




AGENDA

October 26, 2020

1. Investigative Knowledge & Skills: Relevancy and Sufficiency, Including Activities
2. Investigative Knowledge & Skills: Interviewing Witnesses and Activity
3. Investigative Report & Recap of Five General Phases
4. Day Two Q&A

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#4

Investigative Knowledge & Skills: Relevance and Sufficiency

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Relevance: What is it?

- Legal term
- Federal Rules of Evidence (FREs)
- FRE Rule 401. Evidence is relevant if:
 - a) it has a 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

TITLE IX

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Relevance: What is it? (cont.)

- Evidence must help to show that “something” is either true OR not true; or that it happened OR didn’t happen.
- Administrative hearings are not subject to the FREs (unless they are adopted).
- However, FREs serve as a good way ensure evidence is relevant.
- The Title IX grievance procedure is considered an administrative process.
- What is “inculpatory” vs. “exculpatory” evidence? [§106.45(b)(5)(ii)] Which one is “relevant?”

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**Can
relevant
evidence
be
excluded?
YES!**

- FRE Rule 403
- If the reason for asking the question tends to cause the following:
 - a) Unfair prejudice
 - b) Confusing the issues
 - c) Misleading the jury
 - d) Undue delay
 - e) Wasting time
 - f) Needlessly presenting cumulative evidence

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Other “Relevance” Considerations

- Rape Shield Law
- Information protected under a legally recognized?
[§106.45(b)(1)(ix)]
- What about “hearsay?” Can you use hearsay evidence?

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Hearsay

What is hearsay?

An out-of-court statement offered by a party to establish the truth of the matter asserted.

It can be a document or a witness telling you what another witness said.

Hearsay evidence should have corroboration.

A Decision maker may "consider" hearsay evidence.



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Hearsay: What is it?

Example 1:

Witness A says: "I was standing right there and saw Car A run the red light and hit Car B."

Example 2:

Witness B says: "My cousin told me that she was standing right there and saw Car B run the red light which caused Car A to hit them."

- Which one is hearsay?
- What is the problem with hearsay?

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ACTIVITY

I. Relevant vs. Irrelevant Facts

1) Using the written formal complaint, identify at least 5-7 relevant and 5-7 irrelevant facts from the case. Be prepared to explain your choices with the group.

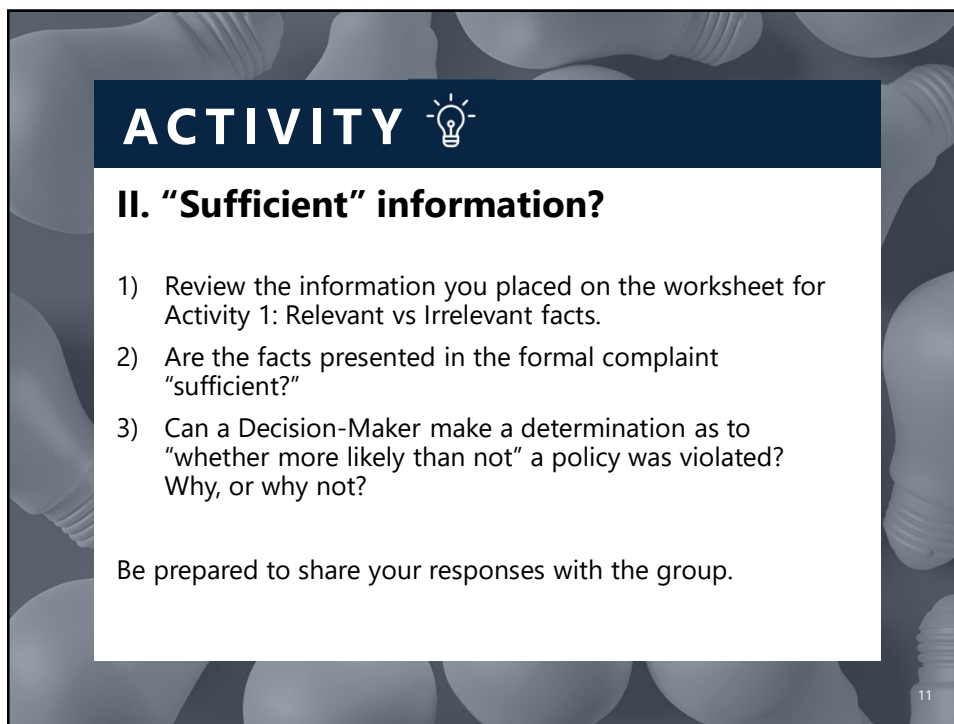
2) Using the relevant facts you identified above, place the facts in the row of the appropriate element on your grid to help you analyze the facts provided. Be prepared to discuss your grid.


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■ Sufficiency: When is evidence “sufficient?”

- The institution’s “burden” [106.45(b)(5)(i)]
- What can you do to ensure you’ve gathered sufficient evidence for the case?
- How do you know when you gathered “sufficient” evidence, such where a decision maker can make an appropriate determination?

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ACTIVITY 

II. "Sufficient" information?

- 1) Review the information you placed on the worksheet for Activity 1: Relevant vs Irrelevant facts.
- 2) Are the facts presented in the formal complaint "sufficient?"
- 3) Can a Decision-Maker make a determination as to "whether more likely than not" a policy was violated? Why, or why not?

Be prepared to share your responses with the group.

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QUESTIONS?

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Basic Interviewing Techniques

- Atmosphere is important.
- Be very conversational, NEVER accusatory!
- Build rapport — ASAP!
- Schedule enough time for the interview.
- Be aware of “why” an interview is important before you interview a witness. (What information do you need from this witness?)



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Basic Interviewing Techniques (cont.)

- Get “comfortable” discussing “uncomfortable” topics.
- Ask extremely detailed questions.
- Make sure the questions have a “reasonable” nexus to the policy violation and/or an issue of credibility.
- Make sure you record as many “direct quotes” from the witnesses as possible—you’ll need these for your report.
- Rephrase statements for clarification. (e.g., “I’m hearing you state that...is that a correct understanding?”)



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Basic Interviewing Techniques (cont.)

- Consider using an introductory disclosure statement and/or “script” when meeting with a witness.
- Take breaks if the witness seems to need one (i.e., to regain composure).
- Don’t miss the obvious! If the witness mentions something that occurred via email or social media, ask for a copy!
- Investigators should control the interview.

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Open vs. Leading Questions



- “Open-ended” — asking questions in a manner that allows the witness to provide a narrative (e.g., “What did you do last week?”)
- “Leading” — you only want a “yes,” “no,” or a very specific answer (e.g., “You went to the party at 615 Harriet Avenue on Friday the 13th, correct?”)
- Start with open-ended and then narrow down the questions as the witness begins to give you more detail.

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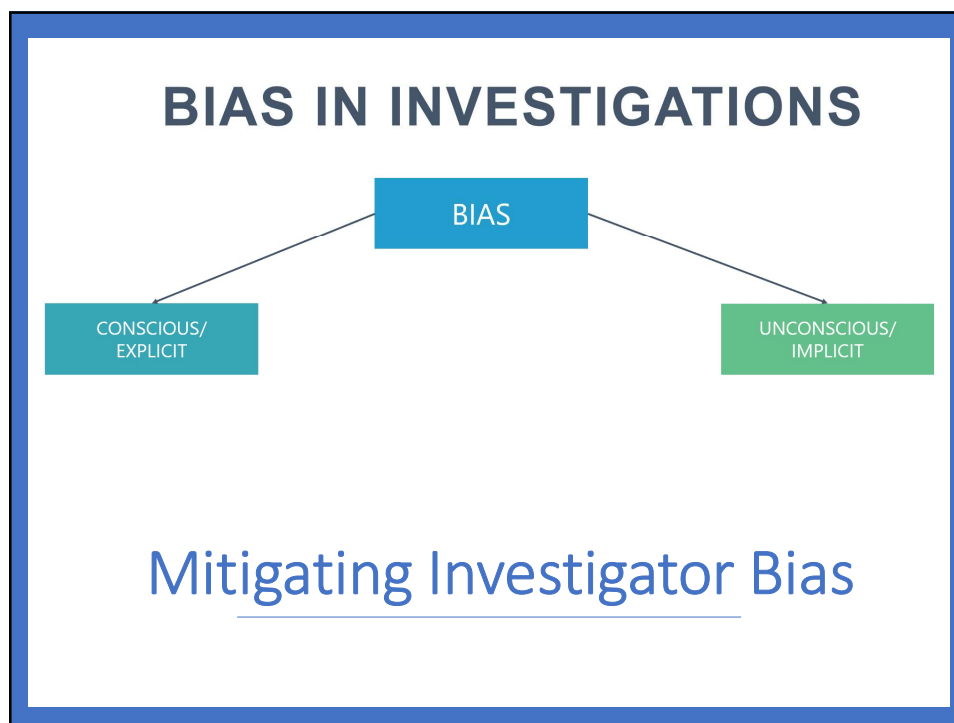
Basic Reasons why Interviewers would ask a witness a question

- ✓ To establish rapport
- ✓ To receive foundational information
- ✓ To receive information regarding "elements"
- ✓ To test credibility
- ✓ To corroborate information
- ✓ To verify previous facts provided

What are some other reasons why an investigator would ask a witness a question?

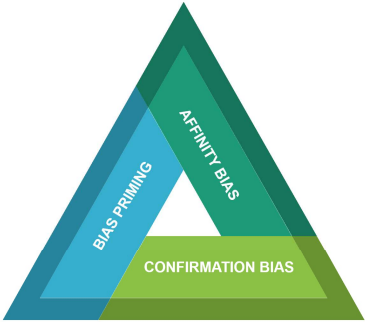
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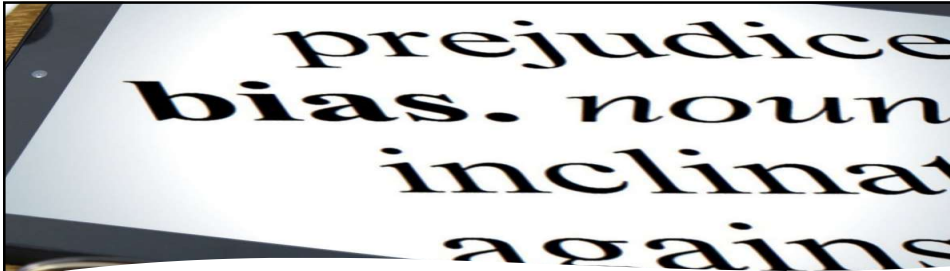
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3 TYPES OF UNCONSCIOUS/IMPLICIT BIAS



- 01** **AFFINITY BIAS**
Favoring information by someone who is similar.
3 contexts: interviewer; interviewee; investigator evaluating representations of others location
- 02** **CONFIRMATION BIAS**
Natural tendency to favor information that confirms a preconceived notion
- 03** **BIAS PRIMING**
Asking questions or using words that may influence the way someone answers or responds to a question (like "leading" questions)

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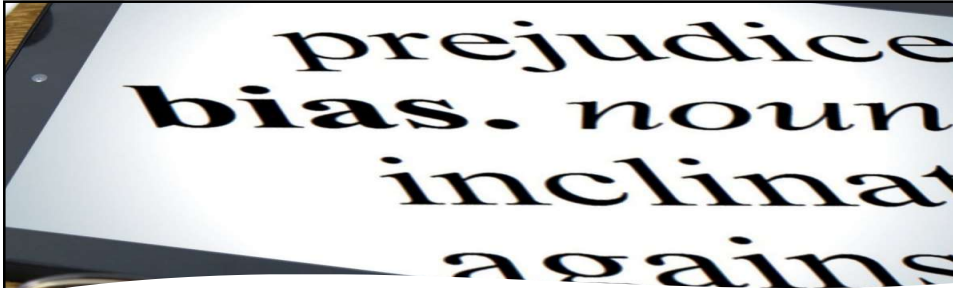


Some Thoughts...

- Everyone has biases. Bias and stereotyping are based on personal experiences and opinions, and they are different for everyone.
- Not everyone will fit your expectations or preconceived notions; be careful of stereotypes.
- Identify and acknowledge your own personal biases; don't allow them to influence you during an investigation.
- Dealing with implicit bias takes a lot of practice.
- Let the facts determine the outcome.

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Some More Thoughts...

- Ask yourself: Why do I think this way?
- Unconscious bias can occur before your investigation starts, while gathering information, choosing witnesses, during interviews and while writing the report.
- Focus on the information provided.
- Don't look for something that's not there (unless there is a reasonable basis to believe it exists and is relevant to your investigation).

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Trauma Informed, FETI, RAINN: Oh My!

While these victim-centered approaches are important, **ALWAYS REMEMBER:**

- These models of are usually identified as being "victim centered" and are mostly used in reference to dealing with sexual assault victims.
- While these models may help an investigator to adjust the method in which they receive or evaluate information provided by a victim or witnesses, **they should never serve as the sole basis for evaluating credibility.**
- Recognize that you **can and should** also use some of the methods for questioning other witnesses including the respondent (e.g., listening to their story, asking about their experience or what they remember, etc.).
- Bottom line: The institution must conduct the investigation in an equitable manner.

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An Equitable Approach: What about the Respondent?

- They have constitution-based protections — assumptions about policy violations should not be determined all information has been presented, AND ONLY by the Decision Maker.
- They must have the ability to provide information and names of potential witnesses to show their side of the story.
- They are stressed out too; process can be intimidating. Show empathy.
- In the interest of a “fair” process, we should want to assist both parties during the process (even though our assistance may look different to the parties) and not ignore a party because of their status.
- Keep your own biases and stereotypes in check — always.

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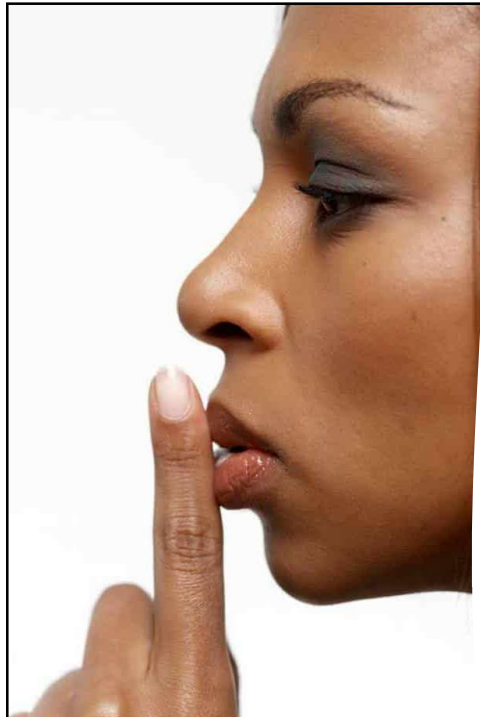


Type of Witness: The “Talker”

- Witness talks...a lot
- Let them talk, unless they have a habit of talking about things that aren't related to your investigation.
- Get into the habit of “re-directing” the witness to providing information that you need.
- Understand that some of the extra information may also be important for some other reason (e.g., credibility, establishing timeframes, etc.).

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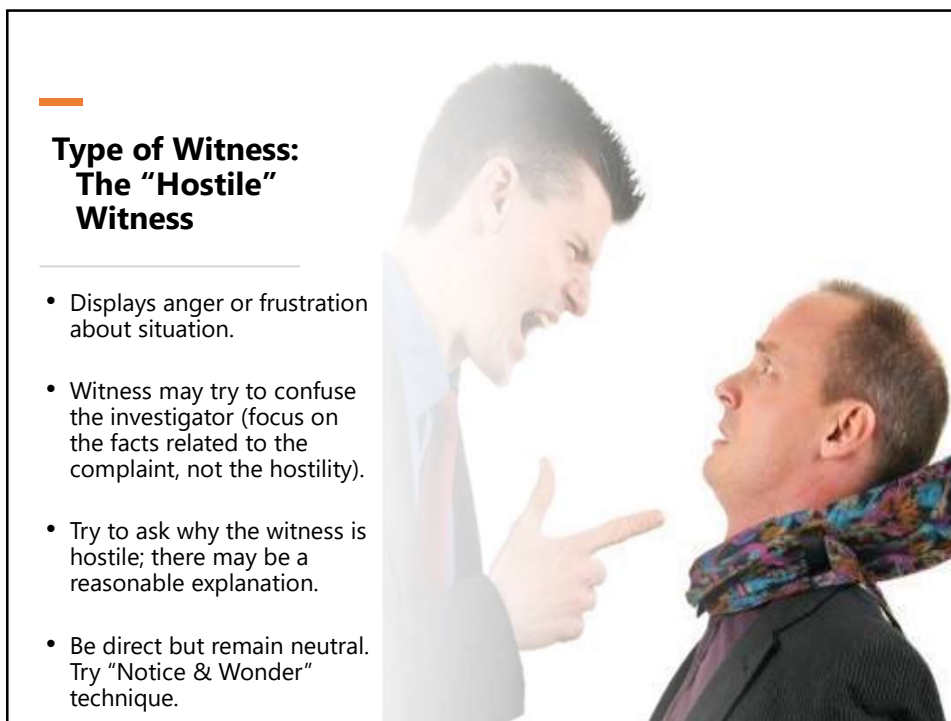


Type of Witness: The “Reluctant” Witness

- May present as if there is a reason WHY they don't want to share information.
- Does the witness have safety concerns? If so, has the witness shared those concerns with the Title IX coordinator?
- Building rapport will be important for the witness to trust the investigator and feel comfortable in providing information.

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Type of Witness: The “Hostile” Witness

- Displays anger or frustration about situation.
- Witness may try to confuse the investigator (focus on the facts related to the complaint, not the hostility).
- Try to ask why the witness is hostile; there may be a reasonable explanation.
- Be direct but remain neutral. Try “Notice & Wonder” technique.

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Type of Witness: “I-Don’t-Know-What-You’re-Talking-About” Witness

- Witness will appear “uncooperative.”
- Try to gently remind them about why you wanted to meet with them (e.g., “I was given your name by a witness who saw you there at that time. Were they mistaken?”)
- Don't try to "force" information out of this witness.
- If they don't want to share information, find another witness.



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III. Possible Witnesses

With the limited information you have received thus far, **who** are the witnesses you believe you need to interview?

Why are they relevant?

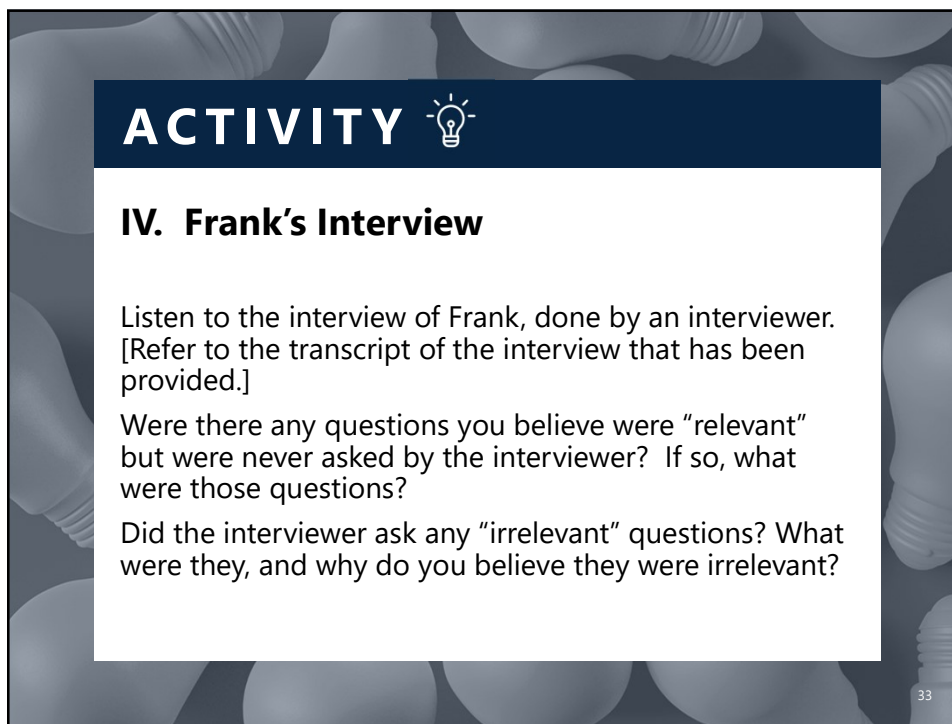
What information do you think they may be able to provide?


Is there a specific witness interview order you believe is important? Why or why not? (If so, list them in scheduling order on the worksheet.)

Be prepared to discuss your responses with the group.

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ACTIVITY 

IV. Frank's Interview

Listen to the interview of Frank, done by an interviewer. [Refer to the transcript of the interview that has been provided.]

Were there any questions you believe were "relevant" but were never asked by the interviewer? If so, what were those questions?

Did the interviewer ask any "irrelevant" questions? What were they, and why do you believe they were irrelevant?

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QUESTIONS?

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Investigative Reports & Recap of Five General Phases

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Don't Forget About... 2 Important Investigative Timeframes

1. Both parties must be allowed to inspect and review any evidence obtained as part of the investigation; provide 10 days to submit a written response [§106.45(b)(5)(vi)]
2. Create an investigative report that fairly summarizes relevant evidence and send a copy to the parties and the parties' advisors (if they have them) at least 10 days prior to a hearing OR before a determination regarding responsibility is made [§106.45(b)(5)(vii)]

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Basic Considerations:

- Fact-based report: No opinions. Is it information as it was provided to you by the witnesses? (substance)
- One voice?
- Written in first person?
- What is the template format (consistency)?
- Case identification?
- Is there a logical flow to the information as it is presented?

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Basic Investigative Report Considerations (cont'd)

- Always assume a newspaper reporter will receive copies of your report.
- Does it reflect professionalism and confidence?
- Does it contain personal opinion that appears to be biased?
- Numbering (UHWO2015-S-01; Page 1 of 14)
- Cite institutional policies and procedures as the basis for the investigation.
- Use as many relevant direct quotes from the interviews, written statements or documentary evidence provided by the witnesses. Make the witness summary "their" statement; not yours.

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Basic Investigative Report Considerations (cont'd)

- Understand what each section of the report is designed to show or explain to a reader.
- Save "marking exhibits" for last.
- Consider making exhibits distinguishable (bold; italicized) within the report.
- Eclectic appeal. (Does it look nice?)

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Pre-Report Writing Considerations

1. Permissive dismissals; "**may**" dismiss at any time during the investigation, if any of the following: [34 CFR 106.45(b)(3)(ii)]
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any of the allegations.
 - The respondent is no longer enrolled or employed by the recipient.
 - Or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

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Pre-Report Writing Considerations

2. If dismissal, institution must promptly send written notice of the dismissal and reasons simultaneously to parties [34 CFR 106.45(b)(3)(iii)].
3. Always check in with the Title IX Coordinator.

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Investigative Report Requirement

“Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or other wise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy for their review and written response.”

[§106.45(b)(5)(vii)]

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■ Important Report Section: History of the Case/Background

- Filing of the formal complaint through the appointment of the investigator(s).
- Usually written by the Title IX Coordinator; investigator edits to fit writing of the rest of the IR.

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■ Important Report Section: Involved Parties/Witnesses

- Written in "list" format.
- Name of individual or "wiped identification" (i.e., "Comp" or "C" for Complainant), whichever is preferred.
- The individual will be referred to using this identification method for the rest of the report ("scrubbing").
- If using name, use the name you intend to cite throughout the report for consistency [i.e., Beverly Baligad; Bev; Ms. Baligad.]
- Should state at the end of the witness section: "No other relevant witnesses were identified or available."

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■ Important Report Section: **Alleged Prohibited Conduct**

- Section includes information directly out of the Notice of Allegations.
- Allegations are in list format.
- Do not include allegations “dismissed” (permissive) by the Title IX Coordinator (if listed on the original notification).
- Cite to the Notice of Allegations document; and place in exhibits.

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■ Important Report Section: **Standard of Proof**

- Short paragraph that describes what standard of proof the institution uses.
- Cite directly from the institution’s sexual harassment policy.
- Can be templated language.

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Important Report Section: Interview Summaries

- Complete narrative of information provided by each witness.
- Should include a short introductory paragraph that gives a short description of the status of the individual, their relationship to the case, date/time and place of interview or when their written statement was provided, and the modality (email, interview, etc.).
- Summaries should ONLY include information that is relevant to the allegations.

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Important Report Section: Jurisdiction Statement

- Cite directly from the policy that allows jurisdiction by the institution to conduct an investigation.
- Use direct language from the policy, then substitute with specific facts to establish jurisdiction.
- Use a final statement that states, "Therefore, based on the information provided, [institution] has jurisdiction over this matter."

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Important Report Section: Exhibit List

- Exhibits should be marked in the order that the document referred to appears in the IR.
- Be sure to include all policies referred to, official notifications, documentary evidence that is referenced, etc.
- Remember, the IR must contain all relevant evidence.

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Important Report Section: Investigator's Attestation

- Attestation can be part of the language used on an IR template
- States that the investigator's report is complete, that they have gathered all relevant evidence in accordance with institutional policy

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Remember these? There's a lot more to it!

Action	Phase
1. Thoroughly review the complaint; understand what the complaint is about.	
2. Find and print all policies, procedures, and agreements relevant to the issue. Review complaint again and compare policy and process information. Possible issue? Several issues?	
3. Determine what potential type of sexual misconduct is described in the complaint. List the "elements." (Remember the "loco moco?")	
4. Gather all available institutional and public information on relevant parties	
5. Identify witnesses and case strategy. Begin assembling investigative file. Keep an investigator's log.	

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The 5 Investigation Phases

- **Phase I:** Policy & Process Review
- **Phase II:** Investigation Planning
- **Phase III:** Preparation and Execution of Interviews
- **Phase IV:** Reviewing Relevant Information Gathered
- **Phase V:** Closing the Gaps; Follow-Up

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Phase I: Policy and Process Review

- ✓ Review complaint/allegation
- ✓ Identify (and print) applicable policies and processes (T9 & non-T9)
- ✓ Gain an understanding of your investigative role & jurisdiction
- ✓ Meet with T9 Coordinator to discuss case; get the green light to move forward

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Phase II: Investigation Planning

- ✓ Keep an investigator's log - right from the start!
- ✓ Begin assembling the physical hard copy of the file (or placing an electronic version of the file somewhere on your laptop where it is encrypted & secured).
- ✓ Begin collecting and compiling available information (educational records; personnel records) on parties.
- ✓ Prepare policy grids (for each alleged policy; for each available witness). Input info supplied by the complainant.
- ✓ Create an event timeline (focusing on the allegations).
- ✓ Identify "first round" of witness. Based on the grids, what questions might you need to ask specific witnesses?

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Phase III: Preparation and Execution of Interviews

- ✓ Prepare letter/email introducing you and your role
- ✓ Address logistics: schedule, room, set-up, etc.
- ✓ Prepare interview disclosures/Interview scripts (focus only on introductions; each witness may have different questions and focus)
- ✓ Pre-Interview considerations?
- ✓ Interviews: To record or not record?

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Pre-Interview Considerations: Mind the Details

- Where the interview takes place is important
- Seating arrangements (e.g., safety, adequate seating, placement, etc.)
- Necessary supplies (e.g., water, tissues, etc.)
- Private, confidential
- Reasonable accommodations for witness? (reader? interpreter?)
- Electronic recording (batteries)? Written documentation (paper, pens)?
- One or two investigators present? Roles?
- Can you think of anything else that should be considered before the interview occurs?

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To Record or NOT Record?

- Be aware of State laws regarding the recording of conversations
- Some institutions do, some don't
- Should be mentioned somewhere; in your Code and/or Policy
- If it is written in a policy or process somewhere, the witnesses should be told in advance
- If it is not written in a policy or process, the investigator should get the permission of the witness before recording
- Recording (if a student) is subject to FERPA; for employees CBA's or personnel records policies/confidentiality


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To Record or NOT Record? (cont.)

- Note-taking requires high level of accuracy (do "direct quotes")
- A witness summary statement would be best if taking notes (investigator summarizes, writes, then provides statement to witness to see if they "got it right", then witness can sign off)
- Recordings may help an appeals officer or DM with determining whether or not "bias" in the interview was a factor
- Would you allow the witness to record at the same time you record?

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Transcription Apps/Software



Live Transcribe

theftwtranscriber

Otter.ai

oTranscribe

Dragon

inqscribe®

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Phase IV: Reviewing Relevant Information Gathered

- ✓ Were there any new witness suggestions? Are they relevant to the issue? Why or why not?
- ✓ Was there documentary evidence introduced by witnesses (copies provided to the investigator)?
- ✓ Is there any relevant information? Is there any relevant information that should not be used? Why or why not? Non-relevant information? (Can you explain why for each?)
- ✓ Witness statements & sign off (interview transcript vs. interview transcript and documentary evidence); "narrative"

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Phase V: Closing the Gaps; Follow Up

- ✓ Do you need to follow up with a witness?
- ✓ How do you deal with large time gaps? Memory lapses? Unwillingness to provide info?
- ✓ Reschedule another interview? Phone call? Email?
- ✓ Any "holes" in your grid? Why? (Lack of witnesses? Lack of information?, etc.)
- ✓ Do you have additional questions you'll need to ask as a follow up to a witness? Is that done?

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Phase V: Closing the Gaps; Follow Up

- ✓ Do you have a transcript or finalized statement of a witness' interview? Signoff?
- ✓ Have you made sure to maintain copies of all documentary evidence? If not apparent on the evidence, do you have info about how you received the evidence?
- ✓ Final meeting with T9 Coordinator (make sure no other allegations were filed)
- ✓ When all gaps have been addressed; all information has been collected; and there is no additional information from the Title IX Coordinator, begin writing the report

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Thank you!

Please remember to complete the *event evaluation*.
Your comments will help us continually improve the
quality of our programs.