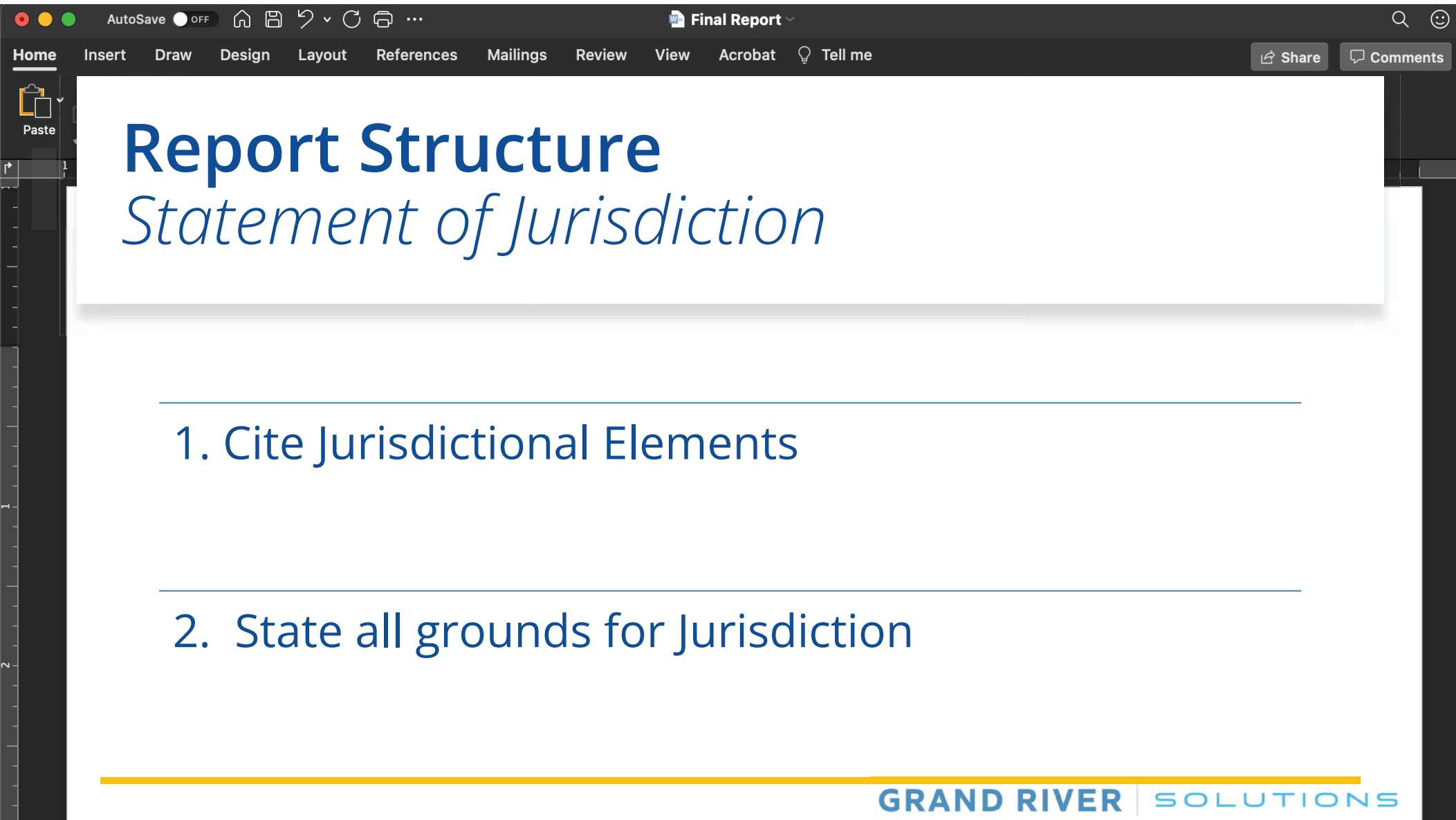
The image is a screenshot of a Microsoft Word document titled "Final Report". The ribbon at the top shows the "Home" tab selected, with options for "Insert", "Draw", "Design", "Layout", "References", "Mailings", "Review", "View", "Acrobat", and "Tell me". On the right side of the ribbon, there are "Share" and "Comments" buttons. The document content is a slide titled "Report Structure Overview" in a large blue font. Below the title, there is a text box with a light blue background and a right-pointing arrow shape. Inside this box, it says "In this section, provide a very brief overview of the case. Include:" followed by a bulleted list of five items. At the bottom right of the slide, there is a yellow horizontal line and the text "GRAND RIVER | SOLUTIONS".

Report Structure Overview

In this section, provide a very brief overview of the case. Include:

- the names of the Parties,
- the applicable policy(ies),
- the prohibited conduct alleged,
- the date, time, and location of the conduct, and
- a brief description of the alleged misconduct.

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The image is a screenshot of a Microsoft Word document titled "Final Report". The document is displayed in a dark-themed window. The ribbon at the top shows the "Home" tab selected, with options for "Insert", "Draw", "Design", "Layout", "References", "Mailings", "Review", "View", "Acrobat", and "Tell me". On the right side of the ribbon, there are "Share" and "Comments" buttons. The document content is as follows:

Report Structure

Statement of Jurisdiction

1. Cite Jurisdictional Elements

2. State all grounds for Jurisdiction

At the bottom right of the page, there is a logo for "GRAND RIVER SOLUTIONS" with a vertical line separating the two words.

AutoSave OFF

Final Report

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ShareComments

Report Structure

Identify Investigators

1. Identify the Investigators by name.

2. State that they have been properly trained.

3. List trainings or cite documents in the record that detail Investigators' prior training.

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Report Structure

Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.

The image is a screenshot of a Microsoft Word document titled "Final Report". The ribbon at the top shows the "Home" tab selected, with options for "Insert", "Draw", "Design", "Layout", "References", "Mailings", "Review", "View", "Acrobat", and "Tell me". On the right side of the ribbon, there are "Share" and "Comments" buttons. The document content is as follows:

Report Structure

Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.

2. Include definitions of prohibited conduct from institution's policy/procedures.

At the bottom right of the page, there is a logo for "GRAND RIVER | SOLUTIONS".

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Final Report

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Share Comments

Report Structure

List Witnesses

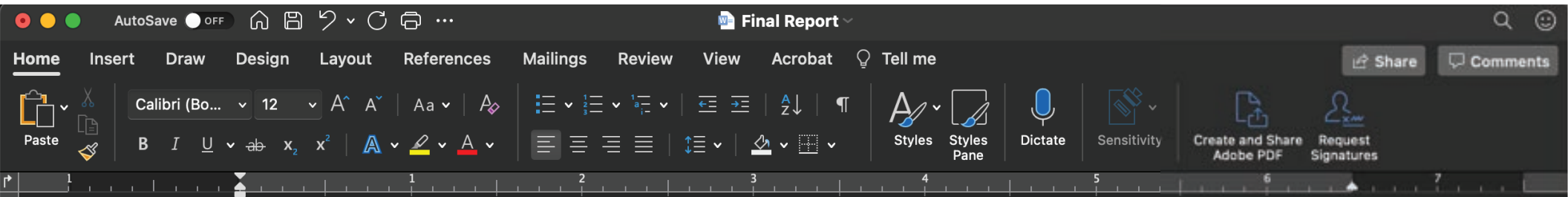
Witnesses that were interviewed

Witnesses that were identified but not interviewed

Simple List

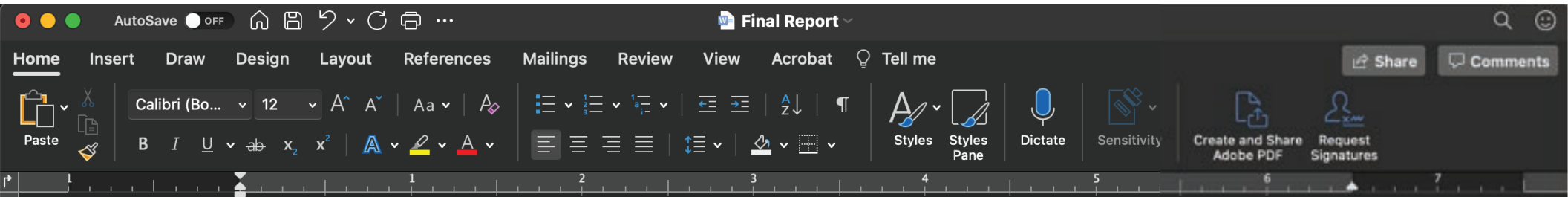
Detailed List

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Example of a Detailed List

Witness Name	Witness Identified By	Information Offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.



Example of a Detailed List

Witness Name	Witness Identified By	Reason Not Interviewed
Sarah Smith	Complainant	Witness declined to be interviewed
Casey Swift	Investigators	Witness was non-responsive to several requests for an interview.
Ben Jones	Respondent	Contact information provided was inaccurate. All attempts to locate this witness were unsuccessful.

AutoSave OFF

Final Report

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Share Comments

Report Structure

Evidence Collected

- The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”
- In this section, list the evidence or refer to table of contents in the Investigative File or it’s appendices.

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Final Report

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Share Comments

Report Structure

Summary of Evidence

- This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion, bias, interpretation, commentary, or judgement.
- In this section, the writer should cite the evidence and information in the Appendices.

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The image is a screenshot of a Microsoft Word document titled "Final Report". The ribbon at the top shows the "Home" tab selected, with options for "Insert", "Draw", "Design", "Layout", "References", "Mailings", "Review", "View", "Acrobat", and "Tell me". On the right side of the ribbon, there are "Share" and "Comments" buttons. The main content area of the document displays a slide titled "Report Structure" with the subtitle "Conclusion". The slide text, enclosed in a blue border, reads: "In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing." At the bottom of the slide, there is a horizontal orange line followed by the text "GRAND RIVER | SOLUTIONS".

AutoSave OFF

Final Report

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Share Comments

Report Structure

Conclusion

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.

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Writing the Report: Developing the Content



03

Get the Easy Stuff Out of the Way

Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

Conclusion





Writing the Summary of Relevant Evidence

Start by
identifying
the questions
that you or
the decision
maker will be
charged with
answering:



What are we being asked to decide?

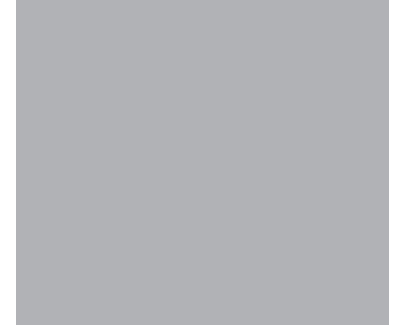


What does the formal complaint allege?



What are the elements of each act of prohibited conduct alleged?

Fondling: is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.



1. Did Respondent touch the Complainant's private body parts?
2. For the purposes of sexual gratification?
3. Without Complainant's consent?

Analysis Grid: List the Elements

Did R touch the private body parts of C?	For the purpose of sexual gratification?	Without C's consent (due to lack of capacity)?



Identify the relevant facts for inclusion in the report.



Any information that is relevant to the elements of the prohibited conduct alleged.



Information that the Investigator believes the Decision Maker should consider or rely upon when making their final determination of responsibility. This includes:




Information that is relevant to an assessment of the evidence.

Credibility
Reliability
Authenticity



Helpful contextual information.

History between the parties
Post incident behavior

A wooden train track is shown with several alphabet blocks placed along it. The blocks currently on the track spell out the word 'ORGANIZ'. Various other alphabet blocks are scattered on the wooden surface around the track. The background is a solid blue color with a white horizontal line.

A well-organized evidence file will assist with this step.

Analysis Grid: List All the Material Facts Relevant to Each Question

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Text messages between Complainant and Respondent ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Respondent's Account ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Witness 3's Account ➤ Photograph of Complainant ➤ Video of Complainant ➤ Text messages between Complainant and Witness 4 ➤ Witness 4's Account

The following information is usually not relevant and should be omitted from reports:

- Irrelevant Information, including
 - Prior sexual history of Complainant
 - Information protected by a legally recognized and un-waived privilege
- The Investigator's Opinions
- Speculation and conjecture
- Character evidence
- Party and witness opinions that are unsupported by fact



The analysis grid can serve as a guide as you start to write your summary of relevant evidence.

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Text messages between Complainant and Respondent ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Respondent's Account ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Witness 3's Account ➤ Photograph of Complainant ➤ Video of Complainant ➤ Text messages between Complainant and Witness 4 ➤ Witness 4's Account

The Report Should **STAND** On Its Own

**S**

Simple and Easy to Comprehend

T

Transparent/Clear


A

Accurate

N

Neutral/Unbiased

DDraw Attention to Significant
Evidence and Issues



Choose an
organizational
outline for the
summary of
facts.



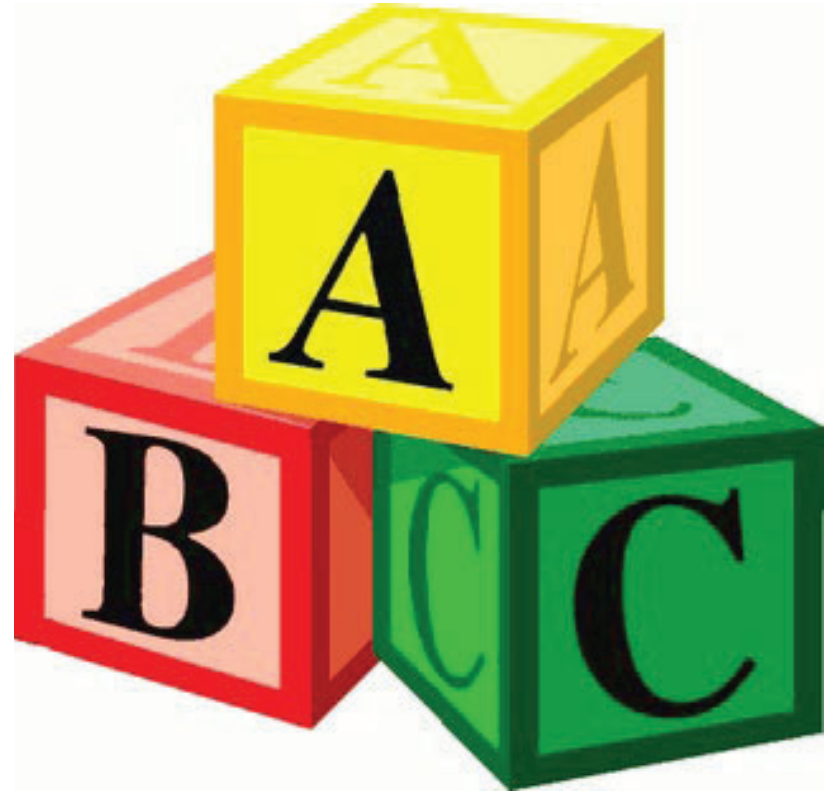


**Start Writing a
Report That
Will STAND on
its Own**

Simplicity

Reports should be written so that they are accessible to all readers, irrespective of their familiarity with the subject matter, or the institutions policies and the law.

- Use plain language
- Be concise
- Avoid repetition
- Consider including a section on facts in dispute/not in dispute
- Avoid or define technical language/acronyms/slang



Choosing Simple Language



Complex Language	Simple Language
"Adjudicated"	"Decided/Determined"
"Preponderance of the Evidence"	"More likely than not"
"Respondent articulated"	"Respondent stated"
"Prima Facie Assessment"	"Plain assessment/On its face assessment"
"The allegation was substantiated"	"The allegation was proven/supported by"
"Pursuant to the policy"	"As stated in the policy"
"Digital Penetration"	"Inserted their finger into (include body part penetrated)"

Transparent and Clear

- Outline the report to enhance transparency and clarity.
- Summarize information chronologically.
- Clearly define language used in the report.
 - Opinions
 - Quantitative language
 - Slang/acronyms
- Provide clear descriptions of reported acts.
- Use consistent language.

Clarifying Language

Unclear Language	Clear Language
"Complainant reported that Respondent forced her to perform oral sex"	"Complainant reported that Respondent forced her to put her mouth on his penis"
"SANE/RA/UPD"	"Sexual Assault Nurse Examiner/Resident Assistant/University Police"
"Witness 1 reported that Respondent was angry"	"Witness 1 reported that he believed that Respondent was angry because Witness 1 observed Respondent yelling, slamming his fists on the wall, and that the 'veins in his neck were popping out.'"
"Complainant stated that Respondent touched them down there"	<p>"Complainant stated that Respondent touched them, "down there". When asked to define 'down there,' Complainant stated, 'my penis.'"</p> <p>OR</p> <p>"Complainant stated that Respondent touched their 'penis.'"</p>

Where Deeper Clarity is Often Needed, But Not Included

Dive Deeper when:

Testimony about contact with a person's vagina.

Testimony about penetration.

Testimony that clothing was removed.

Testimony that an event or an act had an impact on them?

Opinions are offered.

Include in the report clarity about the following:

Was the contact with the vagina or vulva?

What was penetrated?
What was used to penetrate?

What kind of clothing?
How was it removed?

What was the specific impact?

Include facts that form the basis for the opinion.

Accuracy Is Essential

Be precise and accurate in how you identify folks.

- Use their preferred names and pronouns.

Be accurate and precise when citing or referring to policy language.

- Be sure to cite from the applicable policy/procedures.

Accurately state the allegations as set forth in formal complaint.

When summarizing the evidence, do so accurately without editorial or opinion.

- Use quotations often and appropriately.

Always cite to the investigation file.



Every statement in an interview summary should make clear that it was the interviewee who made that statement:

- Not: Complainant first saw Respondent near the fountain in the middle of the quad.
- Instead "Complainant stated that she first saw Respondent near the fountain in the middle of the quad."
- Not: Witness 3 told Complainant that Respondent was creepy.
- Instead: "Complainant stated that Witness 3 told him that Witness 3 believed Respondent was 'creepy.'"

Use interviewee's words and put in quotes if it is their word.

- Not "Witness 3 was really out of it and drunk."
- Instead; "Witness 4 stated that Witness 3 was 'really out of it' and 'drunk,' which she described as . . ."

No conclusory words

- Not "the stalking started"
- Instead; "Complainant stated that the conduct she identified as stalking started in January."
- In some states, particularly California, attorneys litigating these cases will argue that use of a conclusory term means the investigator is agreeing that the conduct did occur. It's a huge nuisance to be a deponent in those cases

Commit to Using Neutral Language

Non-Neutral/Biased	Neutral Alternatives
"Claimed/Alleged"	"Reported/Stated"
"According to X"	"X reported/X stated"
"Story/Version of Events"	"Account/Reported Recollection of Events"
"Had Sex with/Engaged in"	Simply describe what occurred
"Changed their Account/Story/Version of Events"	"When initially interviewed Respondent stated X. In a subsequent interview Respondent stated Y"



Evidence that the Investigator believes should be afforded significant weight.



Evidence related to assessment of credibility, reliability, and authenticity.

Consistencies
Inconsistencies
Corroborative evidence
Omissions
Statements that include or that are lacking in significant details



Explanations that provide a better understanding of certain items of evidence or lack of evidence.



If it feels important, emphasize it in the report.

Draw Attention to Specific Evidence Through Intentional Presentation of Information in the Report

How might you include the following relevant information from the IF in the summary of relevant evidence section of the report?

1. Excerpt from the transcript of Complainant's initial interview located in Appendix A at page 34:
 - Complainant: "The next day he tried to talk to me. He sent me a bunch of text messages asking to see me. He said he was 'sorry' for hitting me and for raping me. I basically told him I didn't want to hear it and I called him an asshole. We've not communicated since."
2. Screenshot of the text message exchange, described above, submitted by Complainant and located in Appendix B, page 67.



Option A

Complainant reported that the next day, she engaged in a text message exchange with Respondent. Complainant stated that in this exchange, Respondent told her that he was sorry for hitting her and for raping her. Screenshots of this exchange were provided by Complainant and are included in Appendix B. See, Appendix A, p.34 and Appendix B, p. 67.

Option B

Complainant reported that the next day, she engaged in a text message exchange with Respondent. Complainant stated that in this exchange, Respondent told her that he was sorry for hitting her and for raping her. See Appendix A, p.34. Complainant provided screenshots of this exchange, which read as follows:

Complainant: I don't care what u say. U know I didn't want it and you did it anyway.

Respondent: I'm sorry I hurt u. You know I don't hit. I was so drunk. IDK what to say to make it better. Can I see u?

Complainant: What could you say? U raped me, asshole.

Respondent: I'm sorry. I'm so sorry. I luv u u know that. I don't know why I did what I did.

Appendix B, p. 67.

Option C

Complainant reported that the next day, she engaged in a text message exchange with Respondent. Complainant stated that in this exchange, Respondent told her that he was “sorry for hitting he and for raping her.” See Appendix A, p.34. Complainant provided the following screen shots of this exchange:
Appendix, p. 67.



When your investigation reveals a fact that was not shared by a party or witness, the investigator should have explored the reason for the omission. The final report should document the exploration and accurately describe the explanation provided.

"Surveillance video from Clinton Hall depicted that at approximately two a.m. Witness A entered the room in which Complainant reports that she was assaulted. Witness A left ten minutes later. Complainant failed to share this fact with the investigators."

"Surveillance video from Clinton Hall depicted that at approximately two a.m. Witness A entered the room in which Complainant reports that she was assaulted. Witness A left the room ten minutes later. In a follow up interview with Complainant, they were asked why they did not report Witness A's presence in the room. Complainant responded by stating that they have no recollection of Witness A being in the room. "

The background of the slide features a close-up, slightly blurred photograph of several hands working together to assemble white puzzle pieces. The hands are positioned around the puzzle, with fingers carefully fitting the pieces together. The entire image is overlaid with a semi-transparent orange filter, which provides a warm, cohesive aesthetic. The text is centered over this background.

**A few final, but important,
points....**

The Investigator should not be present in the report.

The report should never include reference to the investigator.

For example, it should never say. "I then asked why Respondent believed they had consent to kiss complainant"

Instead, "When asked why they believed they had consent to kiss complainant, respondent stated...."



A pair of black-rimmed glasses is resting on a stack of books. The entire image is covered with a semi-transparent blue overlay. The text "Breakout Activity 1" is written in a white, cursive-style font across the middle of the image, with a thin white horizontal line underneath it.

Breakout Activity 1

Identify the irrelevant information...

He stated, "I asked her if she felt better and she told me yes. She apologized and I told her not to worry about it. At that point I was pretty drunk myself and I just wanted to go to sleep. At some point she put her arms around me and snuggled into me. I took that as a sign that she wanted to hook up. I had heard from a few other guys that had had sex with her before that she was a super sexual girl. One of my boys described her as a 'sex freak.' I didn't want to disappoint her so I rolled onto my side and we were face to face; she didn't back away so I kissed her. She kissed me back. I asked her again if she was ok and she moaned. We continued to undress each other. Before I knew it, we were having sex. She was totally awake and totally into it."

He stated, "I asked her if she felt better and she told me yes. She apologized and I told her not to worry about it. At that point I was pretty drunk myself and I just wanted to go to sleep. At some point she put her arms around me and snuggled into me. I took that as a sign that she wanted to hook up. I had heard from a few other guys that had had sex with her before that she was a super sexual girl. One of my boys described her as a 'sex freak.' I didn't want to disappoint her so I rolled onto my side and we were face to face; she didn't back away so I kissed her. She kissed me back. I asked her again if she was ok and she moaned. We continued to undress each other. Before I knew it, we were having sex. She was totally awake and totally into it."

Make it Simple

Commit to Using Plain Language

Instead of this:

"The SANE's report indicated that Complainant presented to the ED with erythema around her left eye."

"Following this investigation, a hearing panel will convene to adjudicate this complaint using a preponderance of the evidence standard."

Consider this:

"Complainant reported that he went to the hospital and was treated in the emergency department by a sexual assault nurse examiner. In her report, the sexual assault nurse examiner noted that Complainant had redness around his left eye."

"When this investigation is complete, a hearing will be held. During that hearing three decision makers will consider testimony and other evidence. Following the hearing, the decision makers will decide whether the evidence supports a finding that it is more likely than not that Respondent engaged in the prohibited conduct alleged in the formal complaint."



**Accurately
Summarize the
Following
Statement**





"I was standing outside of the library when I saw Amanda and Mike standing by the fountain arguing. Amanda started walking away and Mike grabbed her by the arm and yanked her back really hard. She kind of yelped, which was surprising cause it didn't look like it hurt. Maybe she yelped because she was scared. I really don't know. Anyway, Mike was really angry. His face was all red and he was yelling in her face, and like spitting all over it. Amanda turned her face away and Mike grabbed her by the chin and made her face him. She started flailing and trying to get away and that's when he backhanded her across the face. I've known Mike for a long time and I've never seen him hurt a fly. Amanda must have really done something to make him mad. I actually heard she cheated on him with his best friend, Kyle, which is kinda fucked up."

"I was standing outside of the library when I saw Amanda and Mike standing by the fountain arguing. Amanda started walking away and Mike grabbed her by the arm and yanked her back really hard. She kind of yelped, which was surprising cause it didn't look like it hurt. Maybe she yelped because she was scared. I really don't know. Anyway, Mike was really angry. His face was all red and he was yelling in her face, and like spitting all over it. Amanda turned her face away and Mike grabbed her by the chin and made her face him. She started flailing and trying to get away and that's when he backhanded her across the face. I've known Mike for a long time and I've never seen him hurt a fly. Amanda must have really done something to make him mad. I actually heard she cheated on him with his best friend, Kyle, which is kinda fucked up."

Witness A reported that he was standing outside of the library when he saw Complainant and Respondent standing “by the fountain arguing.” Witness A reported that Complainant began “walking away” and Respondent “grabbed” her by the arm and “yanked her back really hard.” Witness A stated that Complainant “kind of yelped.” Witness A stated that Respondent was “really angry.” Witness A described Respondent’s face as, “all red.” Witness A stated that Respondent was “yelling in [Complainant’s] face” and “spitting all over it.” Witness A reported that Complainant “turned her face away” and Respondent “grabbed [Complainant] by the chin and made her face him.” Witness A stated that Complainant began “flailing and trying to get away.” Witness A stated that it was at this point that he observed Respondent “backhand” Complainant “across the face.”



Neutrality



"Complainant claimed that they were face down in the bed with their dress pushed up so that their face was actually laying on the bottom part of their dress. They alleged that someone was having sex with them from behind."

"Complainant **reported** that they were face down in the bed with their dress pushed up so that their face was actually laying on the bottom part of their dress. They **stated** that someone was **penetrating their anus** from behind."



Analysis and Findings



Findings of Fact

- **A "finding of fact"**
 - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be, is credible, and reliable.
 - Based on available evidence and information.
 - Determined by a preponderance of evidence standard .
 - Determined by the fact finder(s).
- **For example...**
 - Complainant reports that they and Respondent ate ice cream prior to the incident.
 - Respondent says that they did not eat ice cream.
 - Witness 1 produces a photo of Respondent eating ice cream.
- **Finding: It is more likely than not that Complainant and Respondent ate ice cream**

Preponderance of the Evidence

More likely than not.

Does not mean 100% true or accurate.

A finding of responsibility =
There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated.

A finding of not responsible =
There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated.



Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

Identify the Relevant Evidence



Analysis Grid: List All the Material Facts Relevant to Each Question

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none">➤ Complainant's Account➤ Respondent's Account➤ Witness 1's Account➤ Text messages between Complainant and Respondent➤ SnapChat DM between Respondent and Witness 2	<ul style="list-style-type: none">➤ Respondent's Account➤ SnapChat DM between Respondent and Witness 2	<ul style="list-style-type: none">➤ Complainant's Account➤ Respondent's Account➤ Witness 1's Account➤ Witness 3's Account➤ Photograph of Complainant➤ Video of Complainant➤ Text messages between Complainant and Witness 4➤ Witness 4's Account

Assessing Authenticity



Are you convinced that the item of evidence is authentic.



What is the information that convinces you of that?



Is that proof information credible and reliable?

Make a Determination About the Authenticity of the Relevant Evidence

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Text messages between Complainant and Respondent ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Respondent's Account ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Witness 3's Account ➤ Photograph of Complainant ➤ Video of Complainant ➤ Text messages between Complainant and Witness 4 ➤ Witness 4's Account

A hand holding a white marker is writing on a green chalkboard. The chalkboard is filled with various mathematical formulas and symbols, including x^2 , $x^2 + (6-x)$, and < 0 . The text "Determining Credibility and Reliability" is written in white, underlined, and "Remember: There is No Formula!" is written below it.

Determining Credibility and Reliability

Remember: There is No Formula!

Sufficiency of Detail and Specificity

Is the level of detail provided by the person reasonable and indicative of a genuine personal experience by the person?

Internal Consistency/ Consistency Over Time

- Did the person share the same version of events in all settings, including interviews, in written and/or verbal statements and between documentary evidence?
- Are there any discrepancies or contradictions?
- Is there a sufficient explanation for any discrepancies?

Consistency with Other Evidence or Testimony

- Is the testimony or evidence consistent with the other evidence?
- Is the testimony or evidence inconsistent with the other evidence?
- Is there a sufficient explanation for any inconsistencies?

Corroboration

- Is there witness testimony (either by witnesses or people who saw the person soon after the alleged incident, or people who discussed the incidents with the person around the time they occurred) or documentary or physical evidence that corroborates the person's testimony?
- Is there witness testimony or documentary and/or physical evidence that are inconsistent with statements made during the interview or does not provide corroboration to the person's version of events?

Inherent Plausibility

- Is the testimony believable on its face?
- Does it make sense?
- Could it have occurred?
- Does it make sense that this person knows this information?
 - What was their opportunity to view?

Material Omission

- Did the person omit material information?
- If so, what?
 - e.g., submitted partial text messages, or omitted text messages that could be perceived as unfavorable
- Is there a reasonable reason for the material omission?

Motive to Falsify

- Did the person have a reason to be untruthful other than the general desire to be believed, or to prevail?
- Did the witness openly volunteer information that is prejudicial to their interests or the Party?
- If so, does the declaration against interest bolster their credibility?
- Does the person have an articulable bias, interest or other motive? [e.g. an employee received a poor performance review, so she falsified a claim of sexual harassment against her boss].
- Alternatively, does the person have little personal gain in the outcome?
- What are the relationships between the parties?

Past Record

- Is there a history of similar behavior in the past?
 - e.g., a supervisor had previous complaints of sexual misconduct
- If so, this might impact whether a statement should be believed.
 - For example, a respondent who states they never knew that a certain behavior was wrong, yet was written up for that same behavior, the history of similar past behavior makes the respondent's statement less believable and less reliable.

Ability to Recollect Events

- What is the extent the person was able to perceive, recollect or communicate the version of events?
 - e.g., the person reported they were intoxicated, or the person reported they were sleeping

Credibility/Reliability Analysis

Step by Step

1. Determine the material facts – focus only on material facts.
2. Determine which material facts are:
 1. Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g., Marcy and Jack attended a fraternity party on April 5, 2019]
 2. Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g., Marcy alleged that Jack kissed her without her consent around 1am at the party, and Jack asserted he never kissed Marcy and went home early]
 3. State clearly which facts are accepted, and which are rejected, and state the reasons why.

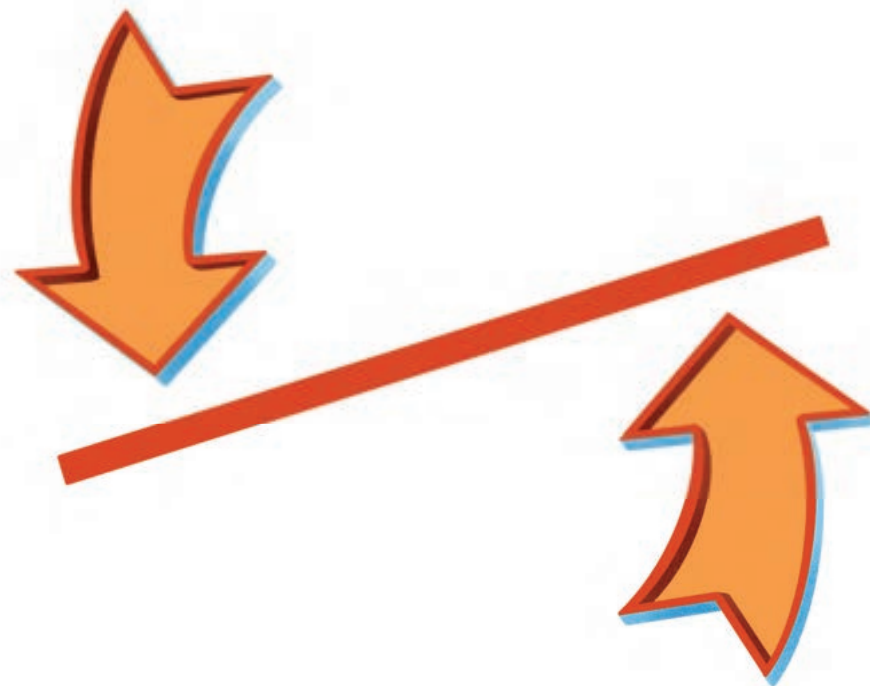
“While Jack maintained that he never kissed Marcy and went home early, several witnesses corroborated that he was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Jack kissing Marcy. Therefore, I find that Jack’s version of events cannot be credited as being more likely than not to be true.”

Make a Determination about the Credibility and Reliability of the Relevant Evidence

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Text messages between Complainant and Respondent ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Respondent's Account ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Witness 3's Account ➤ Photograph of Complainant ➤ Video of Complainant ➤ Text messages between Complainant and Witness 4 ➤ Witness 4's Account

Weighing the Evidence

Determine what weight, if any, you will afford to each item of evidence upon which you intend to rely, of evidence in your final determination.



Make a Determination about the Weight of the Evidence

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Text messages between Complainant and Respondent ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Respondent's Account ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Witness 3's Account ➤ Photograph of Complainant ➤ Video of Complainant ➤ Text messages between Complainant and Witness 4 ➤ Witness 4's Account

Make Findings



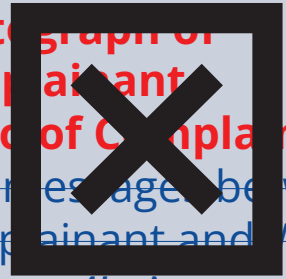




Findings of Fact

- **A "finding of fact"**
 - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be, is credible, and reliable.
 - Based on available evidence and information.
 - Determined by a preponderance of evidence standard .
 - Determined by the fact finder(s).

Make a Findings of Fact

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Text messages between Complainant and Respondent ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Respondent's Account ➤ SnapChat DM between Respondent and Witness 2 	<ul style="list-style-type: none"> ➤ Complainant's Account ➤ Respondent's Account ➤ Witness 1's Account ➤ Witness 3's Account ➤ Photograph of Complainant ➤ Video of Complainant ➤ Text messages between Complainant and Witness 4 ➤ Witness 4's Account 

Making a Recommended Determination

1. Apply the standard of proof and the evidence to each element of the alleged policy violation.
2. Make a determination as to whether or not there has been a policy violation.

The Recommended Determination

“While the credible evidence supports a finding that it is more likely than not that Respondent touched Complainant’s vagina with his hand for the purpose of sexual gratification, the credible evidence does not support a finding, using the preponderance of the evidence standard that Complainant was incapacitated and therefore incapable of providing consent. Thus, the we find Respondent NOT RESPONSIBLE for the allegation of fondling, as set forth in the formal complaint”

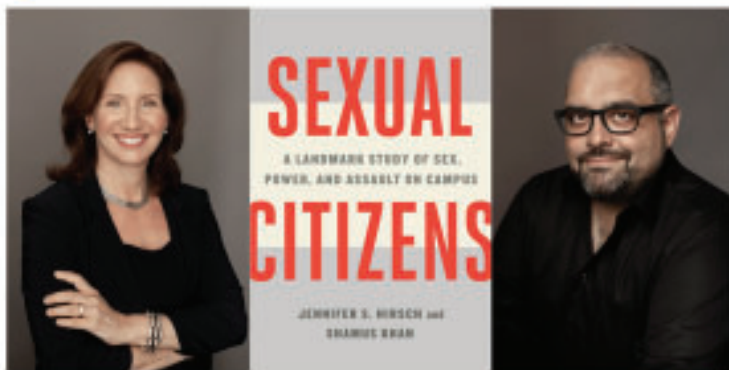


For Day 2

Read the mock
charging
documents and the
mock evidence

Be prepared to
engage in breakout
activities 2-6.

Save the Date!



***Sexual Citizens SPACE
Toolkit: A Discussion
with the Authors***

Hosted by Grand River

May 31, 2022, 2 PM Eastern

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Questions?



Leave Us Feedback:



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Report Writing Workshop Day 2

Chantelle Botticelli, J.D.
February 2022



Developing an Evidence File and Report for “The Formal” Hypothetical



04



Breakout 2

What are the questions that you/the DM must answer?

In your small groups, create an analysis grid.

Report Out: Break Out 2



Analysis Grid: List the Elements

Did Drew Engage In Sexual Intercourse with Taylor?	Was Taylor incapacitated and therefore incapable of providing consent?	Did Drew know Taylor was Incapacitated?	Should Drew have known that Taylor was incapacitated?



Assembling an Investigative Record

Break Out #3

In your small groups, assemble the investigative record.

Be sure to do the following:

1. Create sections or appendices
2. Include an explanation of each section/appendix
3. Create one or more table of contents
4. Include every item of evidence

Report Out Group 1



Report Out Group 3



Appendix A:

Relevant Transcripts

1. Transcript of Complainant's Initial Interview
2. Transcript of Complainant's Follow Up Interview
3. Complainant's Written Response to the Draft Investigative Record
4. Transcript of Respondent's Initial Interview
5. Transcript of Respondent's Follow Up Interview
6. Transcript of Witness 1's Interview
7. Transcript of Witness 1's Follow Up Interview
8. Transcript of Witness 3's Interview
9. Transcript of Witness 3's Follow Up Interview
10. Transcript of Witness 5's Interview



Appendix B

1. Screen Shots of Text Messages Between Complainant and Respondent
2. Screen Shots of Text Messages Between Complainant and Witness 1
3. Screen Shots of Text Messages Between Respondent and Witness 5
4. Screen Shots of Text Messages Between Complainant and Witness 7



Appendix C

1. Transcript of Witness 6's Interview
2. Letter Submitted by Eric Church
3. Transcript of Witness 7's Interview



Appendix D

1. Procedural Timeline




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Appendix E

1. Investigator Abby Plates: Training Materials
2. Investigator Kevin F. Ware: Training Materials





Break Out 4: To Redact or Not to Redact?

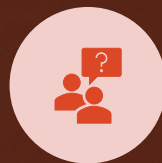
Consider



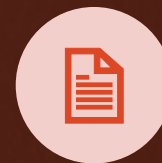
Is there information that must be redacted from this record?



Is there information that should be redacted from this record?



What is your reasoning for any redactions made?



How will you document the redactions?

Do we redact?

Any reference to Complainant's relationship with Witness 3?

Respondent's description of Complainant hooking up with Witness 3 at the fraternity party during the fall of 2020?

Witness 3's statements about Respondent's prior behaviors?

Should the following statement be redacted?

Witness 3 Statement

The other thing is that, like, Drew has a reputation, um, for... like, I've heard rumors that Drew, like, talks about, "Well, if you get a girl drunk enough, you can pretty much do whatever you want with her." And, um, Paul told me that Drew used to joke around about how they should put extra... they should have a separate punch for women at their parties, that had higher alcohol content so that the girls would get drunker so that the boys could get lucky. And I- I mean, that's basically what Paul told me, um, and so you'd probably want to talk to him about that, but I- I just... like I said, like, I believe her. I don't think she would lie about this and I think that Drew is a scumbag.



Break Out #5

In your small groups, do some editing!

As a team, review small portions of a summary and edit it using the track feature in word. Edit the summary:

1. To simplify it
2. For transparency/clarity
3. Accuracy
4. Neutrality
5. Draw attention to important facts



Group 1: 5A

A photograph of a desk with a pencil holder, books, and a chalkboard background. The pencil holder is black and mesh, filled with various colored pencils. To its right is a stack of books. The background is a chalkboard with faint, colorful drawings. A semi-transparent white circle is overlaid on the right side of the image, containing the text "Group 2: 5B".

Group 2: 5B



Group 3: 5C

A photograph of a wooden desk with a black mesh pencil holder containing several colorful pencils. To the right of the pencil holder is a stack of books. The background is a dark green chalkboard with faint, colorful chalk drawings of planets and stars. A semi-transparent white circle is overlaid on the right side of the image, containing the text 'Group 4: 5A'.

Group 4: 5A

Break Out # 6

In your small groups, fill the analysis grid and make a finding!

- First, list the relevant evidence related to each question.
- Second, assess the authenticity, credibility, and reliability of each item of evidence to determine what items of evidence you will rely upon when making and explaining your finding/recommended finding.
- Third, determine the weight you will give to each item of evidence upon which you intend to rely.
- Next, apply the standard of proof and make a finding as to each element of the formal complaint.
- Finally, make a finding of responsibility

Did Drew Engage in a Sexual Act with Taylor?	Was Taylor incapacitated and therefore incapable of providing consent?	Did Drew know Taylor was Incapacitated?	Should Drew have known that Taylor was incapacitated?
<ul style="list-style-type: none"> ➤ Undisputed ➤ Complainant's testimony ➤ Respondent's testimony 			
<ul style="list-style-type: none"> ➤ It is more likely than not that Drew engaged in sexual intercourse with Taylor 			

Be kind to yourself
for the work you've
done already in
good faith.

Compare yourself to
yourself yesterday
instead of
comparing yourself
to others.

Writing good reports
is a constantly
evolving process.
Don't expect
perfection.

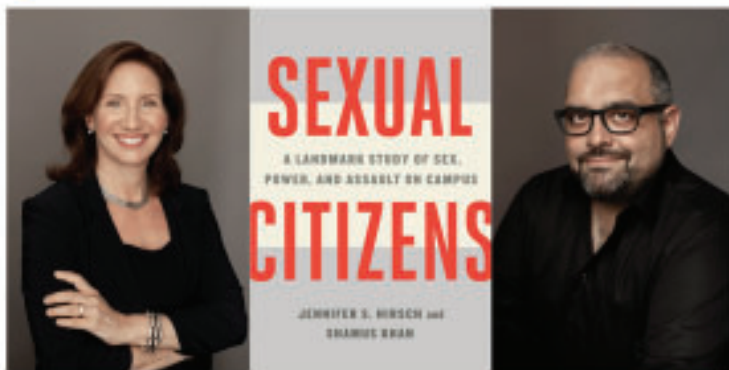
Don't worry about
where your skills are
today, just keep
getting better.

You have the tools.
You can do it!



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Save the Date!



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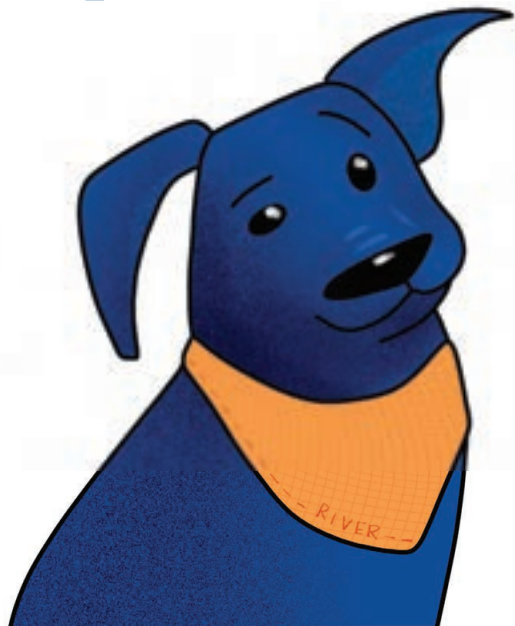
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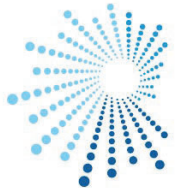
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04

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Breakout 2

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Report Out: Break Out 2



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Analysis Grid: List the Elements

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Report Out Group 1



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Report Out Group 3



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2. Screen Shots of Text Messages Between Complainant and Witness 1
3. Screen Shots of Text Messages Between Respondent and Witness 5
4. Screen Shots of Text Messages Between Complainant and Witness 7



Appendix C

1. Transcript of Witness 6's Interview
2. Letter Submitted by Eric Church
3. Transcript of Witness 7's Interview



Appendix D

1. Procedural Timeline




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Appendix E

1. Investigator Abby Plates: Training Materials
2. Investigator Kevin F. Ware: Training Materials





Break Out 4: To Redact or Not to Redact?

Consider



Is there information that must be redacted from this record?



Is there information that should be redacted from this record?



What is your reasoning for any redactions made?



How will you document the redactions?

**Do we
redact?**

Any reference to Complainant's relationship with Witness 3?

Respondent's description of Complainant hooking up with Witness 3 at the fraternity party during the fall of 2020?

Witness 3's statements about Respondent's prior behaviors?



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Should the following statement be redacted?

Witness 3 Statement

The other thing is that, like, Drew has a reputation, um, for... like, I've heard rumors that Drew, like, talks about, "Well, if you get a girl drunk enough, you can pretty much do whatever you want with her." And, um, Paul told me that Drew used to joke around about how they should put extra... they should have a separate punch for women at their parties, that had higher alcohol content so that the girls would get drunker so that the boys could get lucky. And I- I mean, that's basically what Paul told me, um, and so you'd probably want to talk to him about that, but I- I just... like I said, like, I believe her. I don't think she would lie about this and I think that Drew is a scumbag.



Break Out #5

In your small groups, do some editing!

As a team, review small portions of a summary and edit it using the track feature in word. Edit the summary:

1. To simplify it
2. For transparency/clarity
3. Accuracy
4. Neutrality
5. Draw attention to important facts



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Group 1: 5A

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Group 2: 5B



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Group 3: 5C

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Group 4: 5A

Break Out # 6

In your small groups, fill the analysis grid and make a finding!

- First, list the relevant evidence related to each question.
- Second, assess the authenticity, credibility, and reliability of each item of evidence to determine what items of evidence you will rely upon when making and explaining your finding/recommended finding.
- Third, determine the weight you will give to each item of evidence upon which you intend to rely.
- Next, apply the standard of proof and make a finding as to each element of the formal complaint.
- Finally, make a finding of responsibility



Did Drew Engage in a Sexual Act with Taylor?	Was Taylor incapacitated and therefore incapable of providing consent?	Did Drew know Taylor was Incapacitated?	Should Drew have known that Taylor was incapacitated?
<ul style="list-style-type: none"> ➤ Undisputed ➤ Complainant's testimony ➤ Respondent's testimony 			
<ul style="list-style-type: none"> ➤ It is more likely than not that Drew engaged in sexual intercourse with Taylor 			

Be kind to yourself
for the work you've
done already in
good faith.

Compare yourself to
yourself yesterday
instead of
comparing yourself
to others.

Writing good reports
is a constantly
evolving process.
Don't expect
perfection.

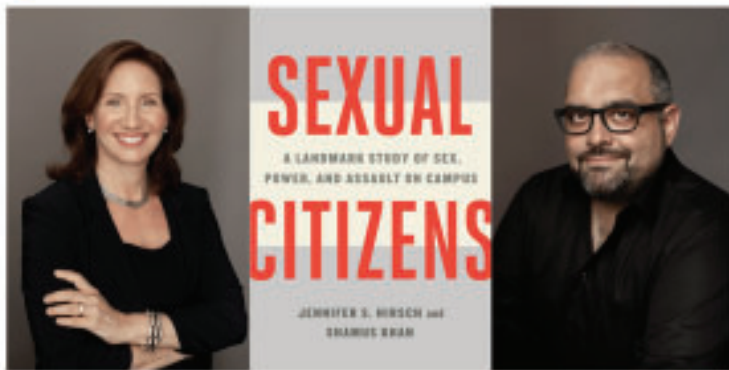
Don't worry about
where your skills are
today, just keep
getting better.

You have the tools.
You can do it!



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Save the Date!



Sexual Citizens SPACE Toolkit: A Discussion with the Authors

Hosted by Grand River

May 31, 2022, 2 PM Eastern

Register here!



Upcoming Trainings

Clery Act Training: Higher Education Act Campus Safety Obligations

May 10, 12, 17 & 19, 2022, noon eastern

June 8 & 9, 2022, noon eastern

From One Title IX Coordinator to Another

September 6 & 7, 2022, noon Eastern

Decision Makers: Conducting Fair, Equitable, and Compliant Title IX Hearings

October 25 & 26, 2022, noon Eastern

Title IX Investigative Report Writing Workshop

Classes in April, August, and November

Conducting Fair, Thorough, and Trauma-Informed Sexual Violence Investigations

Classes in August and October

Driving Down the 493: A Deep Dive into a California Law and Its Overlap with Title IX

June 24, 2022 noon Pacific

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Questions?



Leave Us Feedback:



Email Us:

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info@grandriversolutions.com



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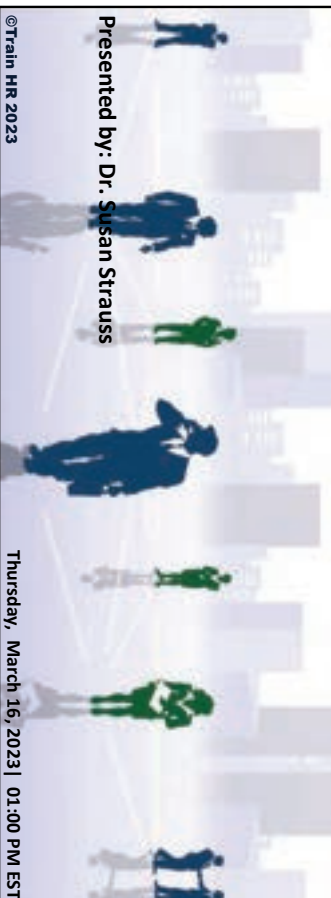
Live Webinar on

2-Hour Virtual Seminar on How to Conduct an Internal Harassment and Bullying Investigation to Determine Facts and Minimize Liability

Presented by: Dr. Susan Strauss

©Train HR 2023

Thursday, March 16, 2023 | 01:00 PM EST



1

How to Conduct Harassment and Bullying Investigations



**Dr. Susan Strauss, RN, Ed.D.
Harassment & Bullying Consultant**

2

Dr. Susan Strauss

Dr. Susan Strauss is a national and international speaker, trainer, consultant and a recognized expert on workplace and school harassment and bullying. She conducts harassment and bullying investigations and functions as a consultant to attorneys as well as an expert witness in harassment lawsuits. Her clients are from business, education, healthcare, law, and government organizations from both the public and private sector.

Dr. Strauss has conducted research, written over 30 books, book chapters, and journal articles on sexual harassment and related topics. She has been featured on 20/20, CBS Evening News and other television and radio programs as well as interviewed for newspaper and journal articles such as *Harvard Education Newsletter*, *Lawyers Weekly* and *Times of London*.

Susan is the recipient of the *Excellence in Educational Equity Award* from the Minnesota Department of Education for her work in sexual harassment in education. She has spoken about sexual harassment at international conferences in Botswana, Egypt, Thailand, and the U.S. She consulted with the Israeli Ministry of Education, as well as with educators from Israel, England, Australia, St. Martin, and Canada. She traveled to Poland and conducted research on sex discrimination and sexual harassment in Polish workplaces with Minnesota Advocates for Human Rights.

Susan has a doctorate in organizational leadership. She is a registered nurse, has a bachelor's degree in psychology and counseling, a master's degree in community health, and professional certificate in training and development. She has been involved in the harassment and bullying arena since 1985.

Susan Strauss
Strauss Consulting
952.937.1991

www.straussconsulting.net
susan@straussconsulting.net

3

Objectives

- ✓ Determine if investigation is necessary
- ✓ Identify components of investigation
- ✓ Conduct steps of investigation
- ✓ Interview accuser, accused & witnesses
- ✓ Differentiate between formal and informal investigative procedures
- ✓ Reach conclusions following investigation
- ✓ Write formal report

4

Qualities to Look for in an Investigator

1. **Strong management connections** - If possible, investigators should be of a higher rank than the highest level person being investigated.
2. **Credibility with the organization** - should be widely regarded by all employees as fair and trustworthy.
3. **Fact-gathering ability** - skilled in fact gathering and be responsible for that task while being objective and impartial. However, although investigators should make recommendations, final decisions about the resolution of a complaint is often left to upper-level management.
4. **Ability for interviewing** – experienced in soliciting information from people because they will be attempting to discover the truth under very trying circumstances.
5. **Impartiality** - should be outside the direct chain of command of either the alleged harasser or the victim. This distance will provide the impartiality necessary to fairly investigate complaints. If possible, investigators should not have a personal relationship with either of the main parties.
6. **Knowledge of harassment legal issues and trained in recognizing sexual harassment** - If investigators lack knowledge of applicable laws and agency guidelines, and only dimly understand the organization's harassment policy, the investigation is unlikely to be ineffective, leaving the organization vulnerable to liability.
7. **Ability to handle sensitive information** with minimal embarrassment.
8. **Detail oriented** – able to probe for the details of the allegation, and to write a detailed report.
9. **Available to act promptly** – ability to respond within one work day, if possible.

7

Self-Examination

Self-examination is critical if one is to be conducting investigations. The answers to these questions will influence your ability to conduct an objective investigation.

- How objective are you able to be?
- How do you view men? Women? Blacks? Atheists? Disabled? Arabs? Etc.
- What is your awareness and knowledge of sexism? Feminism? Machismo? Racism? Religiosity? And discrimination based on religion, disability, and other protected classes?
- What are your biases? What stereotypes do you hold?
- What is your knowledge regarding power/abuse of power?
- Take an inventory of your own behavior and attitudes—where do you stand?
- How assertive are you?
- How do you deal with conflict?
- Are your communication skills where they should be?
- What feelings/relationships do you have toward the alleged harasser and/or victim?

8

When Should You Involve Legal Counsel?

Consider involving your organization's legal counsel when:

- The complaint involves allegations of actual or attempted assault, sexual assault, rape, or other serious violations
- The harassment does not stop
- The organization considers filing a complaint against one of the parties
- There is a question of the organization's liability for defamation or tort suits by employees claiming invasion of privacy, lack of confidentiality or breach of the organization's own policies
- Certain matters require protection from disclosure by way of the attorney-client or work-product privilege
- There is a need to help develop the record with an eye toward possible future litigation, including the preparation of necessary witness statements
- The incident(s) potentially violate other laws in addition to harassment prohibitions
- Management and/or staff have not followed procedures
- Threats have been made or there is danger of physical harm
- The policy is not clear concerning the particular incident
- Either party has hired an attorney or is considering filing or has filed charges outside the organization
- Incidents have been made public

9

Lawyer as Investigator?

Plusses

- Trained in fact gathering
- Legal understanding
- How it will look in court



Minuses

- Not liked or trusted
- Employees less-likely to confide
- Jurors tend to distrust lawyers who testify
- Creates "lawsuit" thinking

10

Do NOT Use Organization's Attorney



- ≈ Perceived as too cozy with management
- ≈ Can't represent organization in court
- ≈ Attorney client privilege jeopardized
- ≈ May have to reveal confidential conversations

11

If One Investigator



CHEAPER

BIAS

ENSURES CONSISTENCY

12

If Two Investigators



- ✓ Reality Check
- ✓ Compare impressions
- ✓ Corroboration
- ✓ Jury may like two with same decision
- ✓ M/F Gender parity
- ✓ If difficult interviews
- ✓ Intimidating
- ✓ Time Commitment

13

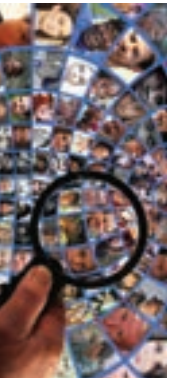
Internal vs External Investigators

Internal

- ✓ Less Expensive
- ✓ Understands culture, politics, players
- ✓ Quicker
- ✓ Appears pro management
- ✓ Appearance of bias

External

- ✓ Better honed skills
- ✓ Neutral/impartial
- ✓ No HR
- ✓ Complaint against Sr. Manager
- ✓ Extremely serious charges
- ✓ Increased costs
- ✓ Doesn't know culture, politics, players
- ✓ No established credibility



14

Why Investigate?

To
reduce
liability

To
restore
harmony



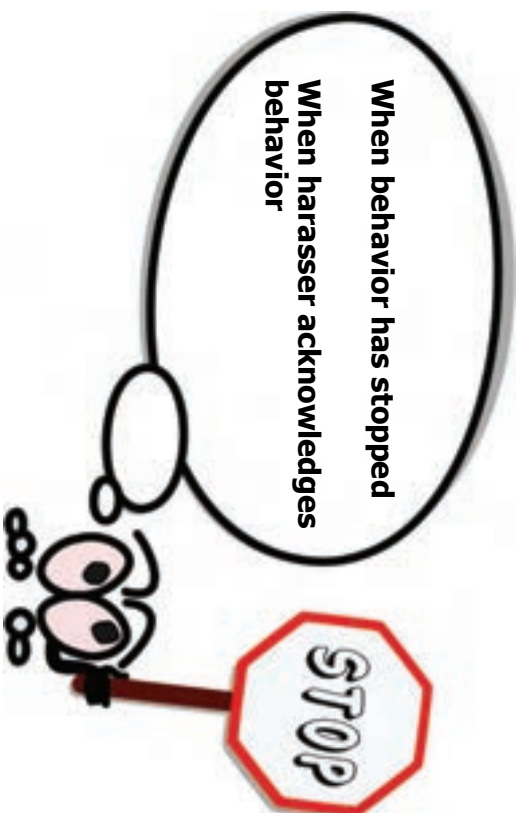
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Objectives of Investigation



16

When Not to Investigate (generally)

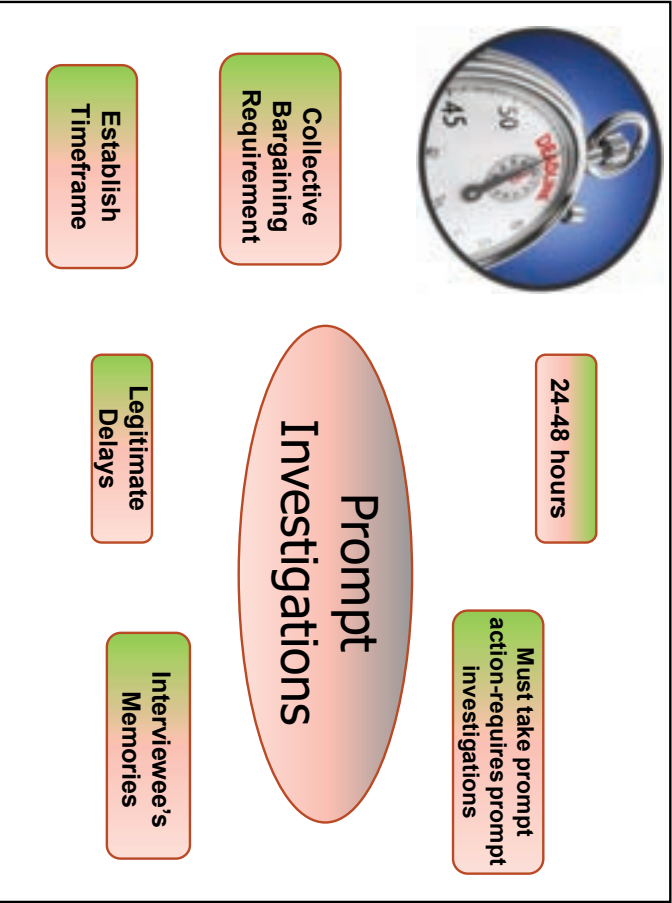


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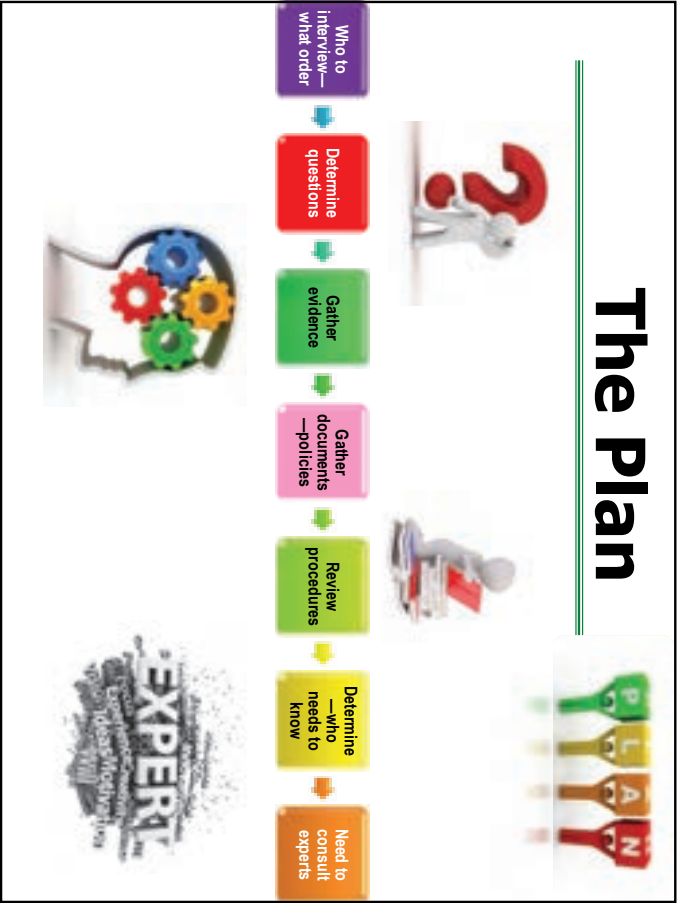
What Is a Complaint?

- 🗣️ Verbal
 - 📝 Written
 - 🗣️ Gossip
 - 🗣️ Off-handed comment
 - 🗣️ Exit interview
 - 👁️ Observation
 - 🗣️ Employee opinion survey
 - 🗣️ Reasonably 'should' know
 - 🗣️ Anonymous
- 
- A 3D rendering of a grey humanoid figure standing with its back to the viewer, holding a large, thick red question mark.

18



19



20

Routine

- Confidentiality
- Retaliation
- Voluntary participation
- Provide policies
- Taking notes—why
- Who “will know”
- Explain process—how they fit
- No conclusions—fact finding
- May need to talk again



21

Should I
record this
interview?



22

When Questioning

- Start with easy questions
- Their background
- Length of time in organization
- Their position
- Who they work with
- Do they like their job?
- Questions about the organization's climate
- Don't give them more info than they need to know
- Differentiate fact from hearsay



23

Questioning Tips



- Use open-ended questions



- Follow – who, what, where, when, how
- Get chronology
- Keep asking – “What happened next?”

24

Clarify



"I don't recall"

VS.



"I don't recall"

25

The Initial Interview: A Checklist

1. Explain the purpose of the interview and your role.
2. Inform her/him you will take notes and how they will be used.
3. Record in writing this and subsequent conversations.
4. Maintain neutrality and non-judgmental demeanor, but sympathetically acknowledge the person's emotional state.
5. Confirm their voluntary participation in the interview and document it.
6. Inform the victim not to discuss this matter with anyone and document it.
7. Provide assurances of non-retaliation and confidentiality, but do not give unqualified promise of confidentiality.
8. State that reprisal will not be tolerated and give examples of retaliatory behavior.
9. Help her/him clarify and understand the experience by defining harassment.
10. Don't blame her/him or allow the person to assess self-blame.
11. Affirm seriousness of complaint and organization's policy.
12. Urge victim to write an account of the incident(s), including what happened, responses, dates, times, names of witnesses, and other details.
13. Discuss options, e. g., informal and formal. Explain how you or others in the organization can assist and support.
14. Ask victim what she/he would like to have happen; assess whether this is appropriate and how it can be implemented.
15. If appropriate, inform victim of available counseling.
16. Provide victim with written materials about harassment, particularly the organization's policy.
17. Inform victim to whom the information about the complaint will be given.
18. Encourage victim to call or return if harassment reoccurs or if help is needed.
19. Let the victim know you may need to talk to her/him again.
20. Be sure to follow up to verify that harassment has stopped and is not likely to recur.

26

Sample Interview Questions: The Target

1. "What brought you here?" Or "Please describe the last situation."
2. "Please tell me what happened in your own words. Be as specific and chronological as you can." *(Obtain specific information on each incident, including dates, day of week and time of day, witnesses, etc.)*
 - "When did it happen?" Give a specific date and time, if possible.
 - during the month?
 - during what week?
 - during what time?
 - during break?
 - during non-working hours?
 - during the morning, afternoon or evening?
3. "What was going on before the incident occurred?"
4. "Who was involved?"
5. "What exactly did xx say to you?"
6. "Describe xx's tone of voice."
7. "Where on your body did xx touch you, and in what manner?"
8. "If you don't remember the exact words, to the best of your recollection, what was said?"
9. "Did xx appear to be speaking or acting in a joking manner?"
10. "Where did the behavior take place? In the workplace? A social setting?"
11. "Describe the location in detail. Where were you? Where was xx? Describe movements of both you and xx." *(Have the victims diagram or visit the actual place, if appropriate.)*
12. "How did the behavior make you feel?"
13. "How did you respond to the behavior at the time?"
14. "What did you say to xx regarding xx's behavior? When did you say it? How did you say it? How did xx respond? And then what happened? What do you mean by the word 'unwelcomed'? What did xx do or say after that? What else happened? What non-verbal communication occurred?"

27

Sample Interview Questions: The Target, continued

16. "What was xx's reaction when informed that his/her behavior was unwelcome?"
17. "Has anything like this happened before? If so, what happened?" *(Get all the details.)*
 - "Was it previously reported? To whom? When? Where? What was said?"
 - "If it was, what action was taken? If it wasn't, do you know why not?"
 - "Have you ever seen xx do or say this to anyone else?"
 - "Have you ever seen anyone else do or say this to anyone?"
 - "Have you ever seen anyone involved in a similar incident? Who told you? When? Where? What exactly did the person tell you?"
 - "What has been your prior contact with xx? Describe your relationship."
18. "How frequently did the behavior occur?"
19. "Did it increase in severity as time went on?"
20. "Were there any witnesses to the encounter(s)? Who? What would they be able to add?"
21. "Did anyone try to break up the incident? Prevent it? Who?"
22. "Did anyone else participate? Who?"
23. "Did a witness say anything during or after the incident?" What did he/she say?"
24. "Were there any witnesses?"
25. "For what portion of the incident were the witness(es) present?"
26. "Was a manager present? Who? What did he/she say?"
27. "Did you talk to any of the witnesses immediately after the incident? Who?"
28. "When and where did you talk to the witness? What did you tell them?"
29. "Is there anyone else who may have information that may be helpful?"
30. "Did you tell anyone else what happened? Who did you tell? What did you tell them?"
31. "Did he/she already know? What did he/she know? How did they find out?"
32. "Can you identify any common themes in the behavior? Any patterns?"
33. "How would you characterize your relationship with xx?"
34. "Have you ever had a social relationship with xx? If so, has it ended, and under what circumstances?"

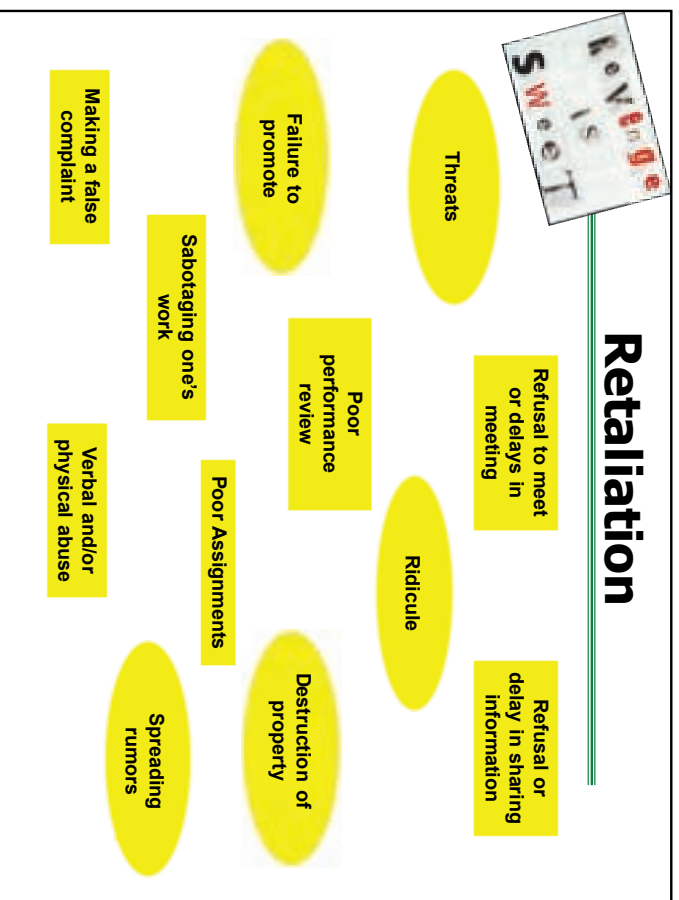
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Sample Interview Questions: The Target, *continued*

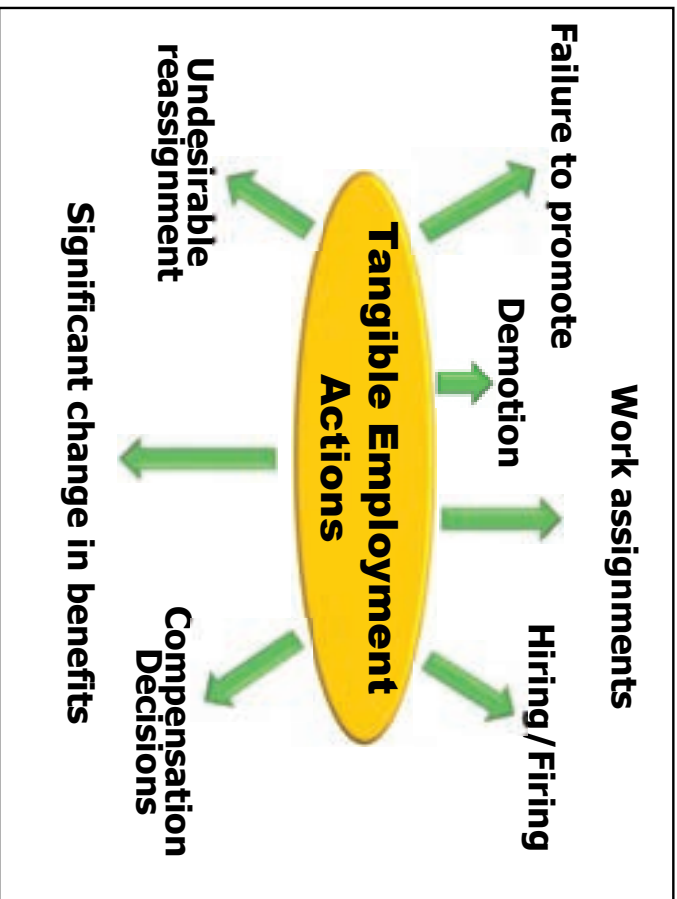
35. "Did you ever engage in social activity with him/her (e.g., meeting for lunch, dinner, or drinks)?"
 36. "Have you reported this incident to anyone else?"
 37. "Did they take any action to resolve your complaint?"
 38. "How long after the conduct occurred did you wait to report it? Why did you wait?" *(If they did wait.)*
 39. "Have you suffered any physical or emotional injury as a result of the conduct? Are you currently seeing a physician or receiving counseling?"
 40. "Have you suffered any adverse employment actions: bad performance evaluations, demotion, or denial of pay or benefit raises?"
 41. "How would you characterize your work unit atmosphere?"
 42. "Do you feel that the atmosphere has changed since the incident(s) occurred, or since you filed your complaint? Please describe the changes."
 43. "Has xx ever threatened you or made promises based on your reception of his/her sexual advances? What specifically?"
 44. "To your knowledge, has xx made similar advances or comments to other employees? Females? Males?" "Blacks?" "Disabled?"
 45. "Have you kept notes or diaries regarding the incident(s)?"
 46. "Do you have any other documents, notes, e-mails, etc.?"
 47. "Is there anything that we haven't talked about that I need to know?"
 48. "Is there anything that you need to know now?"
 49. "What would you like to see happen as a result of your coming forward?"
- At the conclusion of the interview:
- > Review key points made by the victim to ensure accuracy.
 - > Stress the need for the victim to contact you with any additional information or concerns.
 - > Inform the victim that retaliation is prohibited, and, if she/he feels it is occurring, to report it. Give examples of behavior that may constitute retaliation.
 - > Inform the victim that she/he has the right to seek assistance from other sources, such as EEOC, State's Human Rights Department, an attorney, or, if an assault, the police.

29

Retaliation



30



31



32

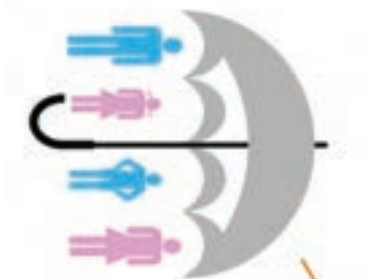
Interim Action

When?

- Assault; physical harm
- Target uncomfortable working with accused
- If misconduct ongoing

Why:

- To prevent further harm to target & others
- Protect organization
- Protect accused



33

Tips for Talking to Accused

Don't

Put words in his/her mouth

Shy away from difficult questions

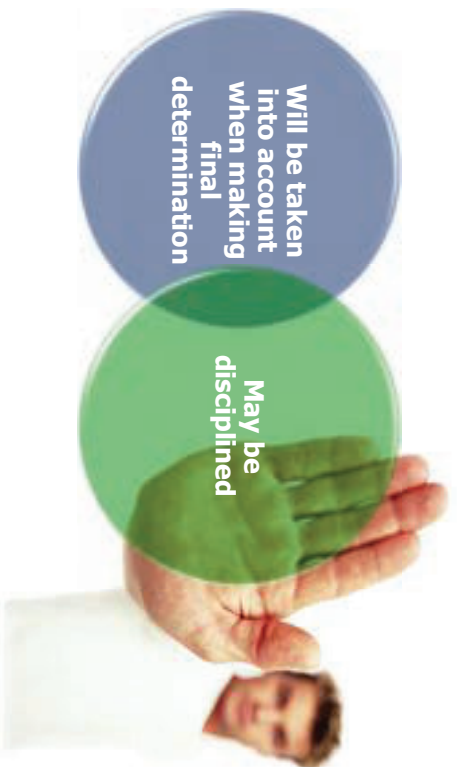
Be surprised at denial

Try to trick person



34

If Accused Refuses to Meet



35

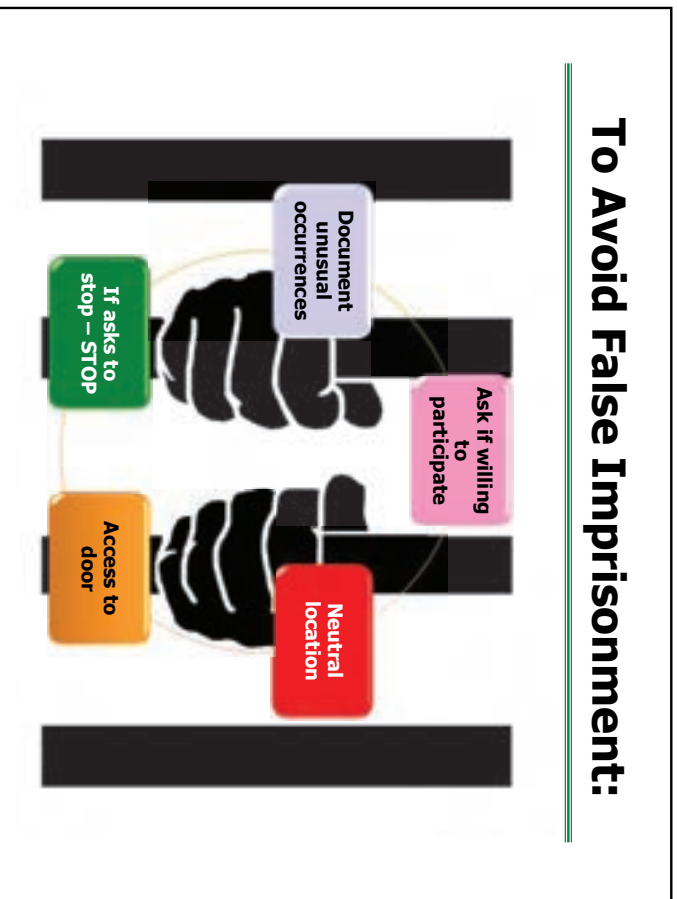
If Criminal Allegation



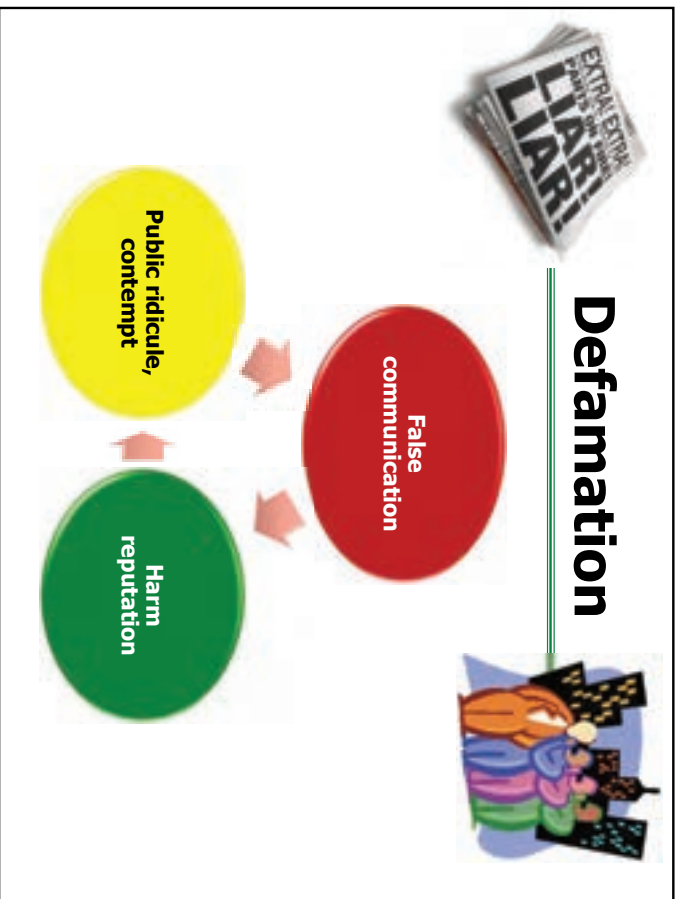
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Tips to Avoid Defamation

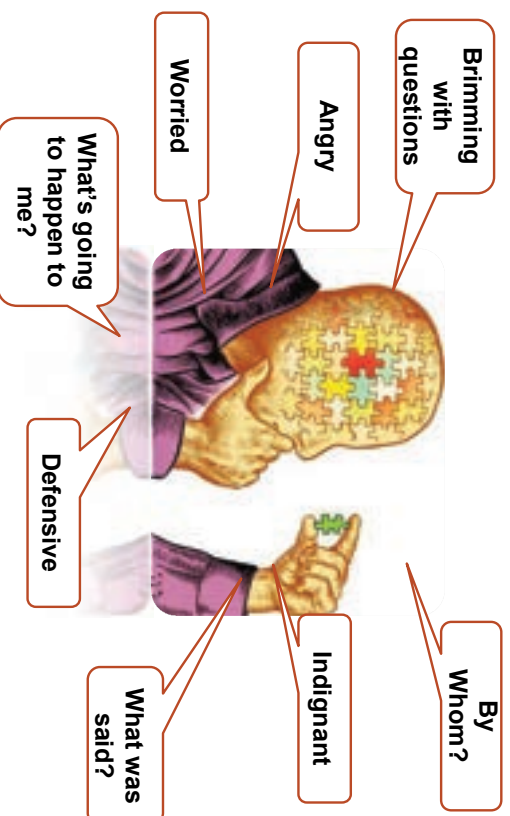
1. Do not unnecessarily disclose details of complaint.
2. Avoid answering employee questions, engaging in gossip or speculation.
3. Tell those being interviewed that confidentiality is required and document it.
4. Don't label the alleged harasser as a harasser.
If harasser is found to have engaged in the behavior – any written or oral communication should conclude only that the harasser violated the organization's policy/.
6. Do not announce that the alleged harasser has harassed.
7. Tell harasser that he/she is being disciplined for violating the organization's harassment policy – not because he/she harassed.
8. Stick to the facts in the final report.
9. Consider two people for interviewing alleged harasser.

Most common circumstances for a defamation claim include:

- Discussing actions of harasser in a conclusory manner
- Making judgments regarding harasser
- Failing to limit dissemination of information gathered

40

Accused's Mindset

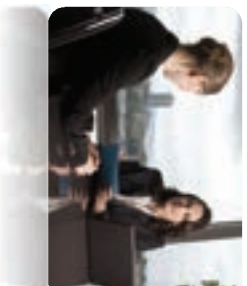


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When Interviewing

➤ Do not:

- Reveal names of others interviewed
- Discuss personal opinions
- Counsel person being interviewed



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Tips on Interviewing the Accused

Prior to interviewing the alleged harasser, consider all of the circumstances surrounding the complaint and follow these general guidelines:

1. Inform the alleged harasser that you will be taking notes and how those notes will be used.
2. Use tact in announcing the reason for talking to the alleged harasser. The person should be told there is a serious matter to discuss.
3. Convey your concern for the difficult nature of the meeting in a neutral manner: *"This may be hard to talk about,"* or *"I can see that you're upset."* *"I'm sorry to have to ask you these questions."*
4. Tell the alleged harasser they have an obligation to cooperate; have the right to be informed of the accusation and present their side; have the right to be treated fairly.
5. Inform the alleged harasser that the organization has a harassment policy and that you are conducting an investigation in relation to the organization policy. Give a copy of the policy to him/her.
6. If the alleged harasser requests to have a lawyer, a friend, or a family member with him or her, inform the person that if he or she is not present, they should advise the individual nor are part of the process.
7. If the alleged harasser is a union employee and requests the presence of a union representative or other employee during the interview, allow this request, but grant only a brief delay (Generally no more than 24 hours).
8. Ask if his/her participation in this interview is voluntary and document it.
9. Discuss the need for confidentiality and document it.
10. Reassure the person of due process. He/she will be under stress and possibly frightened. Again, your demeanor should be open, concerned and non-judgmental.
11. Present the alleged harasser with a general allegation of misconduct. Leave out specific details of the alleged activity and avoid labeling him/her as a harasser or the conduct as harassment. Describe the behavior and why it may be a violation of the organization's policy.
12. Get his/her side of the story, including any possible motivation the accuser might have for falsely alleging harassment, if appropriate.
13. Question the alleged harasser about each specific allegation.

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Tips on Interviewing the Accused, continued

14. Don't ask if he/she harassed the victim. His/her definition of harassment may be inaccurate. Instead, elicit specific responses to each allegation: *"What did you do or say?" "What did she/he say?" "What did you intend by your actions or comments?"* (Be aware, however, that while courts generally look at the perception of the recipient of the alleged harassment, the harasser's intent is not always the case. *"Did the [name of person] object?" "Did you talk to anyone?"*
15. Be prepared for anger, denials, and defensiveness.
16. Describe the investigative process and review your tentative schedule.
17. Ask the alleged harasser if there are any witnesses or written evidence he or she can offer to rebut the allegation.
18. Inform the alleged harasser that they do not have the right to confront the victim directly, or to know what people are interviewed about the complaint, or to be present at interviews.
19. If additional allegations are made during the investigation, or other information is discovered, the alleged harasser should be informed and given a chance to respond, following the format of the original investigation.
20. Many alleged harassers have not thought through the power they have as it relates to retaliation. Inform the alleged harasser that he or she should be aware that he or she could be perceived as offensive, or that they could not be approached about the effects of their behavior. The common response of the accused is: *"If there was a problem, they could have just told me."*
21. Although the main goal of the interview is to get the facts from the alleged harasser's point of view, bear in mind that most courts will look at the alleged conduct through the eyes of the victim. Thus, do not let his/her stated "intentions" with respect to his behavior sway you from focusing on the facts.
22. Warn the alleged harasser that retaliation is against organization policy and the law. Retaliate that all parties to the investigation, including witnesses, are protected against retaliation and that any violation of this policy could result in severe disciplinary action. Advise the alleged harasser that the organization has a policy against retaliation and to identify areas of disagreement, then formulate follow-up questions for both parties, if necessary.

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Sample Interview Questions: The Accused

1. *Be serious and to the point. Begin with, "The purpose of this meeting is to talk about an allegation of misconduct (a violation of our harassment policy)." Focus on the behavior, not the intention of the alleged harasser.*
2. *If possible, do not initially reveal the identity of the person who brought the complaint. If possible, do not reveal the name of the person who brought the complaint until the alleged harasser has been asked to touch the back of a female who was standing by the water fountain around ten o'clock this morning?"*
3. "What is your response to the allegations? Please tell me what happened in your own words. Be as detailed as you can."
4. "What exactly did you say to her/him?"
5. "Did you touch him/her? If so, where and in what manner?"
6. "Where did the situation occur?"
7. "What was her/his response at the time?"
8. "Did you make her/him any threats or promises?"
9. *If the employee refuses to answer, explain that "We cannot make you answer, but when you don't, we assume it's because it's against you".*
10. *When dealing with an alleged harasser who denies the allegation, explain that you have two sides of the story and that you will be doing additional fact finding before making a determination.*
11. "Did you know she/he filed a complaint? When?"
12. "Please describe your office atmosphere."
13. "Did that change in any way after the incident(s)?"
14. "What is your relationship with the victim?"
15. "Have you every dated her/him? When did that relationship end? Under what circumstances?"
16. "Were there any witnesses to the incident(s)? Under what circumstances?"
17. "Were any of the allegations she/he made true? Which ones? Which ones do you disagree with and why?"

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Sample Interview Questions: The Accused, continued

18. "What motivation would she/he have to make this up?" *(If alleged harasser denies complaint)*
19. "Were other people involved in the incident? Who were they? What were their reactions to the incident(s)?"
20. "Can you think of what triggered the incident or caused you to touch her/him?"
21. "Did you talk to anyone inside or outside of the organization immediately after the incident(s)?"
22. "Has anyone, a supervisor, spoken to you previously about your conduct?"
23. "What was your response?"
24. "Have you ever been accused of inappropriate conduct before?"
25. "Do you understand the non-retaliation policy of the organization?"
26. "Do you understand the investigation process and what will happen from here?"
27. "Is there anyone else who should be talked to?"
28. "Do you have any other questions or comments to add?"
29. "I can see you are angry/sad, etc. What do you recall? What is your version?"

46

Informal Resolution

What Is It?



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Formal vs. Informal

Formal Procedures

Disadvantages: To determine if harassment has occurred, the credibility of the alleged offender, appropriate sanctions, or remedies.

How Initiated: Generally, charges of harassment are brought by the complainant, manager, or a third party. Usually, a formal investigation is conducted, and the results are made available to formal procedures.

Investigation: Always required.

Outcomes: If harassment is found, a variety of actions may be applied.

Advantages: Sanctions may be invoked; a formal investigation is conducted; a written commitment to the issue; may settle credibility issues; create record in event of future claims.

Comments: May be invoked by complainant or institution at any time.

Record Keeping when Informal Procedures Are Used:

It is often difficult to recognize sexual harassment in many organizations. Records of informal complaints are not kept or are scattered throughout the organization, or because those in a position to know—Directors of Human Resources—are no longer in those positions. It is important that organizations develop some system to keep track of complaints, especially informal reports of harassment.

Adapted from: Educator's Guide to Combating Sexual Harassment. Thompson Publishing

Informal Procedures

Disadvantages: To stop the behavior. Should not be used for repeated or serious offenses (e.g., assault).

How Initiated: May be complainant's and/or organization's preference to use informal procedures. Generally do not involve written charges.

Investigation: Complainant and alleged harasser may be interviewed, but usually no extensive investigation is necessary.

Outcomes: Generally, the harassment stops. However, if the harasser continues the behavior, further action may be required, such as one party, voluntary resignation or the harasser, warning.

Advantages: Less fighting and rigidity; a written record is made; a written acknowledgment of negative publicity; no need to challenge motives or behavior; may educate harasser; no issues of definition of sexual harassment; usually less costly; if the complainant may play active role in resolution; provides options for complainant and wide procedures; usually less publicity.

Disadvantages: Less educational value; staff may not learn about resolutions and erroneously believe retaliation is not handling harassment issues; record keeping may be inadequate; some organizations may use informal procedures to avoid the use of several formal resolutions without anyone knowing about them.

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Who is a Witness?



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Tips on Interviewing Witnesses

1. Inform the witness that you will be taking notes and how those notes will be used.
2. Have they observed any "misconduct" in the workplace or problems between particular individuals? If so, ask them to identify the individuals involved.
3. If they do not identify the victim or the alleged harasser, be more specific. Bear in mind that your goal is to elicit as much information as possible while divulging only what is absolutely necessary.
4. Ask who, what, when, where and how questions.
5. Remind witnesses to focus on what they observed, but if they heard something from a co-worker or someone else, ask from whom, and interview that individual.
6. Use the witness to discover the parties' relationship with each other.
7. Appear at ease, neutral, and routine. Be supportive.
8. Assure the witness that it is important to tell the truth and not to worry about the consequences of comments. Inform them that no adverse action against them will result, and that no retaliation against him/her will be tolerated.
9. Ask the witness if he/she knows of the behavior that is the subject of the complaint.
10. Reveal only the factual information necessary to your interview. This will, however, include names of the parties and a general description of the complained activity.
11. Solicit specific details, including "What do you know?" "What incidents did you see?" "Where?" "When?" "Have you seen [the alleged harasser] behave this way with anyone else?" etc.
12. Ask if the witness knows of any other potential witnesses.
13. Use open-ended and non-leading conversational questions, which induce the witness to reveal what he or she actually knows.
14. Minimize duplication of witnesses.
15. Stress importance of honesty.
16. Do not promise confidentiality.
17. Get pertinent background information on the witness (position, length of employment, work telephone number and address, etc).

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Tips on Interviewing Witnesses, continued

18. Don't ask if the witness has seen or experienced "harassment". Ask instead about specific behaviors observed. It is all right at the conclusion of the interview to explain the organization's definition of harassment and give a copy of it to the witness.
19. Do not discuss the merits of the allegations or the actions, if any, to be taken following the investigation.
20. Do not reveal the names of other individuals that you will interview.
21. Don't spend excessive time interviewing witnesses with no personal knowledge of the facts.
22. Don't limit your interviews to the individuals identified by the parties.
23. Emphasize confidentiality and document it.
24. Confirm their voluntary participation in the interview and document it.

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Sample Interview Questions: The Witnesses

1. *If possible, do not initially identify the alleged recipient or the alleged harasser. Say to the witness, "Your name has been given to us as a person who may have observed interaction(s) between several employees, and we'd like to talk to you about your observations."*
 - "Describe the situation and circumstances of the alleged harassment". *For example, "Were you in the hallway by the water fountain this morning?"*
 - *Focus on the witnesses' observations, not assumptions or opinions about the personalities of the people involved in the allegation.*
2. "Have you seen any misconduct or inappropriate action? When?"
3. "Who was involved?"
4. "Where did the incident(s) take place?"
5. "Please describe the conduct as specifically as possible".
6. "What exactly did he/she say? Where did he/she touch him/her? How?"
7. "What was her/his response to the conduct?"
8. "What was his/her attitude during the incident(s)? Joking? Threatening?"
9. "Were you a participant in the incident?"
10. "How did you come to observe the situation?"
11. "How did you feel during the incident?"
12. "Did you speak to anyone about it? Did you report it to anyone in authority? Did you ever speak to the victim or alleged harasser about it?" If so, what did you say?
13. "What was the impact of this behavior on the victim? On you? On the department?"
14. "Have you ever seen him/her act in a similar way with other employees? Females? Males? Disabled? Jews? Blacks?"
15. "To your knowledge, what is the relationship between the two people involved? Have you ever observed any evidence of a social relationship between the two—frequent lunches, after work get-togethers, etc?"
16. "How would you characterize the workplace/department atmosphere?"
17. "Have you observed any change in the atmosphere since the incident(s)?"

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Sample Interview Questions: The Witnesses, *continued*

18. "Did the victim or the accused talk to you shortly after the incident(s)? What did he/she say?"
19. "Who else besides you and the two people in question were present?"
20. "How would you characterize the victim? The alleged harasser?"
21. "Have you ever noticed any tension or unusually friendly behavior between the two employees? Has their working relationship changed recently?"
22. "What is your relationship with the victim? The accused?"
23. "Are there other people who should be interviewed about this complaint?"
24. "Do you have any questions about this investigation that I might be able to answer?"

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Taking Statements, *continued*

Occasionally, it is in the investigator's best interest to have the interviewee sign her/his statement, if the interviewee is a witness. A formal signed statement should be considered if any of the following situations exist:

- The interviewee will not be available in the future (relocating, changing companies, imminent death, etc.).
- You have reason to believe the interviewee may change her/his story.
- The interviewee has a terrible memory or is a bad historian.
- The interviewee has significant first hand knowledge and evidence relating to the situation under investigation.

Voluntary Statements

Attempt to persuade individuals to provide a voluntary statement. Ask the individual to assist you in providing a written statement. Explain that a written statement will reduce the chance of an individual being misinterpreted or misquoted.

You may write the statement yourself (as dictated by the individual) or have the individual write the statement. In either case, the statement should contain the following:

- The first paragraph should begin as follows:
"I (name), provide the following voluntary statement to (name) who has identified her/himself as (title). This statement is provided without coercion, or receipt of promise or reward and is unconditionally submitted."
- The handwriting must be legible – the statement may be printed or typed if the handwriting is illegible.
- The statement should include the start and finish time at the top of the page.
- The individual's statement should include a recitation of all facts including: who, what, where, when, and how information. You may guide the individual to make sure they cover all pertinent topics.
- Instruct them to not skip lines.
- The individual should sign, date and number **each** page of the statement.
- The individual giving the statement should initial any crossouts or erasures.
- The conclusion of the statement should include the following language:

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Taking Statements, continued

"I have read this document and have initialed each page and all corrections and deletions. This statement is true and correct to the best of my knowledge."

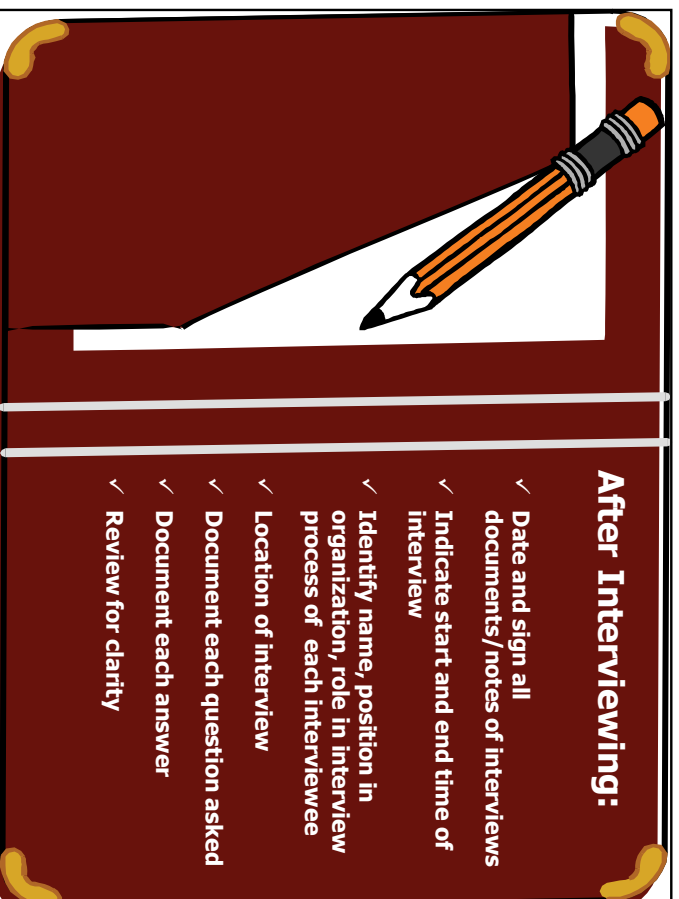
- The statement should be witnessed by at least one person. The witness should sign and date every page of the statement.
- Provide a copy of the statement to the individual. You should maintain the original in the investigation file.

Involuntary Statements:

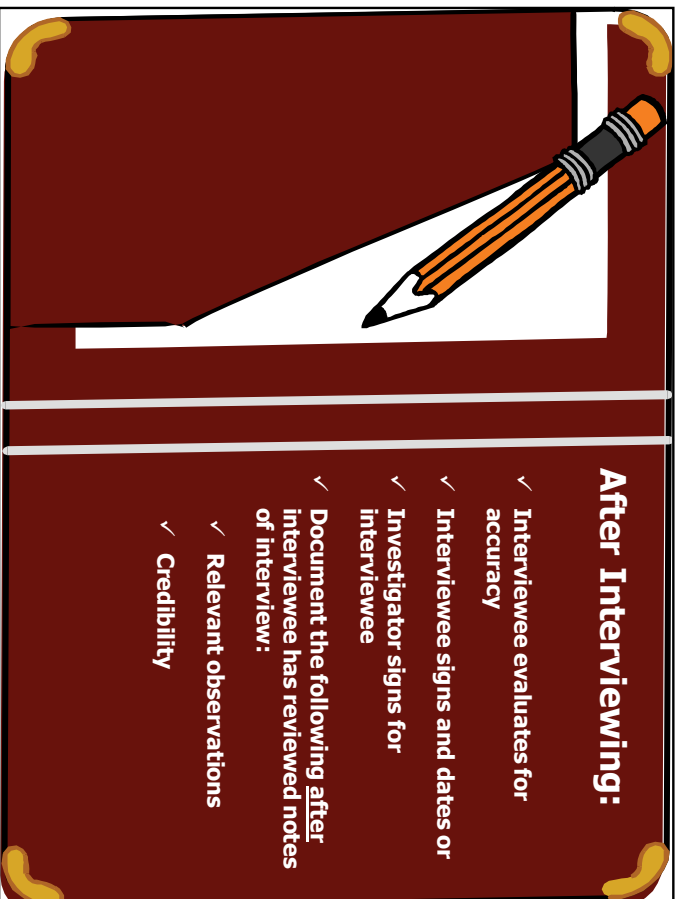
You may require employees to provide statements, but under no circumstances should you attempt to influence any part of the statement. You may, however, advise individuals to cover certain topics in their statement.

- The involuntary statement should begin with the following paragraph:
"I (name) provide the following statement to (name) who has identified her/himself as (title). This statement is true and correct to the best of my knowledge."
 - Follow all guidelines above.

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Documentation

- Names(s) of investigator(s)
- Your name
- Date
- Name of person interviewed
- Start and end times of interview
- Each question (open ended) asked
- Interviewee's response to questions
- Identify if interviewee's response is hearsay/rumor or if it was actually seen or heard by interviewee
- Be objective
- Be detailed
- What happened – use verbatim quotes if possible; state specifically where the victim was touched
- Where it happened – whose office, which hallway, etc.
- When it happened – date and time
- Who was involved – victim, alleged harasser/bully, witnesses
- How incident(s) impacted victim personally, professionally, physically
- Statements by witnesses
- Dates investigation began and ended
- Identify documents reviewed and facts contained within
- What organization policies were violated and how
- Your impressions – overall appearance, facial expressions, questions, tone of voice, emotions of each interviewee

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Documentation, continued

Credibility Assessments: as soon as each interviewee leaves the room, you should assess her/his credibility. On a separate sheet of paper, note the following:

- A. Demeanor
 - How did the interviewee react to the allegations (e.g., argumentative, defensive, hostile)?
 - Does the person inspire confidence in the listener?
 - Note body language.
- B. Logic/Consistency of Story
 - How does the interviewee's chronology and perception of events relate to that of the other interviewees?
 - Does the interviewee's story make sense?
 - Was the person forthcoming?
 - If the interviewee's version of the facts is completely different from others, ask whether the individual who contradicts this person's version of the facts would have a reason to lie about the interviewee.
- C. Affirmative Statements
 - Did the interviewee make any admissions (e.g., say "I said that, but I didn't mean anything"?)
 - Did the person specifically deny anything? Was the denial consistent throughout the interview?

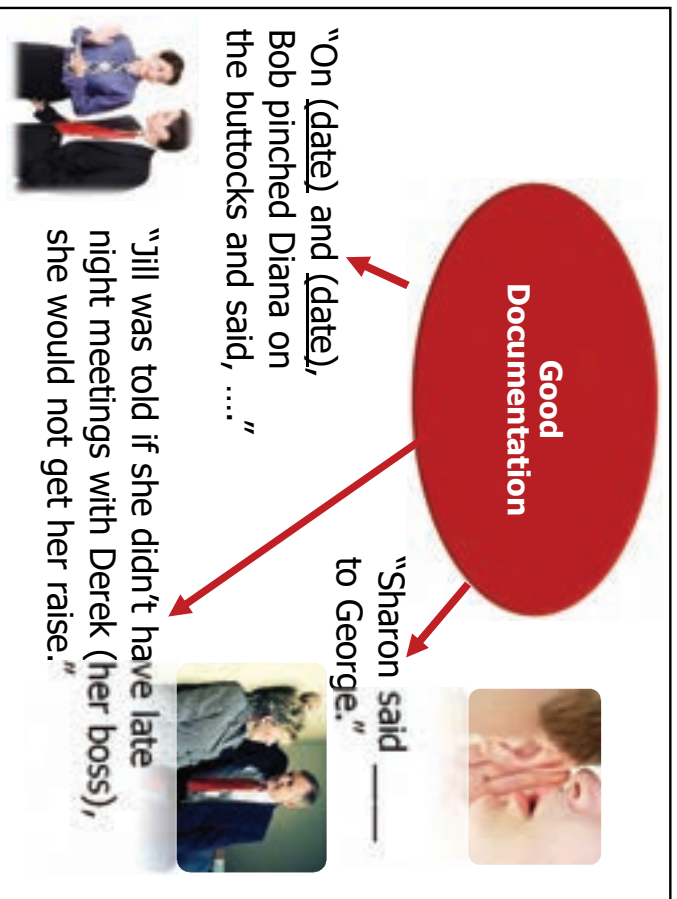
Did the interviewee claim they had no recollection of a particular fact? Clarify, "I don't recall" versus "I recall and deny that allegation."

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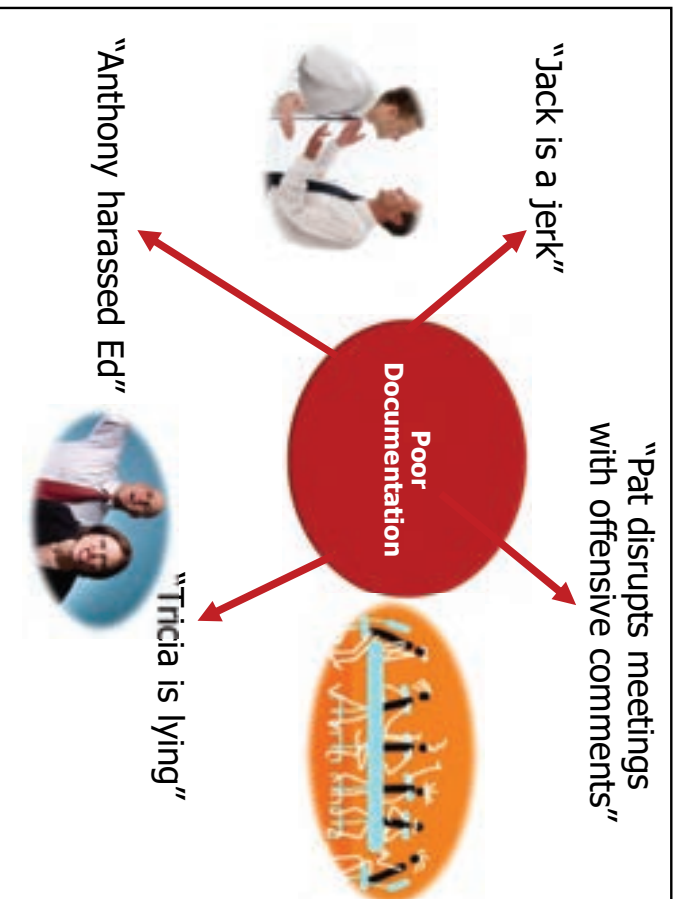
Assessing Credibility

- ◆ Ask yourself – Did I believe the people interviewed? Does the story sound fabricated?
- ◆ Would a jury believe . . . ?
- ◆ Credible impression?
- ◆ Demeanor?
- ◆ Admit or deny?
- ◆ Contradict?
- ◆ Story change?
- ◆ Story makes sense/logical?
- ◆ Reputation?
- ◆ Corroborating evidence?
- ◆ Pattern of conduct?
- ◆ Inconsistent/consistent statements?
- ◆ Writings developed after incident?
- ◆ Biases and motives?
- ◆ Willingness to interview?
- ◆ "Detailed" complaint?
- ◆ Others who report harassment by same individual?
- ◆ Timing – Delay in coming forward to complain
- ◆ Plausible?
- ◆ Change in victim's behavior after the incident(s)
- ◆ Clarify "I don't recall" vs. "I don't remember if it occurred,"
- ◆ Misperceptions and miscollections exist – not necessarily because someone is lying, but they believe their perception.

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Creating Documentation

Don't Create "Bad" Documents

What are "bad" documents? Document that:

- Are ambiguous, easily misinterpreted
- Include factual errors or opinions
- Do not consider consequences of statements made

Creating "Good" Documents

Threshold issue: Does it need to be created?

- What purpose does the document serve?
- Are there possible negative consequences?
- Should the documentation be retained?

Writing Good Documents:

- State facts, not opinions. Where possible, cite specific incidents or behavior rather than making conclusions about the employee.

NOTE: In some cases, it may be impossible to avoid using an opinion to communicate. Where opinions are used, support them with objective facts, tailor the opinion narrowly to the issue involved, do not make assumptions, and clearly identify that it is your opinion only.

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A Determination is Required



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In Reviewing the Evidence, the Investigator will:

- search for corroborative evidence
- determine whether conduct was “welcome”
- consider the absence of corroborating evidence
- make a determination based solely on credibility, if necessary
- consider background
- consider conduct
- distinguish between behavior that was “voluntary,” but coerced, and behavior that was clearly unwelcome, and
- consider whether there was delay in complaining about the alleged behavior

A Determination Needs to be Made Regarding:

- What actually happened? Can we determine what happened?
- Was there a violation of organization policy or the law? – Yes? No? Probably yes? Probably not? Not able to determine?
- What actions need to be taken regarding:
 - the victim
 - the alleged harasser or bully
 - the follow-up training
 - “workplace healing?”
 - communication of harassment policy
- Was behavior:
 - against company policy?
 - inappropriate, but not harassment?
 - subtle harassment?
 - moderate harassment?
 - severe harassment?

If it is determined that harassment occurred, the organization must take immediate and appropriate corrective action by taking the necessary steps to end the harassment and to prevent it from occurring again.

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Reaching Conclusions

Did behavior occur?



Severe



Number and frequency of encounters



Effects on victim



Context of harassment/occur in public or private

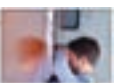
Was it harassment?



Welcome



Current and prior relationship of parties



Effects on work environment



Adverse employment actions against victim

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Reaching Conclusions

- Make a determination based solely on credibility, if necessary
 - Distinguish between behavior that was "voluntary," but coerced, and behavior that was clearly unwelcome
 - "Preponderance of evidence" – not, "Beyond a reasonable doubt"
 - Credibility of each party
 - Documentation
 - Observations of investigation
 - Witness statements
 - Motivation to lie – by anyone
 - EEOC Guidelines
 - Case law
 - Title VII, Title IX, other Civil Rights Law
 - Unwelcome
 - Gender-based, race-based, disability based, etc.
 - Severe/pervasive
 - Reasonable person
 - Collaborating evidence
 - Effects on the victim
 - Number and frequency of incidents
 - Relationship of the parties
 - Effects on the work environment
 - Content of the harassment – public/private
 - Retaliation
 - If no witnesses, did anyone notice a change in the victim's behavior?
- Don't be afraid to make a judgment because you could be wrong. Your investigation needs to be thorough, fair and objective.
- Usually there are indications regarding the truth with a "he said/she said" scenario.
- Generally 5%-10% of investigations are inconclusive

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Don't be afraid to make a judgment because you could be wrong.

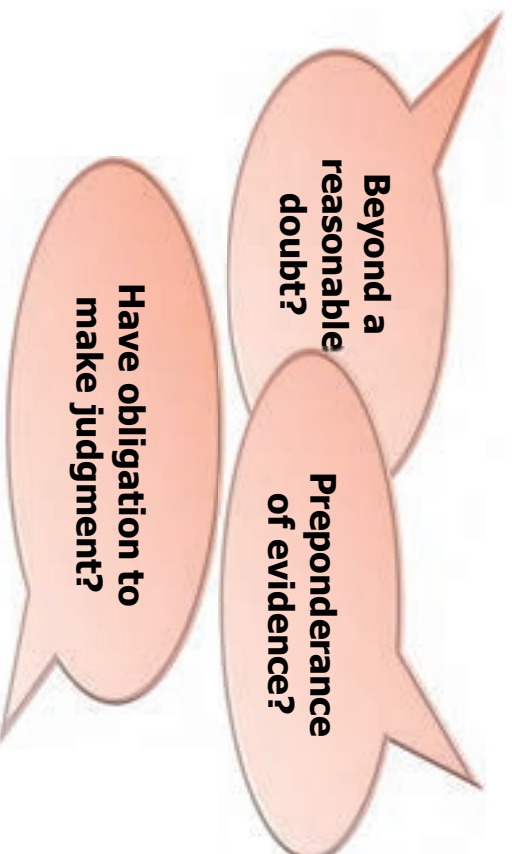
Usually there are indications regarding the truth with a "he said/she said" scenario.



Generally, 5% - 10% of investigations are inconclusive.

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What Standard Applies?



69

Federal & State Laws

"State's" Human Rights Act

Title VII

GINA

ADAAA

LGBTQI

ADEA

Title IX



Pregnancy Discrimination Act

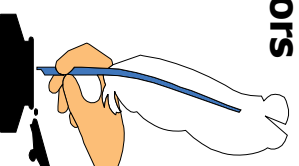
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EEOC Definition of Sexual Harassment

- Sexual advances

Requests for sexual favors

- Verbal or physical conduct of a sexual nature



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Factors

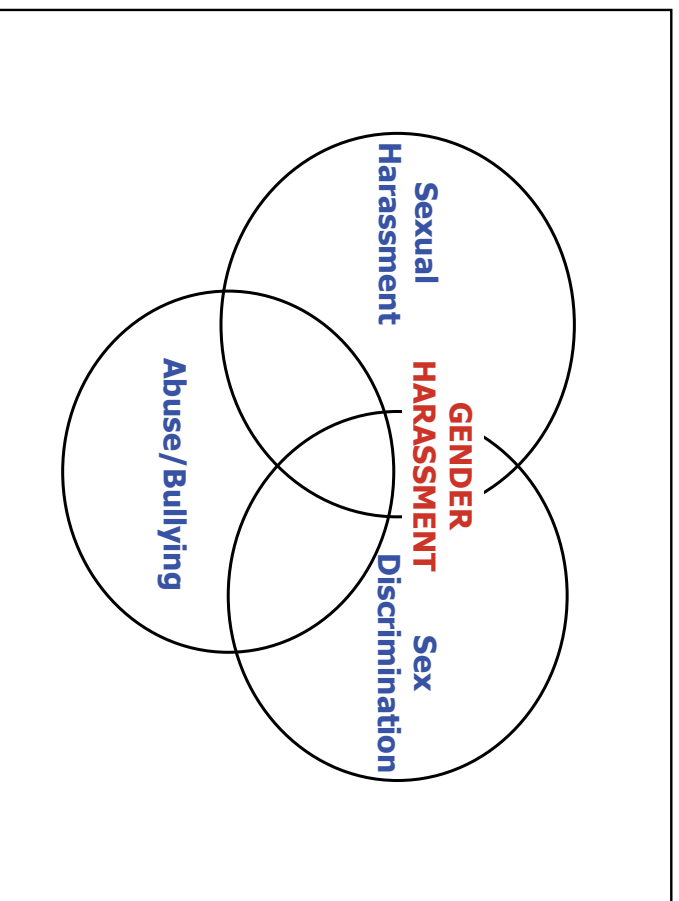


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Know the Protected Classes!



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Gender Harassment



- Hostile Work Environment
- Environmental context
- Gender-typing – occupation
- Gender composition – work group
- Organizational Climate



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Common Law Tort Claims Against Managers & Organizations

- ✓ Aiding & Abetting
- ✓ Assault & Battery
- ✓ False Imprisonment
- ✓ Intentional infliction of emotional distress
- ✓ Negligent hiring or supervision
- ✓ Personal Injury
- ✓ Intentional interference with business relationship
- ✓ Breach of contract



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If Complaint Not Substantiated, Tell Accused:

"The company policy is...and any further complaints will result in..."

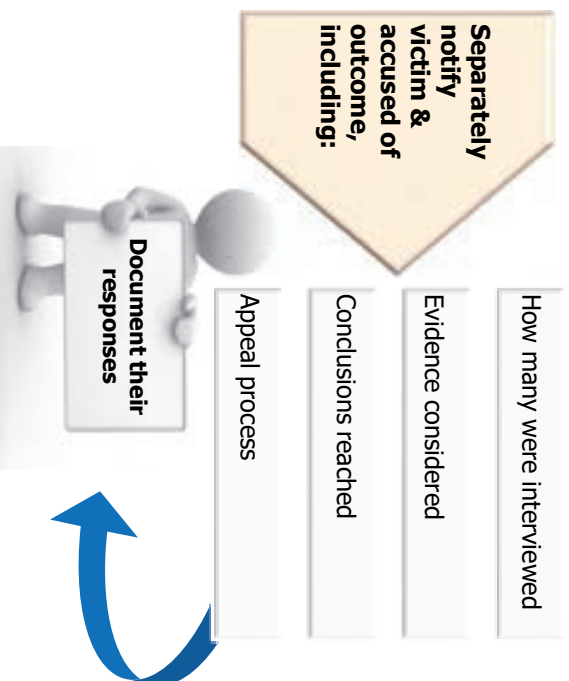
"The company considers allegations serious and although the facts are disputed, such conduct is forbidden and will not be tolerated."

Document the conversation and place documentation in both the victim's and harasser's file.




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Follow up Action



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What Actions Need To Be Taken Regarding:

- 
- ✓ The victim
 - ✓ The alleged harasser
 - ✓ The follow up training
 - ✓ “Workplace healing”
 - ✓ Communication of harassment policy

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Make the victim "whole"

Back pay	Benefits	Vacation	EAP
----------	----------	----------	-----

81

What is Appropriate Discipline? (EEOC)



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**The question to
ask yourself is...**



"How will I feel
sitting on a witness
chair in a courtroom,
under oath,
explaining my
actions?"

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Disciplining Offenders



Must stop harassment!



- Were company policies, guidelines or practices violated?
- Did harasser commit a serious offense?
- How has organization treated other offenders?
- Do any federal, state or local laws require certain action?
- How long has offender been with organization; what is offender's performance history?
- Any mitigating circumstances?
- What does collective bargaining agreement say?

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Corrective Action



- Written agreement not to engage in behavior
- Altered work schedules or responsibilities
- Apology
- Verbal warning
- Transfer
- Written warning
- Suspension
- Probation
- Termination
- Demotion
- Fines
- Education
- Counseling
- Discipline for management
- ↑ Supervisory oversight

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**Do I tell the
victim the
perpetrator's
consequences?**

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If don't tell:

- Cloak of secrecy
- Lowered morale
- Rumor
- Employees mystified
- Better closure for victim if informed

87

Monitor Environment

- Purposeful meetings with victim
- Ensure misconduct has stopped
- No retaliation
- Purposeful meetings with accused as needed



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Follow Up

1. Separately notify the victim and the accused of the outcome of the investigation:
 - How many interviewed
 - Evidence considered
 - Conclusions reached
 - Appeal process
 2. Document their reactions and place with your investigation file.
 3. Management should make whatever amends necessary to make the victim "whole" such as back pay, benefits, vacation, and pay damages, if any.
 4. Discipline the harasser.
 5. Any remedial action taken needs follow up to ensure compliance, e.g., meeting with the victim to ensure harassing behavior has stopped, meeting with harasser to ensure he is in counseling, etc.
 6. If the complaint was not substantiated, tell harasser – "The company policy is . . . and any further complaints will be result in . . ." The company considers allegations serious and although the facts are disputed, such conduct is forbidden and will not be tolerated." Document the conversation and place documentation in both the victim's and harasser's file.
- There are pros and cons as to whether the victim should be told of the consequences to the harasser.
- If you don't tell the victim of the harasser's discipline:
- Decreased morale
 - Cloak of secrecy
 - People are mystified
 - Rumor and problems
 - If victim has more information, there will be better closure

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Appeals

Purpose: Focuses on a specific concern regarding how the investigation was handled (e.g., critical witness/information/documentation misused).

An appeal is not designed to appease workers who are upset regarding the outcome of the investigation.

Explain: If the victim or harasser cannot state why s/he wants an appeal, explain that the organization conducted a fair and thorough investigation and handled the discipline as they saw fit. Remind the victim or harasser that s/he is not privy to all information gathered and that conclusions are based on some facts the victim or harasser is not aware of.



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The Final Report

The final report is a comprehensive rendition of the investigative process. It documents the complaint, the process, and the outcome. It is recommended that a copy of the report be sent to the legal department (or the organization's legal counsel) for review before being sent to the final decision maker. If the harassment incident was minor, the report does not need to be as in depth and may be no more than a one-page summary. The final report includes the following:

- I. A one-page summary with a general overview
- II. Background information
 - Process of the investigation, including the who, what, where, and when of incidents and the investigator's responses
 - Detail of the complaint in chronological order
 - List of documents reviewed
 - Interview information per party including:
 - ~ questions asked
 - ~ answers given
 - ~ differentiating rumor from fact
- III. Summary of complaint and findings
 - Behavior that occurred and the investigator's opinions, along with the rationale for those opinions
 - Determination as to whether the behavior constituted harassment by comparing the behavior with the organization's policy, EEOC guidelines, and other case law
 - Statement saying whether the organization's policy was violated
 - Other factors involved such as alcoholism, poor work environment, previous discipline, personality conflicts, etc.
 - Identifying conflicting evidence and how that influenced the outcome of the investigation
 - Separating fact from investigator's impressions (and explanation for impressions)
- IV. Recommendations
 - Recommend corrective action designed to stop the harassment and consistent with past discipline; not to be punitive to the victim
- V. Appendix
 - Names of any other victims discovered during the investigation
 - Analysis of interviews
 - Copy of memos to . . .
 - Any investigational concerns such as poor management
 - Typed interviews of all parties

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Investigation File:

- Interview notes
- Written outline/questions/topic areas
- People interviewed
- Reason key person not interviewed
- Copies of documents
- Written statements
- Not personnel file



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Appendix

- Names of other victims
- Analysis of interviews
- Copies of.....
- Investigational concerns
- Typed interviews
- Investigator's notes



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Documentation for Personnel Files



- ✓ On ____ (date) Suzie informed HR that Billy had xxxxxxx.
- ✓ An investigation occurred on ____ (dates).
- ✓ It was determined that Billy's misconduct had occurred and was a violation of XXXX policy.
- ✓ Billy was given a written warning.

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Common Problems and Mistakes

1. Behaving like an ostrich by ignoring a problem; letting a problem slide without recognizing its seriousness
2. Honoring confidentiality requests, thereby letting harassment continue
3. Not talking to the right people when investigating a complaint
4. Harboring preconceived notions about the parties and the complaint
5. Failing to listen carefully to all parties during interviews
6. Failing to keep the person who brought the complaint and the person accused of harassment apprised of the investigation's progress
7. Failing to properly document the investigation
8. Doing nothing in a he-said, she-said situation, rather than assessing the credibility of the parties and deciding what likely happened
9. Not taking the right effective remedial action – i.e., taking steps that don't stop the harassment
10. Transferring the victim to a different job, rather than moving the harasser
11. Do nothing ("I'll stop") – denial
12. Making conclusions ("Ole Bill wouldn't have done that")
13. "Finessing" the problem
14. Failing to take corrective measure
15. Requiring formal and/or written complaint
16. Inadequate investigation ("He said/she said" witnesses don't cooperate)
17. Confrontational solution
18. Don't report it to proper authority for investigation
19. Resistance – no training, etc., as too controversial
20. Labeling – "feminist", "militant", and "manipulative"

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Do's & Don'ts



Do's:

- be respectful
- be neutral
- be empathetic
- be responsive
- expect emotional response
- use appropriate vocabulary based on interviewee's education and intelligence
- be warm and inviting
- paraphrase
- ask follow-up questions
- use active listening
- be flexible

Don'ts:

- identify who you will be interviewing
- discuss merits of completeness
- reach conclusions until after investigation completed
- accuse alleged harasser
- make promises of time and action
- make assumptions
- use word "harassment" to inquire of a specific behavior
- say...
"That explains a lot."
"Something will be done about this."
"I have a hard time believing..."
"Why did you do that?"
- be cold and unemotional
- talk too fast
- promise confidentiality
- state the policy has been violated
- commit to complainant's wishes of remedy
- overreact to emotions

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20 Key Principles of a Harassment Investigation

1. Take the complaint seriously. Assume the victim her/his complaint is being taken seriously and that the organization will respond to the problem promptly.
2. Be open-minded. Do not presume guilt or innocence prior to the investigation. Avoid making determinations based on the appearance, position, or reputation of the people involved.
3. Determine who should be advised of the investigation and what they (e.g., supervisors, co-workers, management, etc.) will be told.
4. Determine what documents should be studied in addition to the sexual harassment policy (e.g. prior complaints, the handbook, personnel files, and organizational chart, etc.)
5. Study the environment: review the work area and general communication and behavior among staff.
6. Employees have the right to have someone with them during the interview.
7. Identify the questions for interviews of all parties. Use open-ended, generic, non-defamatory questions. Naturally, specific questions must be asked where appropriate.
8. Avoid using dangerous words or phrases, such as "It's just teasing – no big deal."
9. Be fair in the process. Allow sufficient time for interviews. Strenuously attempt to maintain confidentiality but do not promise confidentiality as it is very difficult to achieve.
10. Listen, empathize, and don't judge. Listen to what the victim has to say, empathize but make no judgment or commitment regarding the allegation or how the investigation will be conducted. Reiterate that your organization takes sexual harassment seriously and will not tolerate it.
11. Meet with appropriate management to inform them regarding the obligation not to retaliate, the importance of open lines of communication, the strategies for handling employee discomfort and confusion, etc.
12. Consider whether other issues affect the investigation, such as whether to include union reps, pending lawsuits, etc.

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20 Key Principles of a Harassment Investigation, *continued*

13. Perform the investigation promptly. It is recommended that the investigation begin within 24 to 48 hours of the time the complaint is made. Case law overwhelmingly supports the conclusion that an employee can do much to minimize its liability by acting promptly. A prompt investigation helps to obtain truthful and complete witness statements before either party has a chance to solicit support from friends in the workplace.
14. Maintain adequate documentation of the investigation. Remember it may be an exhibit in a trial someday. Focus on the facts, avoiding conclusion, speculation and the like.
15. Create a separate confidential file accessible only to the investigators. This should include all notes taken during interviews, copies of corroborating documents, and the final written report. If interview notes are to be typed, someone pledged to maintain the confidentiality of the notes should do this. Notes should be typed directly after each interview so they are more accurate and complete.
16. Respond to concerns. If the victim expresses fear, assure her/him that your organization will do everything to ensure confidentiality (but makes no promises), prevent retaliation, and stop further harassment. Answer any questions about the complaint process.
17. Contact your organization's attorney, if appropriate.
18. Determine what will be told to the victim at the conclusion of the investigation.
19. If appropriate, determine what corrective action will be taken, including discipline and/or termination, training, EAP, etc.
20. Follow up on the complaint. Check with the victim to ensure that she/he is not being retaliated against. Document the conversation and, if necessary, intervene on continued harassment and/or retaliation.

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Questions

- If there are any further questions which we were not able to get to today, please feel free to contact me through Train HR Learning.



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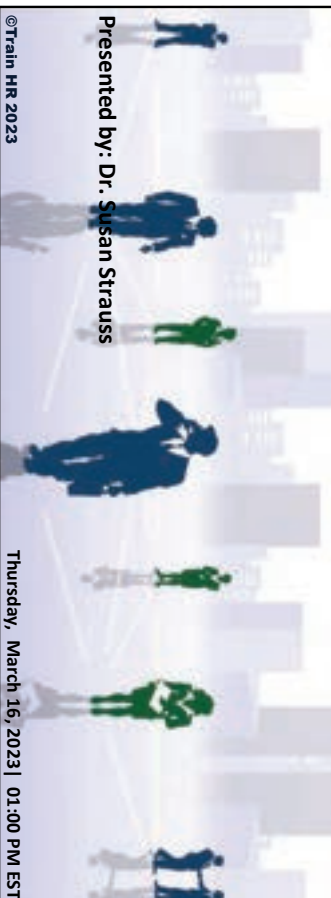
Live Webinar on

2-Hour Virtual Seminar on How to Conduct an Internal Harassment and Bullying Investigation to Determine Facts and Minimize Liability

Presented by: Dr. Susan Strauss

©Train HR 2023

Thursday, March 16, 2023 | 01:00 PM EST



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How to Conduct Harassment and Bullying Investigations



**Dr. Susan Strauss, RN, Ed.D.
Harassment & Bullying Consultant**

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Dr. Susan Strauss

Dr. Susan Strauss is a national and international speaker, trainer, consultant and a recognized expert on workplace and school harassment and bullying. She conducts harassment and bullying investigations and functions as a consultant to attorneys as well as an expert witness in harassment lawsuits. Her clients are from business, education, healthcare, law, and government organizations from both the public and private sector.

Dr. Strauss has conducted research, written over 30 books, book chapters, and journal articles on sexual harassment and related topics. She has been featured on 20/20, CBS Evening News and other television and radio programs as well as interviewed for newspaper and journal articles such as *Harvard Education Newsletter*, *Lawyers Weekly* and *Times of London*.

Susan is the recipient of the *Excellence in Educational Equity Award* from the Minnesota Department of Education for her work in sexual harassment in education. She has spoken about sexual harassment at international conferences in Botswana, Egypt, Thailand, and the U.S. She consulted with the Israeli Ministry of Education, as well as with educators from Israel, England, Australia, St. Martin, and Canada. She traveled to Poland and conducted research on sex discrimination and sexual harassment in Polish workplaces with Minnesota Advocates for Human Rights.

Susan has a doctorate in organizational leadership. She is a registered nurse, has a bachelor's degree in psychology and counseling, a master's degree in community health, and professional certificate in training and development. She has been involved in the harassment and bullying arena since 1985.

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3


Objectives

- ✓ Determine if investigation is necessary
- ✓ Identify components of investigation
- ✓ Conduct steps of investigation
- ✓ Interview accuser, accused & witnesses
- ✓ Differentiate between formal and informal investigative procedures
- ✓ Reach conclusions following investigation
- ✓ Write formal report

4

A Good Investigator...

- Thinks clearly and analytically
- Sounds authoritative; convincing to a jury
- Unbiased and impartial
- Good with people
- Writes thorough, organized, factual report
- Gathers facts and follows up on leads
- Knows harassment law

A cartoon illustration of a detective character. The character is a yellow, round-faced figure wearing a red and black checkered hat and a matching scarf. They are holding a magnifying glass over their right eye and have a small, mischievous smile. The character is standing on a light blue patch of ground, with a green shadow cast behind them. Three small, brown, teardrop-shaped marks are scattered on the ground near the character's feet.

A Good Investigator...

- Good probing questions
- Introspective
- Reads between the lines
- Can see holes in story
- Separates rumor from fact
- Communicates clearly
- Skilled & knowledgeable

Qualities to Look for in an Investigator

1. **Strong management connections** - If possible, investigators should be of a higher rank than the highest level person being investigated.
2. **Credibility with the organization** - should be widely regarded by all employees as fair and trustworthy.
3. **Fact-gathering ability** - skilled in fact gathering and be responsible for that task while being objective and impartial. However, although investigators should make recommendations, final decisions about the resolution of a complaint is often left to upper-level management.
4. **Ability for interviewing** – experienced in soliciting information from people because they will be attempting to discover the truth under very trying circumstances.
5. **Impartiality** - should be outside the direct chain of command of either the alleged harasser or the victim. This distance will provide the impartiality necessary to fairly investigate complaints. If possible, investigators should not have a personal relationship with either of the main parties.
6. **Knowledge of harassment legal issues and trained in recognizing sexual harassment** - If investigators lack knowledge of applicable laws and agency guidelines, and only dimly understand the organization's harassment policy, the investigation is unlikely to be ineffective, leaving the organization vulnerable to liability.
7. **Ability to handle sensitive information** with minimal embarrassment.
8. **Detail oriented** – able to probe for the details of the allegation, and to write a detailed report.
9. **Available to act promptly** – ability to respond within one work day, if possible.

7

Self-Examination

Self-examination is critical if one is to be conducting investigations. The answers to these questions will influence your ability to conduct an objective investigation.

- How objective are you able to be?
- How do you view men? Women? Blacks? Atheists? Disabled? Arabs? Etc.
- What is your awareness and knowledge of sexism? Feminism? Machismo? Racism? Religiosity? And discrimination based on religion, disability, and other protected classes?
- What are your biases? What stereotypes do you hold?
- What is your knowledge regarding power/abuse of power?
- Take an inventory of your own behavior and attitudes—where do you stand?
- How assertive are you?
- How do you deal with conflict?
- Are your communication skills where they should be?
- What feelings/relationships do you have toward the alleged harasser and/or victim?

8

When Should You Involve Legal Counsel?

Consider involving your organization's legal counsel when:

- The complaint involves allegations of actual or attempted assault, sexual assault, rape, or other serious violations
- The harassment does not stop
- The organization considers filing a complaint against one of the parties
- There is a question of the organization's liability for defamation or tort suits by employees claiming invasion of privacy, lack of confidentiality or breach of the organization's own policies
- Certain matters require protection from disclosure by way of the attorney-client or work-product privilege
- There is a need to help develop the record with an eye toward possible future litigation, including the preparation of necessary witness statements
- The incident(s) potentially violate other laws in addition to harassment prohibitions
- Management and/or staff have not followed procedures
- Threats have been made or there is danger of physical harm
- The policy is not clear concerning the particular incident
- Either party has hired an attorney or is considering filing or has filed charges outside the organization
- Incidents have been made public

9

Lawyer as Investigator?

Plusses

- Trained in fact gathering
- Legal understanding
- How it will look in court



Minuses

- Not liked or trusted
- Employees less-likely to confide
- Jurors tend to distrust lawyers who testify
- Creates "lawsuit" thinking

10

Do NOT Use Organization's Attorney



- ≈ Perceived as too cozy with management
- ≈ Can't represent organization in court
- ≈ Attorney client privilege jeopardized
- ≈ May have to reveal confidential conversations

11

If One Investigator



CHEAPER

BIAS

ENSURES CONSISTENCY

12

If Two Investigators



- ✓ Reality Check
- ✓ Compare impressions
- ✓ Corroboration
- ✓ Jury may like two with same decision
- ✓ M/F Gender parity
- ✓ If difficult interviews
- ✓ Intimidating
- ✓ Time Commitment

13

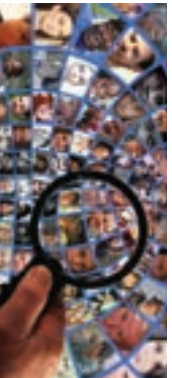
Internal vs External Investigators

Internal

- ✓ Less Expensive
- ✓ Understands culture, politics, players
- ✓ Quicker
- ✓ Appears pro management
- ✓ Appearance of bias

External

- ✓ Better honed skills
- ✓ Neutral/impartial
- ✓ No HR
- ✓ Complaint against Sr. Manager
- ✓ Extremely serious charges
- ✓ Increased costs
- ✓ Doesn't know culture, politics, players
- ✓ No established credibility

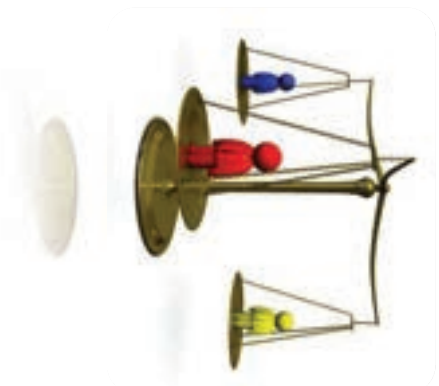


14

Why Investigate?

To
reduce
liability

To
restore
harmony



15

Objectives of Investigation

Identify
the who,
what,
where and
when

Identify all
involved

Gather
information

Make
conclusion

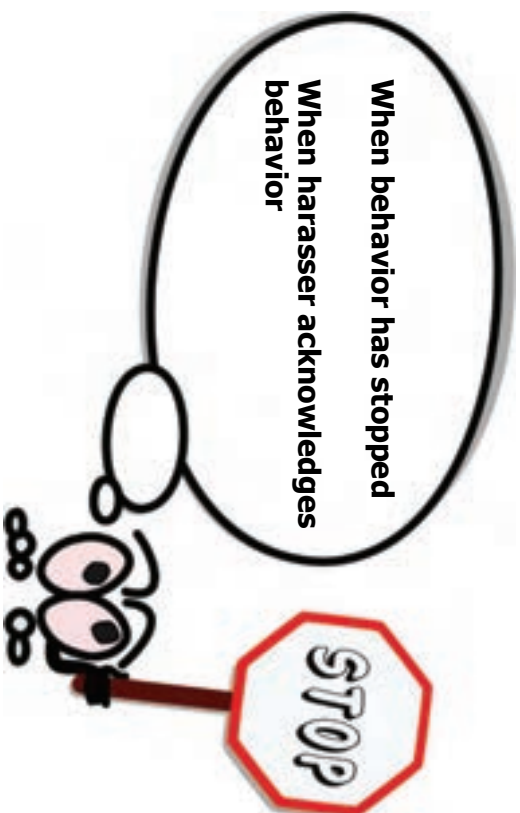
Suggest
action

Remedy
situation



16

When Not to Investigate (generally)



17

What Is a Complaint?

- 🗣️ Verbal
 - 📝 Written
 - 🗣️ Gossip
 - 🗣️ Off-handed comment
 - 🗣️ Exit interview
 - 👁️ Observation
 - 🗣️ Employee opinion survey
 - 🗣️ Reasonably 'should' know
 - 🗣️ Anonymous
- 
- A 3D rendering of a grey humanoid figure standing with its back to the viewer, holding a large, thick red question mark.

18

Routine

- Confidentiality
- Retaliation
- Voluntary participation
- Provide policies
- Taking notes—why
- Who “will know”
- Explain process—how they fit
- No conclusions—fact finding
- May need to talk again



21

Should I
record this
interview?



22

When Questioning

- Start with easy questions
- Their background
- Length of time in organization
- Their position
- Who they work with
- Do they like their job?
- Questions about the organization's climate
- Don't give them more info than they need to know
- Differentiate fact from hearsay



23

Questioning Tips



- Use open-ended questions



- Follow – who, what, where, when, how
- Get chronology
- Keep asking – “What happened next?”

24

Clarify



"I don't recall"

VS.



"I don't recall"

25

The Initial Interview: A Checklist

1. Explain the purpose of the interview and your role.
2. Inform her/him you will take notes and how they will be used.
3. Record in writing this and subsequent conversations.
4. Maintain neutrality and non-judgmental demeanor, but sympathetically acknowledge the person's emotional state.
5. Confirm their voluntary participation in the interview and document it.
6. Inform the victim not to discuss this matter with anyone and document it.
7. Provide assurances of non-retaliation and confidentiality, but do not give unqualified promise of confidentiality.
8. State that reprisal will not be tolerated and give examples of retaliatory behavior.
9. Help her/him clarify and understand the experience by defining harassment.
10. Don't blame her/him or allow the person to assess self-blame.
11. Affirm seriousness of complaint and organization's policy.
12. Urge victim to write an account of the incident(s), including what happened, responses, dates, times, names of witnesses, and other details.
13. Discuss options, e. g., informal and formal. Explain how you or others in the organization can assist and support.
14. Ask victim what she/he would like to have happen; assess whether this is appropriate and how it can be implemented.
15. If appropriate, inform victim of available counseling.
16. Provide victim with written materials about harassment, particularly the organization's policy.
17. Inform victim to whom the information about the complaint will be given.
18. Encourage victim to call or return if harassment reoccurs or if help is needed.
19. Let the victim know you may need to talk to her/him again.
20. Be sure to follow up to verify that harassment has stopped and is not likely to recur.

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Sample Interview Questions: The Target

1. "What brought you here?" Or "Please describe the last situation."
2. "Please tell me what happened in your own words. Be as specific and chronological as you can." *(Obtain specific information on each incident, including dates, day of week and time of day, witnesses, etc.)*
 - "When did it happen?" Give a specific date and time, if possible.
 - during the month?
 - during what week?
 - during what time?
 - during break?
 - during non-working hours?
 - during the morning, afternoon or evening?
3. "What was going on before the incident occurred?"
4. "Who was involved?"
5. "What exactly did xx say to you?"
6. "Describe xx's tone of voice."
7. "Where on your body did xx touch you, and in what manner?"
8. "If you don't remember the exact words, to the best of your recollection, what was said?"
9. "Did xx appear to be speaking or acting in a joking manner?"
10. "Where did the behavior take place? In the workplace? A social setting?"
11. "Describe the location in detail. Where were you? Where was xx? Describe movements of both you and xx." *(Have the victims diagram or visit the actual place, if appropriate.)*
12. "How did the behavior make you feel?"
13. "How did you respond to the behavior at the time?"
14. "What did you say to xx regarding xx's behavior? When did you say it? How did you say it? How did xx respond? And then what happened? What do you mean by the word 'unwelcomed'? What did xx do or say after that? What else happened? What non-verbal communication occurred?"

27

Sample Interview Questions: The Target, continued

16. "What was xx's reaction when informed that his/her behavior was unwelcome?"
17. "Has anything like this happened before? If so, what happened?" *(Get all the details.)*
 - "Was it previously reported? To whom? When? Where? What was said?"
 - "If it was, what action was taken? If it wasn't, do you know why not?"
 - "Have you ever seen xx do or say this to anyone else?"
 - "Have you ever seen anyone else do or say this to anyone?"
 - "Have you ever seen anyone involved in a similar incident? Who told you? When? Where? What exactly did the person tell you?"
 - "What has been your prior contact with xx? Describe your relationship."
18. "How frequently did the behavior occur?"
19. "Did it increase in severity as time went on?"
20. "Were there any witnesses to the encounter(s)? Who? What would they be able to add?"
21. "Did anyone try to break up the incident? Prevent it? Who?"
22. "Did anyone else participate? Who?"
23. "Did a witness say anything during or after the incident?" What did he/she say?"
24. "Were there any witnesses?"
25. "For what portion of the incident were the witness(es) present?"
26. "Was a manager present? Who? What did he/she say?"
27. "Did you talk to any of the witnesses immediately after the incident? Who?"
28. "When and where did you talk to the witness? What did you tell them?"
29. "Is there anyone else who may have information that may be helpful?"
30. "Did you tell anyone else what happened? Who did you tell? What did you tell them?"
31. "Did he/she already know? What did he/she know? How did they find out?"
32. "Can you identify any common themes in the behavior? Any patterns?"
33. "How would you characterize your relationship with xx?"
34. "Have you ever had a social relationship with xx? If so, has it ended, and under what circumstances?"

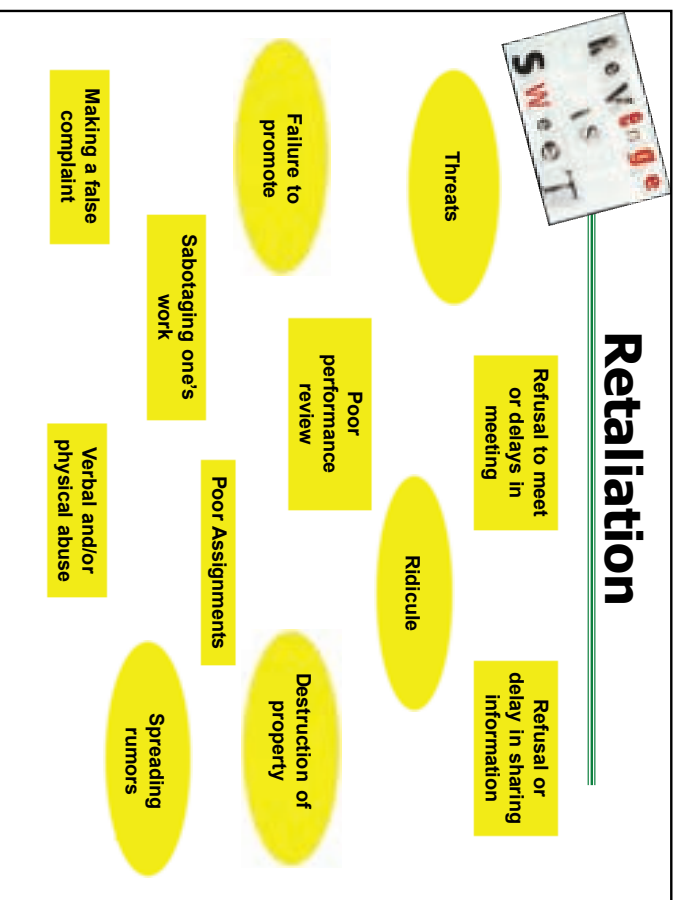
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Sample Interview Questions: The Target, *continued*

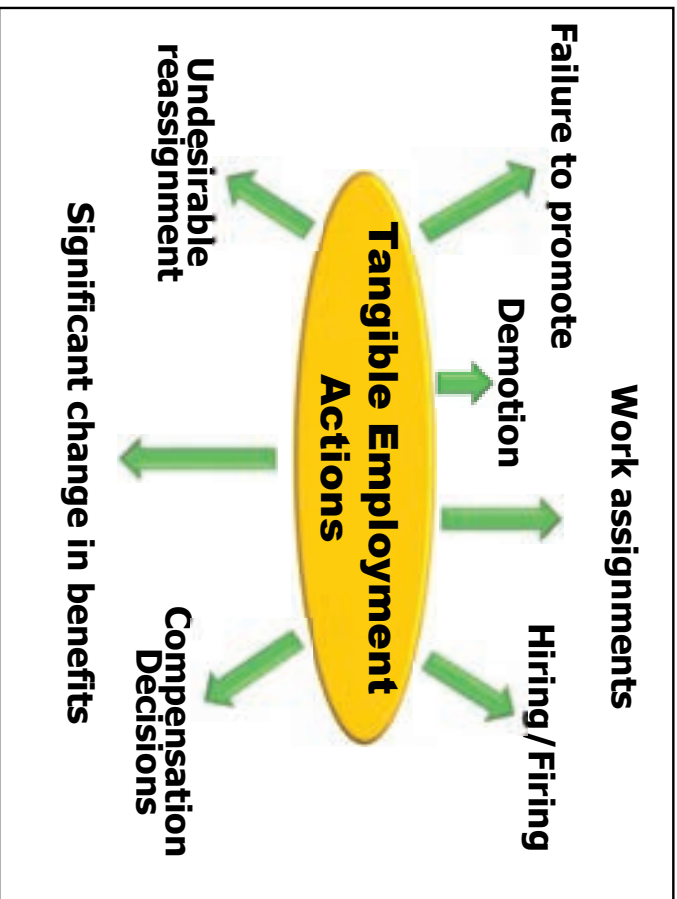
35. "Did you ever engage in social activity with him/her (e.g., meeting for lunch, dinner, or drinks)?"
 36. "Have you reported this incident to anyone else?"
 37. "Did they take any action to resolve your complaint?"
 38. "How long after the conduct occurred did you wait to report it? Why did you wait?" *(If they did wait.)*
 39. "Have you suffered any physical or emotional injury as a result of the conduct? Are you currently seeing a physician or receiving counseling?"
 40. "Have you suffered any adverse employment actions: bad performance evaluations, demotion, or denial of pay or benefit raises?"
 41. "How would you characterize your work unit atmosphere?"
 42. "Do you feel that the atmosphere has changed since the incident(s) occurred, or since you filed your complaint? Please describe the changes."
 43. "Has xx ever threatened you or made promises based on your reception of his/her sexual advances? What specifically?"
 44. "To your knowledge, has xx made similar advances or comments to other employees? Females? Males?" "Blacks?" "Disabled?"
 45. "Have you kept notes or diaries regarding the incident(s)?"
 46. "Do you have any other documents, notes, e-mails, etc.?"
 47. "Is there anything that we haven't talked about that I need to know?"
 48. "Is there anything that you need to know now?"
 49. "What would you like to see happen as a result of your coming forward?"
- At the conclusion of the interview:
- > Review key points made by the victim to ensure accuracy.
 - > Stress the need for the victim to contact you with any additional information or concerns.
 - > Inform the victim that retaliation is prohibited, and, if she/he feels it is occurring, to report it. Give examples of behavior that may constitute retaliation.
 - > Inform the victim that she/he has the right to seek assistance from other sources, such as EEOC, State's Human Rights Department, an attorney, or, if an assault, the police.

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Retaliation



30



31



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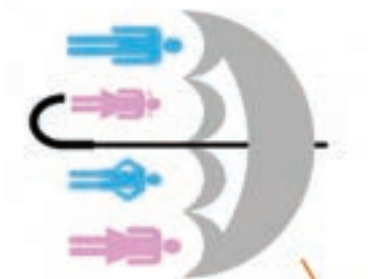
Interim Action

When?

- Assault; physical harm
- Target uncomfortable working with accused
- If misconduct ongoing

Why:

- To prevent further harm to target & others
- Protect organization
- Protect accused



33

Tips for Talking to Accused

Don't

Put words in his/her mouth

Shy away from difficult questions

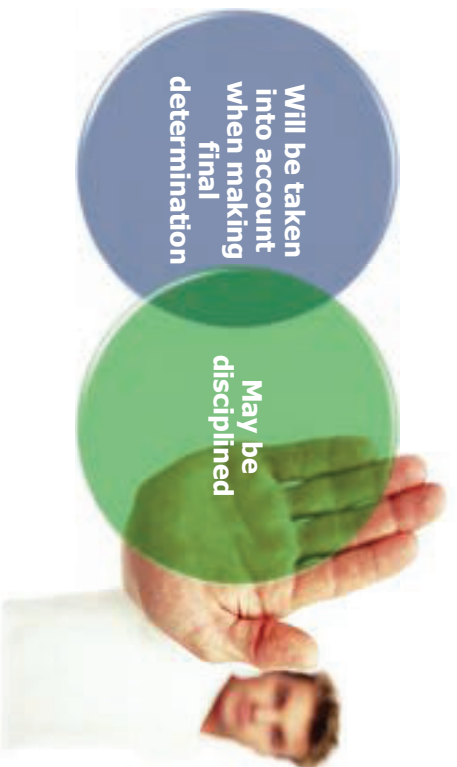
Be surprised at denial

Try to trick person



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If Accused Refuses to Meet



35

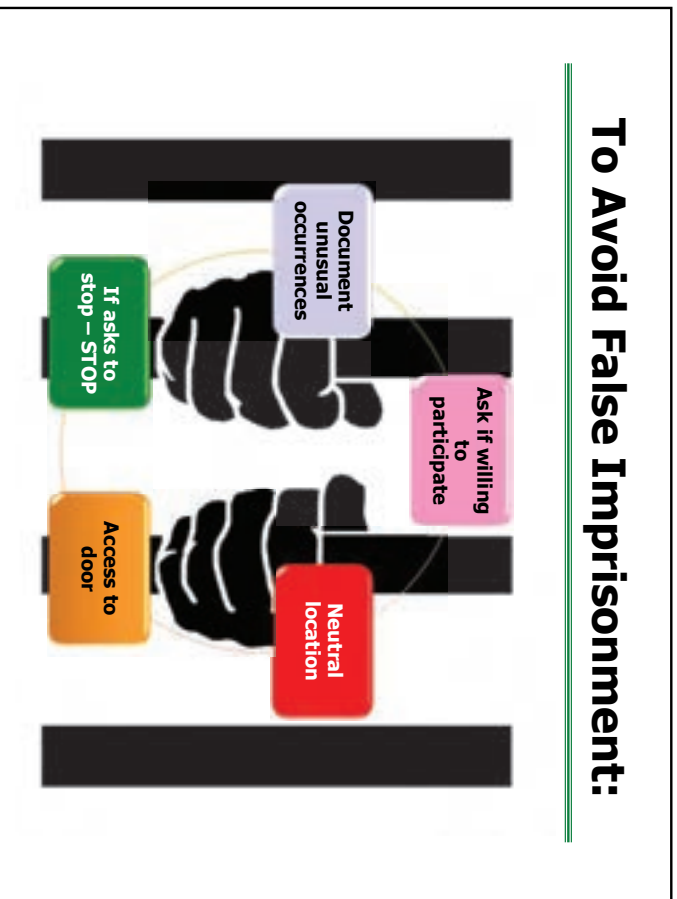
If Criminal Allegation



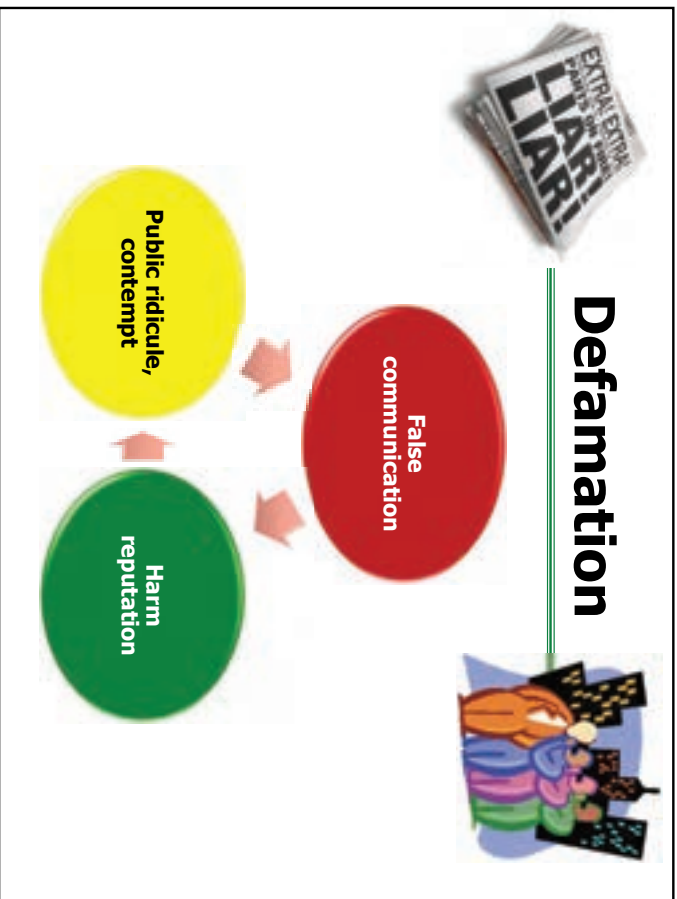
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Tips to Avoid Defamation

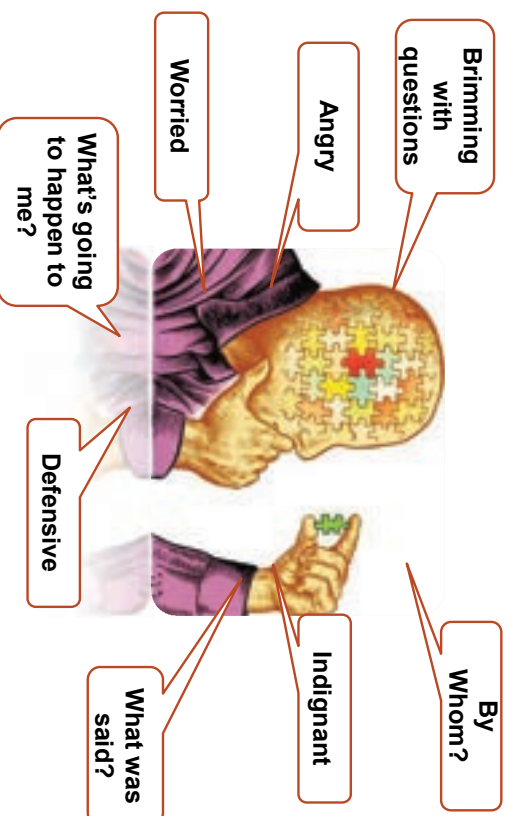
1. Do not unnecessarily disclose details of complaint.
2. Avoid answering employee questions, engaging in gossip or speculation.
3. Tell those being interviewed that confidentiality is required and document it.
4. Don't label the alleged harasser as a harasser.
If harasser is found to have engaged in the behavior – any written or oral communication should conclude only that the harasser violated the organization's policy/.
6. Do not announce that the alleged harasser has harassed.
7. Tell harasser that he/she is being disciplined for violating the organization's harassment policy – not because he/she harassed.
8. Stick to the facts in the final report.
9. Consider two people for interviewing alleged harasser.

Most common circumstances for a defamation claim include:

- Discussing actions of harasser in a conclusory manner
- Making judgments regarding harasser
- Failing to limit dissemination of information gathered

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Accused's Mindset

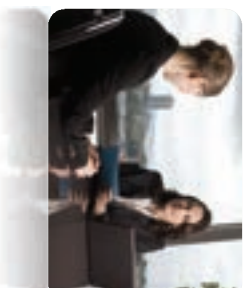


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When Interviewing

➤ Do not:

- Reveal names of others interviewed
- Discuss personal opinions
- Counsel person being interviewed



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Tips on Interviewing the Accused

Prior to interviewing the alleged harasser, consider all of the circumstances surrounding the complaint and follow these general guidelines:

1. Inform the alleged harasser that you will be taking notes and how those notes will be used.
2. Use tact in announcing the reason for talking to the alleged harasser. The person should be told there is a serious matter to discuss.
3. Convey your concern for the difficult nature of the meeting in a neutral manner: *"This may be hard to talk about,"* or *"I can see that you're upset."* *"I'm sorry to have to ask you these questions."*
4. Tell the alleged harasser they have an obligation to cooperate; have the right to be informed of the accusation and present their side; have the right to be treated fairly.
5. Inform the alleged harasser that the organization has a harassment policy and that you are conducting an investigation in relation to the organization policy. Give a copy of the policy to him/her.
6. If the alleged harasser requests to have a lawyer, a friend, or a family member with him or her, inform him/her that if he/she is not present, they should advise the individual nor are part of the process.
7. If the alleged harasser is a union employee and requests the presence of a union representative or other employee during the interview, allow this request, but grant only a brief delay (Generally no more than 24 hours).
8. Ask if his/her participation in this interview is voluntary and document it.
9. Discuss the need for confidentiality and document it.
10. Reassure the person of due process. He/she will be under stress and possibly frightened. Again, your demeanor should be open, concerned and non-judgmental.
11. Present the alleged harasser with a general allegation of misconduct. Leave out specific details of the alleged activity and avoid labeling him/her as a harasser or the conduct as harassment. Describe the behavior and why it may be a violation of the organization's policy.
12. Get his/her side of the story, including any possible motivation the accuser might have for falsely alleging harassment, if appropriate.
13. Question the alleged harasser about each specific allegation.

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Tips on Interviewing the Accused, continued

14. Don't ask if he/she harassed the victim. His/her definition of harassment may be inaccurate. Instead, elicit specific responses to each allegation: *"What did you do or say?" "What did she/he say?" "What did you intend by your actions or comments?"* (Be aware, however, that while courts generally look at the perception of the recipient of the alleged harassment, the harasser's intent is not always the case. *"Did the [name of person] object?" "Did you talk to anyone?"*
15. Be prepared for anger, denials, and defensiveness.
16. Describe the investigative process and review your tentative schedule.
17. Ask the alleged harasser if there are any witnesses or written evidence he or she can offer to rebut the allegation.
18. Inform the alleged harasser that they do not have the right to confront the victim directly, or to know what people are interviewed about the complaint, or to be present at interviews.
19. If additional allegations are made during the investigation, or other information is discovered, the alleged harasser should be informed and given a chance to respond, following the format of the original investigation.
20. Many alleged harassers have not thought through the power they have as it relates to retaliation. Inform the alleged harasser that he/she should be aware that he/she could be perceived as offensive, or that they could not be approached about the effects of their behavior. The common response of the accused is: *"If there was a problem, they could have just told me."*
21. Although the main goal of the interview is to get the facts from the alleged harasser's point of view, bear in mind that most courts will look at the alleged conduct through the eyes of the victim. Thus, do not let his/her stated "intentions" with respect to his behavior sway you from focusing on the facts.
22. Warn the alleged harasser that retaliation is against organization policy and the law. Reiterate that all parties to the investigation, including witnesses, are protected against retaliation and that any violation of this policy could result in severe disciplinary action. Advise the alleged harasser that the organization has a policy against retaliation and to identify areas of disagreement, then formulate follow-up questions for both parties, if necessary.

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Sample Interview Questions: The Accused

1. *Be serious and to the point. Begin with, "The purpose of this meeting is to talk about an allegation of misconduct (a violation of our harassment policy)." Focus on the behavior, not the intention of the alleged harasser.*
2. *If possible, do not initially reveal the identity of the person who brought the complaint. If possible, do not reveal the identity of the person who brought the complaint until the alleged harasser has been asked to touch the back of a female who was standing by the water fountain around ten o'clock this morning?"*
3. "What is your response to the allegations? Please tell me what happened in your own words. Be as detailed as you can."
4. "What exactly did you say to her/him?"
5. "Did you touch him/her? If so, where and in what manner?"
6. "Where did the situation occur?"
7. "What was her/his response at the time?"
8. "Did you make her/him any threats or promises?"
9. *If the employee refuses to answer, explain that "We cannot make you answer, but when you don't, we assume it's because it's against you".*
10. *When dealing with an alleged harasser who denies the allegation, explain that you have two sides of the story and that you will be doing additional fact finding before making a determination.*
11. "Did you know she/he filed a complaint? When?"
12. "Please describe your office atmosphere."
13. "Did that change in any way after the incident(s)?"
14. "What is your relationship with the victim?"
15. "Have you every dated her/him? When did that relationship end? Under what circumstances?"
16. "Were there any witnesses to the incident(s)? Under what circumstances?"
17. "Were any of the allegations she/he made true? Which ones? Which ones do you disagree with and why?"

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Sample Interview Questions: The Accused, continued

18. "What motivation would she/he have to make this up?" *(If alleged harasser denies complaint)*
19. "Were other people involved in the incident? Who were they? What were their reactions to the incident(s)?"
20. "Can you think of what triggered the incident or caused you to touch her/him?"
21. "Did you talk to anyone inside or outside of the organization immediately after the incident(s)?"
22. "Has anyone, a supervisor, spoken to you previously about your conduct?"
23. "What was your response?"
24. "Have you ever been accused of inappropriate conduct before?"
25. "Do you understand the non-retaliation policy of the organization?"
26. "Do you understand the investigation process and what will happen from here?"
27. "Is there anyone else who should be talked to?"
28. "Do you have any other questions or comments to add?"
29. "I can see you are angry/sad, etc. What do you recall? What is your version?"

46

Informal Resolution

What Is It?



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Formal vs. Informal

Formal Procedures

Disadvantages: To determine if harassment has occurred, the credibility of the alleged offender, appropriate sanctions, or remedies.

How Initiated: Generally, charges of harassment are brought by the complainant, manager, or a third party. Usually, a formal investigation is conducted, and the results are made available to formal procedures.

Investigation: Always required.

Outcomes: If harassment is found, a variety of actions may be applied.

Advantages: Sanctions may be invoked; a formal investigation is conducted; a written commitment to the issue; may settle credibility issues; create record in event of future claims.

Comments: May be invoked by complainant or institution at any time.

Record Keeping when Informal Procedures Are Used:

It is often difficult to recognize sexual harassment in many organizations. Records of informal complaints are not kept or are scattered throughout the organization, or because those in a position to know—Directors of Human Resources—are no longer in those positions. It is important that organizations develop some system to keep track of complaints, especially informal reports of harassment.

Adapted from: Educator's Guide to Combating Sexual Harassment. Thompson Publishing

Informal Procedures

Disadvantages: To stop the behavior. Should not be used for repeated or serious offenses (e.g., assault).

How Initiated: May be complainant's and/or organization's preference to use informal procedures. Generally do not involve written charges.

Investigation: Complainant and alleged harasser may be interviewed, but usually no extensive investigation is necessary.

Outcomes: Generally, the harassment stops. However, if the harasser continues the behavior, further action may be required, such as one party, voluntary resignation or the harasser, warning.

Advantages: Less fighting and rigidity; a written record is maintained; a written record of negative publicity; no need to challenge motives or behavior; may educate harasser; no issues of definition of sexual harassment; no issues of credibility of the complainant; may play active role in resolution; provides options for complainant and wide range of responses; usually less publicity.

Disadvantages: Less educational value; staff may not learn about resolutions and seriously believe institution is not handling harassment issues; record keeping may be inadequate; some organizations may use informal procedures to avoid the use of several formal resolutions without anyone knowing about them.

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Who is a Witness?



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Tips on Interviewing Witnesses

1. Inform the witness that you will be taking notes and how those notes will be used.
2. Have they observed any "misconduct" in the workplace or problems between particular individuals? If so, ask them to identify the individuals involved.
3. If they do not identify the victim or the alleged harasser, be more specific. Bear in mind that your goal is to elicit as much information as possible while divulging only what is absolutely necessary.

Ask who, what, when, where and how questions.
4. Remind witnesses to focus on what they observed, but if they heard something from a co-worker or someone else, ask from whom, and interview that individual.
5. Use the witness to discover the parties' relationship with each other.
6. Appear at ease, neutral, and routine. Be supportive.
7. Assure the witness that it is important to tell the truth and not to worry about the consequences of comments. Inform them that no adverse action against them will result, and that no retaliation against him/her will be tolerated.
8. Ask the witness if he/she knows of the behavior that is the subject of the complaint.
9. Reveal only the factual information necessary to your interview. This will, however, include names of the parties and a general description of the complained activity.
10. Solicit specific details, including "What do you know?" "What incidents did you see?" "Where?" "When?" "Have you seen [the alleged harasser] behave this way with anyone else?" etc.
11. Ask if the witness knows of any other potential witnesses.
12. Use open-ended and non-leading conversational questions, which induce the witness to reveal what he or she actually knows.
13. Minimize duplication of witnesses.
14. Stress importance of honesty.
15. Do not promise confidentiality.
16. Get pertinent background information on the witness (position, length of employment, work telephone number and address, etc).
- 17.

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Tips on Interviewing Witnesses, continued

18. Don't ask if the witness has seen or experienced "harassment". Ask instead about specific behaviors observed. It is all right at the conclusion of the interview to explain the organization's definition of harassment and give a copy of it to the witness.
19. Do not discuss the merits of the allegations or the actions, if any, to be taken following the investigation.
20. Do not reveal the names of other individuals that you will interview.
21. Don't spend excessive time interviewing witnesses with no personal knowledge of the facts.
22. Don't limit your interviews to the individuals identified by the parties.
23. Emphasize confidentiality and document it.
24. Confirm their voluntary participation in the interview and document it.

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Sample Interview Questions: The Witnesses

1. *If possible, do not initially identify the alleged recipient or the alleged harasser. Say to the witness, "Your name has been given to us as a person who may have observed interaction(s) between several employees, and we'd like to talk to you about your observations."*
 - "Describe the situation and circumstances of the alleged harassment". *For example, "Were you in the hallway by the water fountain this morning?"*
 - *Focus on the witnesses' observations, not assumptions or opinions about the personalities of the people involved in the allegation.*
2. "Have you seen any misconduct or inappropriate action? When?"
3. "Who was involved?"
4. "Where did the incident(s) take place?"
5. "Please describe the conduct as specifically as possible".
6. "What exactly did he/she say? Where did he/she touch him/her? How?"
7. "What was her/his response to the conduct?"
8. "What was his/her attitude during the incident(s)? Joking? Threatening?"
9. "Were you a participant in the incident?"
10. "How did you come to observe the situation?"
11. "How did you feel during the incident?"
12. "Did you speak to anyone about it? Did you report it to anyone in authority? Did you ever speak to the victim or alleged harasser about it?" If so, what did you say?
13. "What was the impact of this behavior on the victim? On you? On the department?"
14. "Have you ever seen him/her act in a similar way with other employees? Females? Males? Disabled? Jews? Blacks?"
15. "To your knowledge, what is the relationship between the two people involved? Have you ever observed any evidence of a social relationship between the two—frequent lunches, after work get-togethers, etc?"
16. "How would you characterize the workplace/department atmosphere?"
17. "Have you observed any change in the atmosphere since the incident(s)?"

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Sample Interview Questions: The Witnesses, *continued*

18. "Did the victim or the accused talk to you shortly after the incident(s)? What did he/she say?"
19. "Who else besides you and the two people in question were present?"
20. "How would you characterize the victim? The alleged harasser?"
21. "Have you ever noticed any tension or unusually friendly behavior between the two employees? Has their working relationship changed recently?"
22. "What is your relationship with the victim? The accused?"
23. "Are there other people who should be interviewed about this complaint?"
24. "Do you have any questions about this investigation that I might be able to answer?"

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Taking Statements, *continued*

Occasionally, it is in the investigator's best interest to have the interviewee sign her/his statement, if the interviewee is a minor, is illiterate, or is a foreigner. A formal signed statement should be considered if any of the following situations exist:

- The interviewee will not be available in the future (relocating, changing companies, imminent death, etc.).
- You have reason to believe the interviewee may change her/his story.
- The interviewee has a terrible memory or is a bad historian.
- The interviewee has significant first hand knowledge and evidence relating to the situation under investigation.

Voluntary Statements

Attempt to persuade individuals to provide a voluntary statement. Ask the individual to assist you in providing a written statement. Explain that a written statement will reduce the chance of an individual being misinterpreted or misquoted.

You may write the statement yourself (as dictated by the individual) or have the individual write the statement. In either case, the statement should contain the following:

- The first paragraph should begin as follows:
"I (name), provide the following voluntary statement to (name) who has identified her/himself as (title). This statement is provided without coercion, or receipt of promise or reward and is unconditionally submitted."
- The handwriting must be legible – the statement may be printed or typed if the handwriting is illegible.
- The statement should include the start and finish time at the top of the page.
- The individual's statement should include a recitation of all facts including: who, what, where, when, and how information. You may guide the individual to make sure they cover all pertinent topics.
- Instruct them to not skip lines.
- The individual should sign, date and number **each** page of the statement.
- The individual giving the statement should initial any crossouts or erasures.
- The conclusion of the statement should include the following language:

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Taking Statements, continued

"I have read this document and have initialed each page and all corrections and deletions. This statement is true and correct to the best of my knowledge."

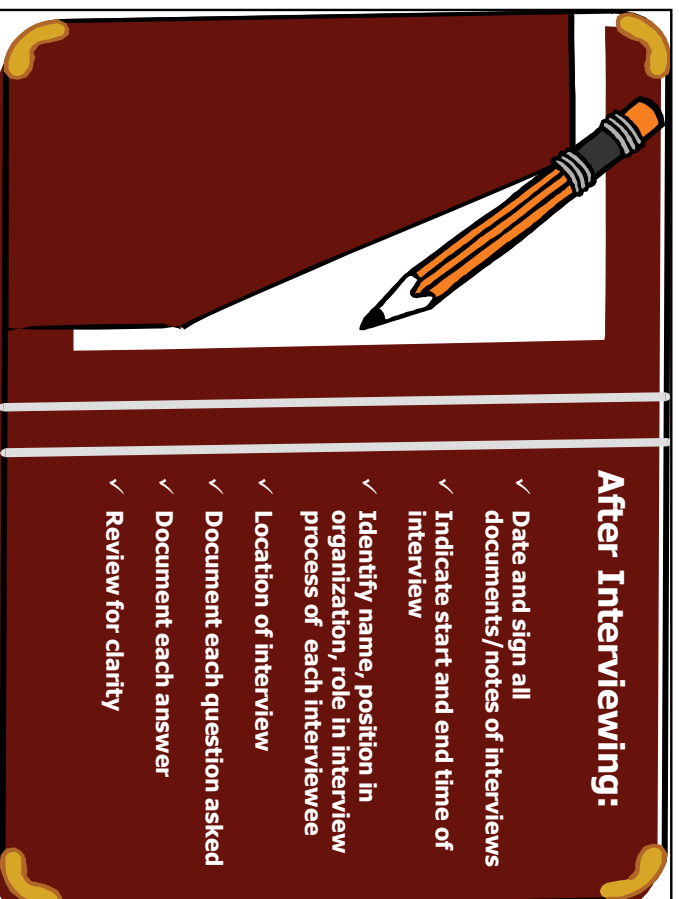
- The statement should be witnessed by at least one person. The witness should sign and date every page of the statement.
- Provide a copy of the statement to the individual. You should maintain the original in the investigation file.

Involuntary Statements:

You may require employees to provide statements, but under no circumstances should you attempt to influence any part of the statement. You may, however, advise individuals to cover certain topics in their statement.

- The involuntary statement should begin with the following paragraph:
"I (name) provide the following statement to (name) who has identified her/himself as (title). This statement is true and correct to the best of my knowledge."
- Follow all guidelines above.

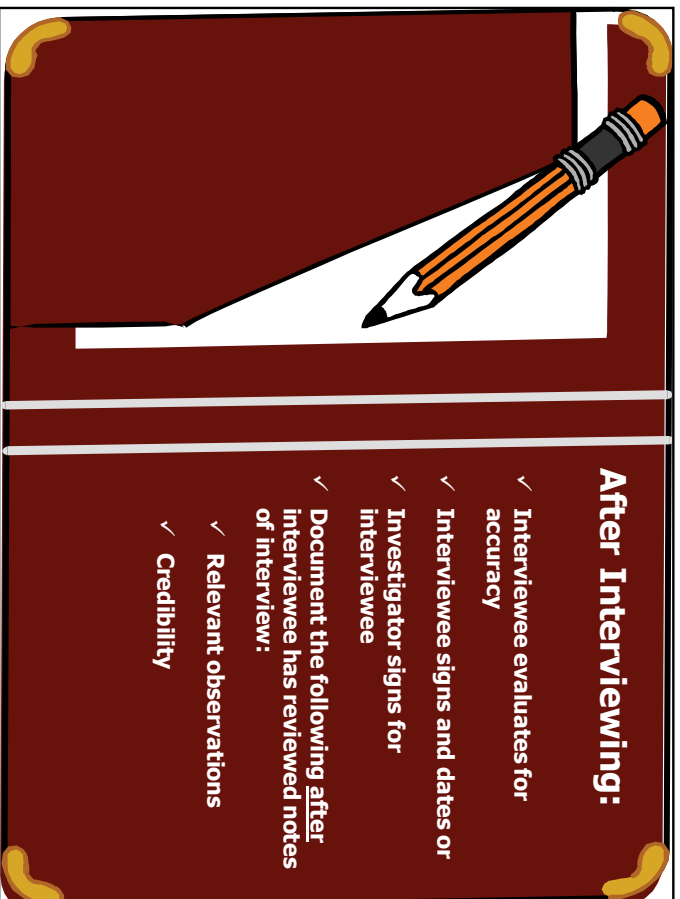
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After Interviewing:

- ✓ Date and sign all documents/notes of interviews
- ✓ Indicate start and end time of interview
- ✓ Identify name, position in organization, role in interview process of each interviewee
- ✓ Location of interview
- ✓ Document each question asked
- ✓ Document each answer
- ✓ Review for clarity



After Interviewing:

- ✓ Interviewee evaluates for accuracy
- ✓ Interviewee signs and dates or
- ✓ Investigator signs for interviewee
- ✓ Document the following after interviewee has reviewed notes of interview:
 - ✓ Relevant observations
 - ✓ Credibility

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Documentation

- Names(s) of investigator(s)
- Your name
- Date
- Name of person interviewed
- Start and end times of interview
- Each question (open ended) asked
- Interviewee's response to questions
- Identify if interviewee's response is hearsay/rumor or if it was actually seen or heard by interviewee
- Be objective
- Be detailed
- What happened – use verbatim quotes if possible; state specifically where the victim was touched
- Where it happened – whose office, which hallway, etc.
- When it happened – date and time
- Who was involved – victim, alleged harasser/bully, witnesses
- How incident(s) impacted victim personally, professionally, physically
- Statements by witnesses
- Dates investigation began and ended
- Identify documents reviewed and facts contained within
- What organization policies were violated and how
- Your impressions – overall appearance, facial expressions, questions, tone of voice, emotions of each interviewee

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Documentation, continued

Credibility Assessments: as soon as each interviewee leaves the room, you should assess her/his credibility. On a separate sheet of paper, note the following:

- A. Demeanor
 - How did the interviewee react to the allegations (e.g., argumentative, defensive, hostile)?
 - Does the person inspire confidence in the listener?
 - Note body language.
- B. Logic/Consistency of Story
 - How does the interviewee's chronology and perception of events relate to that of the other interviewees?
 - Does the interviewee's story make sense?
 - Was the person forthcoming?
 - If the interviewee's version of the facts is completely different from others, ask whether the individual who contradicts this person's version of the facts would have a reason to lie about the interviewee.
- C. Affirmative Statements
 - Did the interviewee make any admissions (e.g., say "I said that, but I didn't mean anything"?)
 - Did the person specifically deny anything? Was the denial consistent throughout the interview?

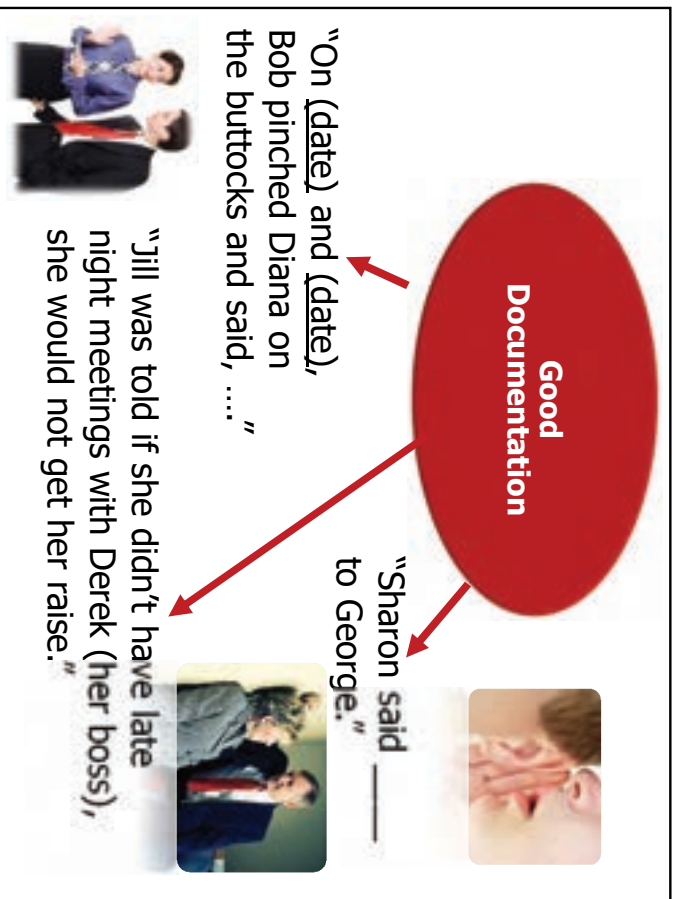
Did the interviewee claim they had no recollection of a particular fact? Clarify, "I don't recall" versus "I recall and deny that allegation."

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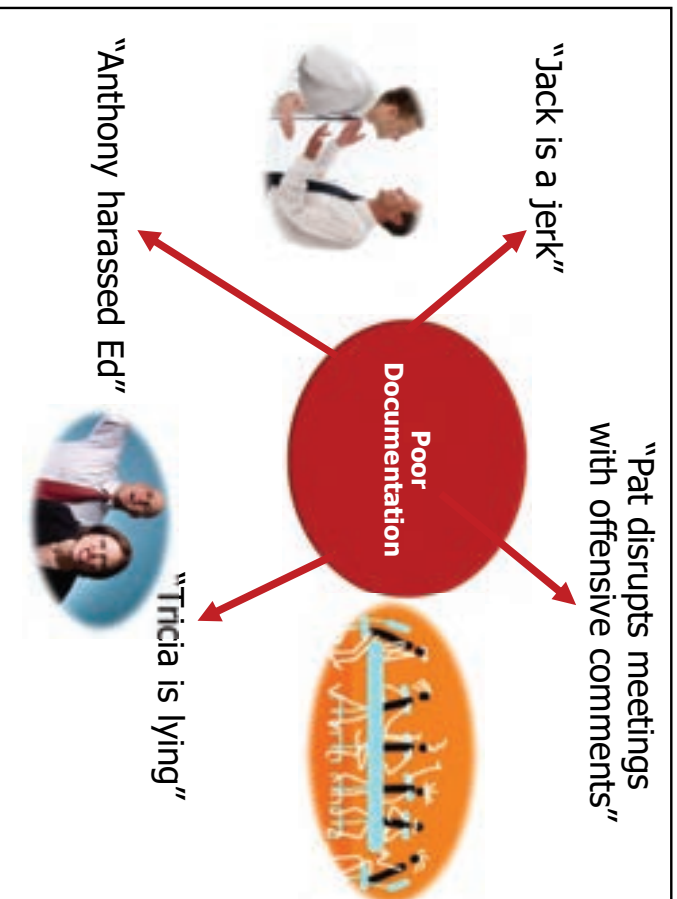
Assessing Credibility

- ◆ Ask yourself – Did I believe the people interviewed? Does the story sound fabricated?
- ◆ Would a jury believe . . . ?
- ◆ Credible impression?
- ◆ Demeanor?
- ◆ Admit or deny?
- ◆ Contradict?
- ◆ Story change?
- ◆ Story makes sense/logical?
- ◆ Reputation?
- ◆ Corroborating evidence?
- ◆ Pattern of conduct?
- ◆ Inconsistent/consistent statements?
- ◆ Writings developed after incident?
- ◆ Biases and motives?
- ◆ Willingness to interview?
- ◆ "Detailed" complaint?
- ◆ Others who report harassment by same individual?
- ◆ Timing – Delay in coming forward to complain
- ◆ Plausible?
- ◆ Change in victim's behavior after the incident(s)
- ◆ Clarify "I don't recall" vs. "I don't remember if it occurred,"
- ◆ Misperceptions and miscollections exist – not necessarily because someone is lying, but they believe their perception.

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Creating Documentation

Don't Create "Bad" Documents

What are "bad" documents? Document that:

- Are ambiguous, easily misinterpreted
- Include factual errors or opinions
- Do not consider consequences of statements made

Creating "Good" Documents

Threshold issue: Does it need to be created?

- What purpose does the document serve?
- Are there possible negative consequences?
- Should the documentation be retained?

Writing Good Documents:

- State facts, not opinions. Where possible, cite specific incidents or behavior rather than making conclusions about the employee.

NOTE: In some cases, it may be impossible to avoid using an opinion to communicate. Where opinions are used, support them with objective facts, tailor the opinion narrowly to the issue involved, do not make assumptions, and clearly identify that it is your opinion only.

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A Determination is Required



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In Reviewing the Evidence, the Investigator will:

- search for corroborative evidence
- determine whether conduct was “welcome”
- consider the absence of corroborating evidence
- make a determination based solely on credibility, if necessary
- consider background
- consider conduct
- distinguish between behavior that was “voluntary,” but coerced, and behavior that was clearly unwelcome, and
- consider whether there was delay in complaining about the alleged behavior

A Determination Needs to be Made Regarding:

- What actually happened? Can we determine what happened?
- Was there a violation of organization policy or the law? – Yes? No? Probably yes? Probably not? Not able to determine?
- What actions need to be taken regarding:
 - the victim
 - the alleged harasser or bully
 - the follow-up training
 - “workplace healing?”
 - communication of harassment policy
- Was behavior:
 - against company policy?
 - inappropriate, but not harassment?
 - subtle harassment?
 - moderate harassment?
 - severe harassment?

If it is determined that harassment occurred, the organization must take immediate and appropriate corrective action by taking the necessary steps to end the harassment and to prevent it from occurring again.

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Reaching Conclusions

Did behavior occur?



Severe



Number and frequency of encounters



Effects on victim



Context of harassment/occur in public or private

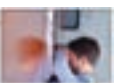
Was it harassment?



Welcome



Current and prior relationship of parties



Effects on work environment



Adverse employment actions against victim

66

Reaching Conclusions

- Make a determination based solely on credibility, if necessary
 - Distinguish between behavior that was "voluntary," but coerced, and behavior that was clearly unwelcome
 - "Preponderance of evidence" – not, "Beyond a reasonable doubt"
 - Credibility of each party
 - Documentation
 - Observations of investigation
 - Witness statements
 - Motivation to lie – by anyone
 - EEOC Guidelines
 - Case law
 - Title VII, Title IX, other Civil Rights Law
 - Unwelcome
 - Gender-based, race-based, disability based, etc.
 - Severe/pervasive
 - Reasonable person
 - Collaborating evidence
 - Effects on the victim
 - Number and frequency of incidents
 - Relationship of the parties
 - Effects on the work environment
 - Content of the harassment – public/private
 - Retaliation
 - If no witnesses, did anyone notice a change in the victim's behavior?
- Don't be afraid to make a judgment because you could be wrong. Your investigation needs to be thorough, fair and objective.
- Usually there are indications regarding the truth with a "he said/she said" scenario.
- Generally 5%-10% of investigations are inconclusive

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Don't be afraid to make a judgment because you could be wrong.

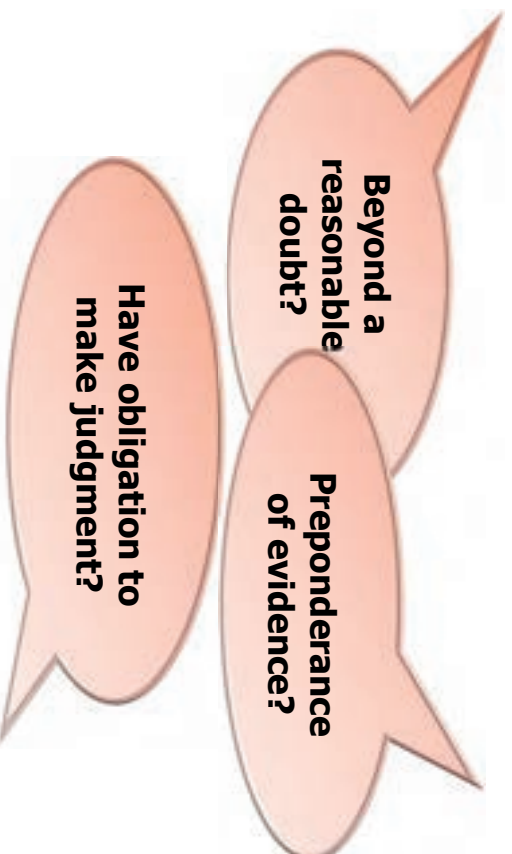
Usually there are indications regarding the truth with a "he said/she said" scenario.



Generally, 5% - 10% of investigations are inconclusive.

68

What Standard Applies?



69

Federal & State Laws

"State's" Human Rights Act

Title VII

GINA

ADAAA

LGBTQI

ADEA

Title IX



Pregnancy Discrimination Act

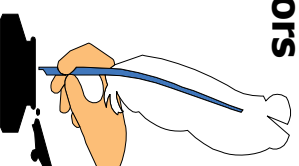
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EEOC Definition of Sexual Harassment

- Sexual advances

Requests for sexual favors

- Verbal or physical conduct of a sexual nature



1980

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Factors

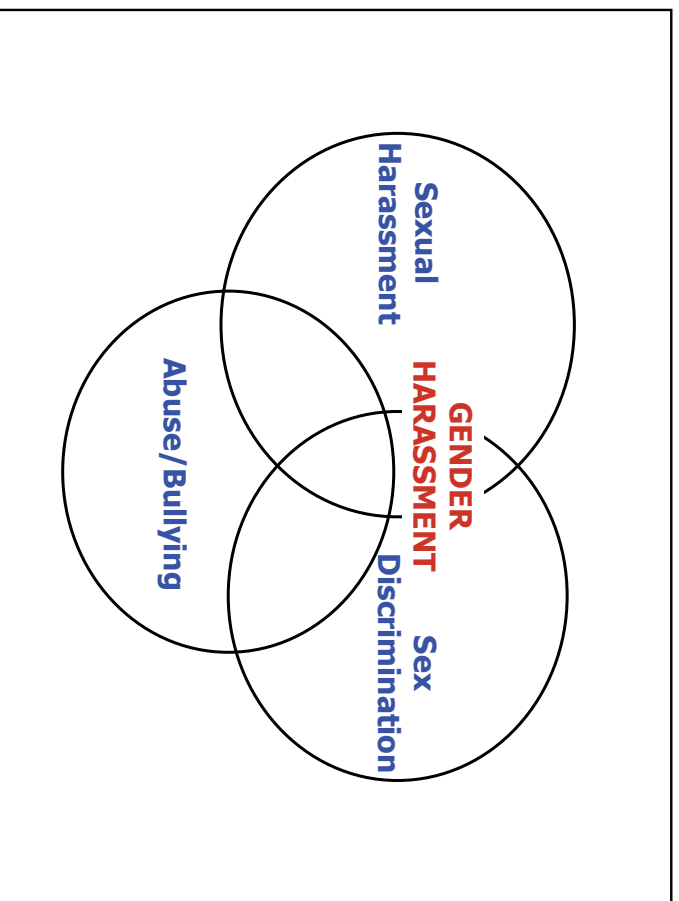


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Know the Protected Classes!



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Gender Harassment

- Hostile Work Environment
 - Environmental context
- 

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Common Law Tort Claims Against Managers & Organizations

- ✓ Aiding & Abetting
 - ✓ Assault & Battery
 - ✓ False Imprisonment
 - ✓ Intentional infliction of emotional distress
 - ✓ Negligent hiring or supervision
 - ✓ Personal Injury
 - ✓ Intentional interference with business relationship
 - ✓ Breach of contract
- 
- A stack of books is shown in the bottom right corner. The top book is black with the word 'LAW' written in gold capital letters. A gold-colored bookmark or ribbon is visible, sticking out from between the pages of the top book. The books are slightly out of focus, serving as a decorative element.



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If Complaint Not Substantiated, Tell Accused:

**"The company policy is...and any further complaints
will result in..."**

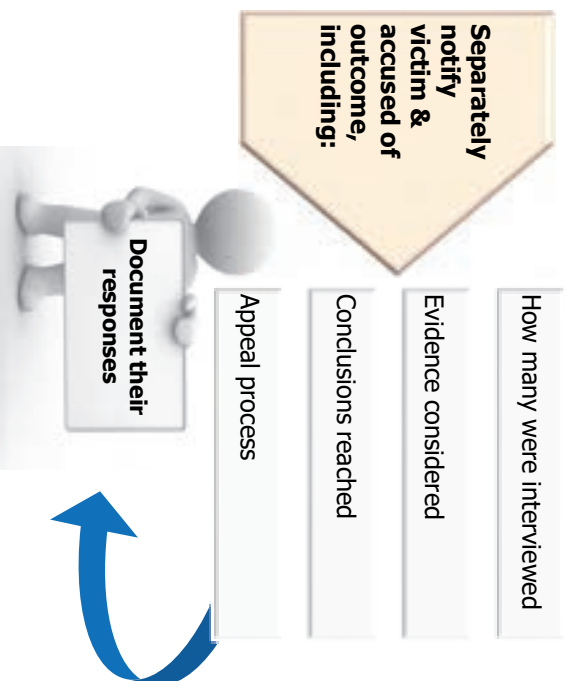
**"The company considers allegations serious and
although the facts are disputed, such conduct is
forbidden and will not be tolerated."**

**Document the
conversation and place
documentation in both the
victim's and harasser's
file.**



78

Follow up Action



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What Actions Need To Be Taken Regarding:



- ✓ The victim
- ✓ The alleged harasser
- ✓ The follow up training
- ✓ “Workplace healing”
- ✓ Communication of harassment policy

80



Make the victim "whole"



81

What is Appropriate Discipline? (EEOC)



82

**The question to
ask yourself is...**

"How will I feel
sitting on a witness
chair in a courtroom,
under oath,
explaining my
actions?"



83

Disciplining Offenders



Must stop harassment!



- Were company policies, guidelines or practices violated?
- Did harasser commit a serious offense?
- How has organization treated other offenders?
- Do any federal, state or local laws require certain action?
- How long has offender been with organization; what is offender's performance history?
- Any mitigating circumstances?
- What does collective bargaining agreement say?

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Corrective Action



- Written agreement not to engage in behavior
- Altered work schedules or responsibilities
- Apology
- Verbal warning
- Transfer
- Written warning
- Suspension
- Probation
- Termination
- Demotion
- Fines
- Education
- Counseling
- Discipline for management
- ↑ Supervisory oversight

85

**Do I tell the
victim the
perpetrator's
consequences?**

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If don't tell:

- Cloak of secrecy
- Lowered morale
- Rumor
- Employees mystified
- Better closure for victim if informed

87

Monitor Environment

- Purposeful meetings with victim
- Ensure misconduct has stopped
- No retaliation
- Purposeful meetings with accused as needed



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Follow Up

1. Separately notify the victim and the accused of the outcome of the investigation:
 - How many interviewed
 - Evidence considered
 - Conclusions reached
 - Appeal process
 2. Document their reactions and place with your investigation file.
 3. Management should make whatever amends necessary to make the victim "whole" such as back pay, benefits, vacation, and pay damages, if any.
 4. Discipline the harasser.
 5. Any remedial action taken needs follow up to ensure compliance, e.g., meeting with the victim to ensure harassing behavior has stopped, meeting with harasser to ensure he is in counseling, etc.
 6. If the complaint was not substantiated, tell harasser – "The company policy is . . . and any further complaints will be result in . . .". The company considers allegations serious and although the facts are disputed, such conduct is forbidden and will not be tolerated." Document the conversation and place documentation in both the victim's and harasser's file.
- There are pros and cons as to whether the victim should be told of the consequences to the harasser.
- If you don't tell the victim of the harasser's discipline:
- Decreased morale
 - Cloak of secrecy
 - People are mystified
 - Rumor and problems
 - If victim has more information, there will be better closure

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Appeals

Purpose: Focuses on a specific concern regarding how the investigation was handled (e.g., critical witness/information/documentation misused).

An appeal is not designed to appease workers who are upset regarding the outcome of the investigation.

Explain: If the victim or harasser cannot state why s/he wants an appeal, explain that the organization conducted a fair and thorough investigation and handled the discipline as they saw fit. Remind the victim or harasser that s/he is not privy to all information gathered and that conclusions are based on some facts the victim or harasser is not aware of.



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The Final Report

The final report is a comprehensive rendition of the investigative process. It documents the complaint, the process, and the outcome. It is recommended that a copy of the report be sent to the legal department (or the organization's legal counsel) for review before being sent to the final decision maker. If the harassment incident was minor, the report does not need to be as in depth and may be no more than a one-page summary. The final report includes the following:

- I. A one-page summary with a general overview
- II. Background information
 - Process of the investigation, including the who, what, where, and when of incidents and the investigator's responses
 - Detail of the complaint in chronological order
 - List of documents reviewed
 - Interview information per party including:
 - ~ questions asked
 - ~ answers given
 - ~ differentiating rumor from fact
- III. Summary of complaint and findings
 - Behavior that occurred and the investigator's opinions, along with the rationale for those opinions
 - Determination as to whether the behavior constituted harassment by comparing the behavior with the organization's policy, EEOC guidelines, and other case law
 - Statement saying whether the organization's policy was violated
 - Other factors involved such as alcoholism, poor work environment, previous discipline, personality conflicts, etc.
 - Identifying conflicting evidence and how that influenced the outcome of the investigation
 - Separating fact from investigator's impressions (and explanation for impressions)
- IV. Recommendations
 - Recommend corrective action designed to stop the harassment and consistent with past discipline; not to be punitive to the victim
- V. Appendix
 - Names of any other victims discovered during the investigation
 - Analysis of interviews
 - Copy of memos to . . .
 - Any investigational concerns such as poor management
 - Typed interviews of all parties

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Investigation File:

- Interview notes
- Written outline/questions/topic areas
- People interviewed
- Reason key person not interviewed
- Copies of documents
- Written statements
- Not personnel file



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Appendix

- Names of other victims
- Analysis of interviews
- Copies of.....
- Investigational concerns
- Typed interviews
- Investigator's notes



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Documentation for Personnel Files



- ✓ On ____ (date) Suzie informed HR that Billy had xxxxxxx.
- ✓ An investigation occurred on ____ (dates).
- ✓ It was determined that Billy's misconduct had occurred and was a violation of XXXX policy.
- ✓ Billy was given a written warning.

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Common Problems and Mistakes

1. Behaving like an ostrich by ignoring a problem; letting a problem slide without recognizing its seriousness
2. Honoring confidentiality requests, thereby letting harassment continue
3. Not talking to the right people when investigating a complaint
4. Harboring preconceived notions about the parties and the complaint
5. Failing to listen carefully to all parties during interviews
6. Failing to keep the person who brought the complaint and the person accused of harassment apprised of the investigation's progress
7. Failing to properly document the investigation
8. Doing nothing in a he-said, she-said situation, rather than assessing the credibility of the parties and deciding what likely happened
9. Not taking the right effective remedial action – i.e., taking steps that don't stop the harassment
10. Transferring the victim to a different job, rather than moving the harasser
11. Do nothing ("I'll stop") – denial
12. Making conclusions ("Ole Bill wouldn't have done that")
13. "Finessing" the problem
14. Failing to take corrective measure
15. Requiring formal and/or written complaint
16. Inadequate investigation ("He said/she said" witnesses don't cooperate)
17. Confrontational solution
18. Don't report it to proper authority for investigation
19. Resistance – no training, etc., as too controversial
20. Labeling – "feminist", "militant", and "manipulative"

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Do's & Don'ts



Do's:

- be respectful
- be neutral
- be empathetic
- be responsive
- expect emotional response
- use appropriate vocabulary based on interviewee's education and intelligence
- be warm and inviting
- paraphrase
- ask follow-up questions
- use active listening
- be flexible

Don'ts:

- identify who you will be interviewing
- discuss merits of completeness
- reach conclusions until after investigation completed
- accuse alleged harasser
- make promises of time and action
- make assumptions
- use word "harassment" to inquire of a specific behavior
- say...
"That explains a lot."
"Something will be done about this."
"I have a hard time believing..."
"Why did you do that?"
- be cold and unemotional
- talk too fast
- promise confidentiality
- state the policy has been violated
- commit to complainant's wishes of remedy
- overreact to emotions

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20 Key Principles of a Harassment Investigation

1. Take the complaint seriously. Assume the victim her/his complaint is being taken seriously and that the organization will respond to the problem promptly.
2. Be open-minded. Do not presume guilt or innocence prior to the investigation. Avoid making determinations based on the appearance, position, or reputation of the people involved.
3. Determine who should be advised of the investigation and what they (e.g., supervisors, co-workers, management, etc.) will be told.
4. Determine what documents should be studied in addition to the sexual harassment policy (e.g. prior complaints, the handbook, personnel files, and organizational chart, etc.)
5. Study the environment: review the work area and general communication and behavior among staff.
6. Employees have the right to have someone with them during the interview.
7. Identify the questions for interviews of all parties. Use open-ended, generic, non-deferatory questions. Naturally, specific questions must be asked where appropriate.
8. Avoid using dangerous words or phrases, such as "It's just teasing – no big deal."
9. Be fair in the process. Allow sufficient time for interviews. Strenuously attempt to maintain confidentiality but do not promise confidentiality as it is very difficult to achieve.
10. Listen, empathize, and don't judge. Listen to what the victim has to say, empathize but make no judgment or commitment regarding the allegation or how the investigation will be conducted. Reiterate that your organization takes sexual harassment seriously and will not tolerate it.
11. Meet with appropriate management to inform them regarding the obligation not to retaliate, the importance of open lines of communication, the strategies for handling employee discomfort and confusion, etc.
12. Consider whether other issues affect the investigation, such as whether to include union reps, pending lawsuits, etc.

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20 Key Principles of a Harassment Investigation, *continued*

13. Perform the investigation promptly. It is recommended that the investigation begin within 24 to 48 hours of the time the complaint is made. Case law overwhelmingly supports the conclusion that an employee can do much to minimize its liability by acting promptly. A prompt investigation helps to obtain truthful and complete witness statements before either party has a chance to solicit support from friends in the workplace.
14. Maintain adequate documentation of the investigation. Remember it may be an exhibit in a trial someday. Focus on the facts, avoiding conclusion, speculation and the like.
15. Create a separate confidential file accessible only to the investigators. This should include all notes taken during interviews, copies of corroborating documents, and the final written report. If interview notes are to be typed, someone pledged to maintain the confidentiality of the notes should do this. Notes should be typed directly after each interview so they are more accurate and complete.
16. Respond to concerns. If the victim expresses fear, assure her/him that your organization will do everything to ensure confidentiality (but makes no promises), prevent retaliation, and stop further harassment. Answer any questions about the complaint process.
17. Contact your organization's attorney, if appropriate.
18. Determine what will be told to the victim at the conclusion of the investigation.
19. If appropriate, determine what corrective action will be taken, including discipline and/or termination, training, EAP, etc.
20. Follow up on the complaint. Check with the victim to ensure that she/he is not being retaliated against. Document the conversation and, if necessary, intervene on continued harassment and/or retaliation.

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Questions

- If there are any further questions which we were not able to get to today, please feel free to contact me through Train HR Learning.



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Welcome to PBV & Title IX Policy Issues in Higher Education



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Title IX, Title VII and the Americans with Disabilities Act: Responsibilities of Secondary Institutions

March 29, 2023

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DISCLAIMER

*This information is accurate as of the date of
presentation, is for informational purposes, and is
not a substitute for specific legal advice.*

8/20/2022/2023

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Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.

*Education Amendments of 1972 20 U.S.C. § 1681 &
34 C.F.R. Part 106*

REAP TOPICS

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Title IX: What It Is

- Prohibits sexual harassment and discrimination based on sex within educational institutions
- Governed by the United States Department of Education Office for Civil Rights (OCR)
- Evolution: gender equity in athletics → sexual misconduct

REAP TOPICS

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Title IX: What It Is Not

- Limited to athletics
- Limited to sexual assault
- Limited to women
- A recommendation

REAP TOPICS

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Scope of Policy

Prohibited conduct occurring:

- On campus or off-campus
- Within context of university program or activity

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Three Categories of Sexual Harassment

There are three categories that meet OCR's definition of sexual harassment and must be reported:

- Quid pro quo
- Statutory
- Hostile environment

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Category 1: Quid Pro Quo

- "Something for Something"
- Threats or rewards in exchange for sexual behavior
- Involves abuse of supervisory authority

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Category 2: Statutory

“Sexual assault” as defined in 20 U.S.C. § 1092(f)(6)(A)(v)
“Dating violence” as defined in 34 U.S.C. § 12291(a)(10)
“Domestic violence” as defined in 34 U.S.C. § 12291(a)(8)
“Stalking” as defined in 34 U.S.C. § 12291(a)(30)

*Conduct that falls within any of these definitions
must be reported.*

10/1/2023

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Consent

- Permission for something to happen or an agreement to do something
- Presence of coercion, intimidation, threats, force, incapacitation → absence of consent
- Consent to one form of sexual activity does not imply consent to other forms
- Something to consider: power dynamics and consent

10/1/2023

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Category 3: Hostile Work Environment

“Sex-based harassment is unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient’s education program or activity.”
U.S. Department of Education

10/1/2023

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What Does All This Mean?

NO:

- Prohibitions on participation based on sex
- Unequal funding of athletics
- Discrimination based on pregnancy
- Sexual harassment
(includes sexual assault, stalking, domestic/dating violence)

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Pregnancy and Title IX

"A recipient (of federal funds) shall not apply any rule concerning a student's actual or potential parental, family or marital status which treats students differently on the basis of sex."

U.S. Department of Education

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What Does This Mean?

- No discrimination against a person based on pregnancy, childbirth, termination of pregnancy, or recovery
- Cannot exclude
- Appropriate and reasonable accommodations

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True or False?

Sexual assault that occurs during a university's study abroad program is covered by Title IX procedures.

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True or False?

Quid pro quo must occur on more than one occasion to be actionable under Title IX.

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True or False?

Sexual harassment cannot be perpetrated by a subordinate against their supervisor.

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True or False?

A person cannot withdraw consent after consenting to a sexual act.

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True or False?

Conduct must happen on more than two occasions in order to be "severe, pervasive, and objectively offensive."

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True or False?

Discriminating against a person because they have had an abortion is not a violation of Title IX.

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Responsible Parties

- Institution
 - Responsible Employees
- Actual notice of sexual harassment or misconduct
- What is actual notice?
- Notice of sexual harassment is given to the Title IX Coordinator or other personnel who have the authority to institute corrective measures

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Responsible Parties, Continued

- ***Requires*** schools to investigate and address gender-based discrimination, sexual harassment, and sexual misconduct.
- Standard: must act in a manner that is not deliberately indifferent
- Under oversight of Title IX Coordinator
- ***With few exceptions, ANY employee triggers requirement***
- Exceptions: licensed counselors, clergy, medical professionals

REAL PROGRESS

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Responsible Parties, Continued

- ***Requires*** schools to investigate and address gender-based discrimination, sexual harassment, and sexual misconduct.
- Standard: must act in a manner that is not deliberately indifferent
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- ***With few exceptions, ANY employee triggers requirement***
- Exceptions: licensed counselors, clergy, medical professionals

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STOP



REMEDY

PREVENT

REAL PROGRAM

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Actual Notice?

LISTEN



INFORM

ACT

REAL PROGRAM

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Listen

- No judgment
- Be cognizant of revictimization
- Get just enough information

REAL PROGRAM

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Inform

- Your obligation – to report
- Option to report to someone who can maintain confidentiality
- Resources: counseling services, student health services, clergy, Title IX office
- Civil/criminal complaints

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Act

“When a responsible employee knows or reasonably should know of possible sexual misconduct, the Office of Civil Rights deems an institution to have notice of the sexual misconduct.”

- Report to Title IX Coordinator
 - What to report:
 - Identity of Complainant*
 - Identity of Respondent*
 - Alleged misconduct*
 - Details (date, time, witnesses, etc.)*
- U.S. Department of Education*

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Constructive Notice is back y'all! (Probably)

Evolution:

Constructive notice →
Actual notice (current) →

Constructive notice (*proposed* Title IX regulations)

What does constructive notice mean?

- Responsible employee knew or should have known of the sexual harassment
 - Higher standard
 - Considerations

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Formal Complaint

- Can be filed by Complainant or Title IX Coordinator (risk of substantial harm to community)
- Formal complaint → determination of Title IX applicability
 - If Title IX is not triggered, proceed with investigation pursuant to university's Code of Conduct

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Supportive Measures

- Non-punitive, non-disciplinary, individualized services to protect safety of parties and educational environment
 - Implemented when report is made
- **Offered to both parties** (counseling referral, safety planning, academic accommodations, housing accommodations)
- Can include suspension of Respondent on emergency basis

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Investigation

- Investigation requires a formal complaint by complainant or Title IX Coordinator
 - Investigators
 - Notice
 - Standard: ~60 days (but you can set your own)
 - No prohibition on discussing investigation
 - Conclusion of investigation: draft investigative report
 - Parties have 10 business days to review report and submit response
 - Final report

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Advisors

- Each person is allowed an advisor to be present at all meetings and proceedings
- Advisor cannot answer questions on behalf of advisee or generally cannot act as spokesperson
- Institution must provide advisor at no cost, if requested

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Determination

- Hearing panel/Decisionmaker determines outcome
- Title IX Coordinator is responsible for implementation of sanctions
- Sanctions/corrective actions – suspension, warning, expulsion/termination, psychological assessment, restrictions, revocation of admission/degree – all communicated in writing

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Appeal

- Either party can appeal a decision
 - Inappropriate sanctions
 - Erroneous outcome
 - Procedural irregularity
 - Conflict of interest or bias
- New evidence not previously available

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Resolution Options

- **Informal** – not all cases are appropriate for this.
→ Cannot be used when it involves teacher and student,
for example.
→ Parties work with professional to reach resolution.
- **Formal** – possible violation of Title IX
→ Hearing

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Responsibility of a Title IX Coordinator

Oversee “all complaints of sex discrimination and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.”

U.S. Department of Education

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Retaliation

Cannot retaliate against a person who made a complaint or participated in an investigation

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Title IX vs. Title VII (Civil Rights Act of 1964)

- **Title IX** prohibits sex-based employment discrimination in schools, education programs, and activities that receive federal funding.
- **Governed by:** Office for Civil Rights, U.S. Department of Education
- **Bottom line:** equal access for students regardless of gender
- **Title VII** prohibits discrimination in the workplace, which includes discrimination based on sex:
 - **Governed by:** Equal Employment Opportunity Commission
 - **Bottom line:** equal treatment of employees and prohibition against discrimination for those belonging to protected classes (race, color, sex, religion, and national origin)

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History of Title VII

- Title VII of the Civil Rights Act of 1964
- Unlawful to discriminate against a person (employee) based on race, color, religion, sex, or national origin.
- Evolution of application
 - Years of disagreement about applicability to and protection of employees who identify as gay or transgender. Historically, courts interpreted Title VII's prohibitions on discrimination in employment based on an individual's **race, color, religion, sex, or national origin** as extending only to an individual's gender assigned at birth. That started to change in 1989 when the United States Supreme Court held that discrimination based on sex stereotyping is unlawful sex discrimination under Title VII.

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Title IX vs. Title VII

- Title VII applies to employees in the workplace and it is not tied to funding.
- Title IX is tied to funding and is limited to the context of education.
- Title VII is motivated by a desire to ensure equal employment opportunities.
- Title VII comes with money damage provisions to ensure that the law is followed.
- Title IX is compliance-based although there can be damages under Title IX based on court precedent.

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Material Differences Between Title IX vs. Title VII

Standard for Legal Liability

- **Title IX:** deliberate indifference by institution to known acts of discrimination
- **Title VII:** employer did not take prompt and appropriate corrective action; employer negligence in prevention of discriminatory conduct

Jurisdiction

- **Title IX:** schools are required to act when sexual harassment or assault happens in the U.S. within an educational program or activity
- **Title VII:** a school can be held responsible for extra-territorial sexual harassment

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Material Differences Between Title IX and Title VII

Informal resolution

Title IX: acceptable form of resolution as long as both parties consent in writing
Exception: allegations involving employee and student in sexual harassment and sexual assault cases

Title VII: no specific guidance, although informal resolution is permitted

Hearing format

Title IX: recording or transcript required; provide live hearings for formal complaints of sexual harassment and sexual assault

Title VII: no such requirements in this capacity

Title IX: cross-examination must be performed orally and by the party's advisor, it cannot be by a party

Title VII: no such requirements in this capacity

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Material Differences Between Title IX and Title VII

Consequences

Title IX: withdrawal of federal funding, no authority for suits against individual school officials

Document retention

Title VII: no authority for suits against individual school officials

Title IX: records must be maintained for seven years

Title VII: no specific guidance on this → prudent to ensure records are preserved in the event of an EEOC charge or lawsuit

Litigation

Title IX: no requirement that administrative remedies are pursued first, no statute of limitations → lawsuit? State statute of limitations

Title VII: administrative remedies (EEOC) and right to sue letter prior to lawsuit, normally 180-300 days after alleged misconduct

Title IX: no limit on monetary damages

Title VII: cap on monetary damages

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Evolving Distinction Between Title IX and Title VII: Hostile Work Environment

Title VII: [conduct that is] "severe, pervasive, or objectively offensive..."

Title IX: [conduct that is] "so severe, pervasive, and objectively offensive..."

Proposed Title IX regulations

- Broader definition → investigation under more circumstances
- Discrimination based on sex is prohibited if it is "sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively or objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity" (Proposed Rule § 106.2).

May 2020 regulations

- Narrowed definition
- Discrimination based on sex is prohibited only when it is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

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Employees and the Title IX Process: Yes or No?

- Can employee complaints initiate a formal complaint and trigger the formal grievance process requirements under Title IX?
- Can employees be respondents in a Title IX complaint initiated by a student?
- Can employees be subject to the grievance process under Title IX if a formal complaint is filed against them by a student?
- Can a Title IX Coordinator dismiss a formal complaint if an employee-respondent is no longer employed by the school?

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Title IX and Title VII: Preemption

Circuit splits

First, Third, and Fourth Circuits: Title IX not preempted by Title VII

United States Supreme Court: silent

Fifth Circuit (Louisiana)

- **Congress:** purpose of Title VII is to adjudicate cases of employment discrimination versus purpose of Title IX is to enable federal agencies to withdraw funding when instances of employment discrimination occurs
- **Bottom line:** Title IX to bolster and support Title VII where applicable, not supersede
- Employment discrimination based on sex → Title VII preempts Title IX

"We are not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII. We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Lodokoff v. James*, 66 F.3d 751, 753 (5th Cir. 1995)

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Balancing Title IX and Title VII

Process claims where actionable

- Learn more information? Adjust course of action accordingly.
- Stop and restart? Yes.

Process claims through Title IX grievance process **AND** Title VII grievance process as applicable

- Considerations for litigation: timing of filing, available monetary remedies, question of preemption

Bottom line: there is no inherent conflict; comply with both.

U.S. Department of Education

18-07-2020-15

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Bostock v. Clayton County

Bottom line: pursuant to Title VII, employees are protected against discrimination based on sexual orientation or gender identity

District Court & Eleventh Circuit holding

- no discrimination based on sexual orientation

Supreme Court holding

- discrimination based on sexual orientation violates Title VII of Civil Rights Act of 1964 and is discrimination "because...of sex"
 - "A(n) employer who fires an individual merely for being gay or transgender defies the law."
 - Violations of Title IX based on sexual orientation and gender identity – could be considered gender discrimination under Title IX
- Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)*

18-07-2020-15

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Adams v. St. John

Bottom line: "...separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX."

School board policy → violation of constitutional equal protection rights and Title IX?

District Court holding

- School board policy violated Equal Protection Clause of Fourteenth Amendment and Title IX

11th U.S. Circuit Court of Appeals holding

- Three judge panel
- Did not reach Title IX issue
- Ruling on narrower grounds
- En banc
- School board policy did not violate constitutional equal protection rights of student
- Policy did not violate Title IX

Drew Adams v. School Board of St. Johns County, Florida, No. 18-13592 (11th Cir. 2022)

18-07-2020-15

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U.S. Department of Education's 2022 Proposed Amendments to Its Title IX Regulations

Bostock parallel

- "impossible to discriminate against a person" based on sexual orientation or gender identity without "discriminating against that individual based on sex."

Protections against all forms of sex discrimination expansive

- Title IX protections against sex discrimination apply to sexual orientation and gender identity

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Transgender Student-Athletes

Lia Thomas

Uniform eligibility criteria → Transgender student-athlete participation determined on a sport-to-sport basis, according to the policy of the national governing body (or international federation policy) of each sport (2022)

- Alignment with International Olympic and Paralympic and United States Olympics Committees

Transgender student-athletes:

- Document testosterone levels

Title IX

- Intention to initiate separate rulemaking process for transgender student-athletes → pending
- Proposed set of Title IX rules: includes sexual orientation and gender identity as protected classes
- Trajectory: public comment → litigation → congressional review

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NCAA – Transgender Student-Athletes

Opposition and support of transgender student-athletes' participation in sports

Political implications

Then and now

- Then: did not require degree of consistent testing
- Now: possible excessive testing
- Then: . NCAA policy required transgender women to have a year of testosterone suppressants to compete
- Now: transgender student-athletes must undergo and provide results of testosterone testing at beginning of season, six months after, and four weeks before championships

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Transgender Student-Athletes in Louisiana

18" state to ban transgender women and girls from participating in female sports
→ What about transgender men?

- Fairness in Women's Sports Act
- Became law August 1, 2022
 - Requires designation of team participants according to biological sex
 - Application: Public universities and private universities that receive public funds
 - Allows lawsuits against transgender women who play on female sports teams and protects whistleblowers
- Governor John Bel Edwards did not sign or veto bill
- State law versus NCAA guidelines

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Title IX Athletic Rule

- USDOE stated it would engage in a separate rule-making process regarding Title IX and athletics
- No proposed rule yet
- Proposed rule >>> Notice and comment period >>> Final rule
- Bottom line – it might be a while!

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The Americans with Disabilities Act of 1990

Protects persons with disabilities within educational institutions

→ "Person with a disability means a person with a physical or mental impairment that substantially limits a major life activity; has a record of such an impairment; or is regarded as having such an impairment."

Title II – publicly funded universities

Title III – privately funded schools, covers places of public accommodations

Section 504 of the Rehabilitation Act of 1973 – all public or private institutions that receive federal funding are required to make their programs accessible to those with disabilities

REAL PROGRESS

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Compliance

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ADA and Employees

- Disabled employees have affirmative duty to request reasonable accommodations in the workplace
- Interactive process
- Job description will only get you so far!
- What is essential, what can be modified?

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ADA and Students

- Disabled students must also affirmatively request accommodations
- Interactive process
- What is essential to class and coursework, what can be modified?
- What is essential to campus life, what can be modified?

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Service Animals & Emotional Support Animals

Emotional support animal ≠ Service animal

Emotional support animals

- Often used in furtherance of medical treatment
- Not considered service animals
- Not limited to dogs
- Are not specially trained to perform tasks for the benefit of people with disabilities
- Not covered by federal law

Service animal definition (Title II and III)

- A dog that is trained to work for the benefit of an individual with a disability of any kind.
- Limited to dogs, generally (exception: miniature horses)

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Service Animals

- Not required to be professionally trained
- Must be fully trained, cannot be in-training
 - Educational institutions cannot ask for proof of certification documentation as a condition for animal's entry
- Service animals are not required to wear identification
- Educational institutions are not required to supervise or care for service animals
- Staff may ask if dog is a service animal, is required because of a disability, and what work the dog has been trained to perform
 - NOT permitted: requesting documentation for the dog, requesting the dog demonstrate work, or requesting information about the disability

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Limitations of Service Animals

- Legitimate safety requirements – i.e., service animal is out of control
- If the presence of a service animal fundamentally alters the nature of a service or a program

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Emotional Support Animals

- Fair Housing Act (FHA) applies to dormitories and student housing facilities
- Assistance animal = service animal or emotional support animal
 - Does not have to be trained to perform a specific task
 - Can provide emotional support that alleviates one or more identified symptoms or effects of a person's disability
 - Not a pet!
- If only an emotional support animal, must remain in dormitory/housing facility
- Documentation required to substantiate the disability alleviated by the emotional support animal

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Emotional Support Animals

- Animal must be under control or, if out of control, owner takes effective action to control it
- Animal must be housebroken
- Animal must not pose a direct threat to the health and safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, regulations, practices, and procedures

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Bottom Line

- **Err on the side of caution**
- **Document, document, document**
- **Familiarity with regulations, laws, policies, and procedures**
 - **Holistic compliance & education**

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Questions?



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Thank You for Attending
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Issues in Higher Education



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