


ICUT
INDEPENDENT COLLEGES & UNIVERSITIES OF TEXAS

**2019 Title IX
Compliance
Conference**

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Audience Questions – Volume 1

- Help us understand the new level of threshold for determination not POTE.
- Will regulations will trump when they conflict? Texas regs or FERPA?
- How does the state bills align with the proposed DOE regs?
- Is the state going to provide funding for the costs associated with new laws?
- What does OCR want during a review that we need to remember to gather?

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- Title IX policies and procedures
- Student Code of Conduct and/or Student Handbook or any other document(s) that contain the school's policies and procedures regarding student behavior, student discipline, and other student reporting avenues
- Identity of Title IX coordinator(s) all employees designated to investigate complaints
- How are policies and procedures communicated
- A detailed description of training provided to school staff on sexual harassment, including sexual assault/sexual violence, or other discrimination based on sex

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Detailed list of all complaints of sexual harassment, including sexual assault/sexual violence, brought to the school's attention (formally or informally) which includes:

- The name and sex of the student
- The type of complaint filed
- The name and title of the school official or staff member who received the complaint and the date the complaint was received
- Whether the incident occurred on or off campus Whether the complaint was investigated
- Whether corrective action was taken and include any remedial action provided
- Whether an appeal was filed
- For each grievance or complaint process offered to students, identify name and title of each individual, including administrators, staff and student that comprise the membership of the adjudicative body or hearing committee

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Difficult Issues in Investigations

Five Evergreen Practical Issues

1. Relevance
2. Credibility
3. Consent
4. Incapacitation
5. Coercion



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What Is Relevant?

- **Mantra:** Is the fact or information that is being offered likely to prove/disprove an issue in the investigation?
- If likely to prove/disprove, even indirectly, it is relevant. If it is not likely to do so, it is irrelevant.
- Product of narrow issue & contested facts
- **Pro Tip: When in doubt, err on the side of allowing it and giving it the weight it is due**



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Audience Questions – Volume 2

- Are there categories of evidence we should be aware of?
- What/how to balance the credibility of social media “evidence”?
- Where to draw line on witnesses that are only character witnesses & no 1st hand knowledge?
- How to handle snapchat & twitter?
- Do you have any thoughts on retrieving snapchat communication?

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Assessing Credibility

- When “he said/she said,” look for more but . . .beware of trap
- There are always competing narratives
- Must thoughtfully assess credibility (which is always difficult)
- Over-reliance on demeanor



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Model Jury Instructions

- “In weighing the testimony of the witnesses, you may consider the witness’s **manner and demeanor** on the witness stand, any feelings or interest in the case, or any **prejudice or bias** about the case, that he or she may have, and the **consistency or inconsistency** of his or her testimony considered in the light of the circumstances. Has the witness been **contradicted by other credible evidence**? **Has he or she made statements at other times and places contrary to those made here on the witness stand**? You must give the testimony of each witness the credibility that you think it deserves.”
- “**You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted.** The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.”

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/App/Psychol_2004_Feb;86(1):137-40.

Detecting true lies: police officers' ability to detect suspects' lies.

Mann S, Vila A, Bull B.

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Abstract

Ninety-nine police officers, not identified in previous research as belonging to groups that are superior in lie detection, attempted to detect truths and lies told by suspects during their videotaped police interviews. Accuracy rates were higher than those typically found in deception research and reached levels similar to those obtained by specialized lie detectors in previous research. Accuracy was positively correlated with perceived experience in interviewing suspects and with mentioning cues to detecting deceit that relate to a suspect's story. Accuracy was negatively correlated with popular stereotypical cues such as gaze aversion and fidgeting. As in previous research, accuracy and confidence were not significantly correlated, but the level of confidence was dependent on whether officers judged actual truths or actual lies and on the method by which confidence was measured.

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Nebraska Law Review

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1993

A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility

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FBI Law Enforcement Bulletin

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The Truth About Lying: What Investigators Need to Know

By Brian D. Fitch, Ph.D.



Credibility: 7 Factors to Consider

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Have there been similar complaints against the respondent? ***
7. Do any of the witnesses have a motivation to lie, exaggerate or distort information?

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Credibility Exercise

Sample: “I find Jane Roe credible because of the level of detail she was able to provide in her interview. She was clearly under extreme stress but gave a detailed account of the incident with John Doe.”

- Is this language adequate?
- What would improve the analysis?

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Audience Questions – Volume 3

- Does Trauma-Informed Questioning mean we (a) don't ask relevant questions? (b) believe a victim's version over others? (c) can't apply our life experience in making decisions about credibility, as long as we understand how trauma may affect one's ability to recount details, etc.?
- Interview techniques for those who have worked out their stories in advance?
- What are signature behaviors or key words when someone is or making up facts?
- What do you think about witness phone interviews/best practices for interviewing those not able to appear in person?

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10 Common Capacity Questions

1. What type of alcohol did you consume? Over what period of time? How quickly? Did you eat? How much? When? Were you taking any medication?
2. Describe the impact of the alcohol.
3. Was the complainant conscious or unconscious?
4. Did complainant black out? Vomit?
5. Describe the complainant's condition when last seen.
6. Did complainant understand where s/he was going?

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10 Common Capacity Questions

7. Could the complainant walk on own?
8. Could the complainant speak clearly?
9. What physical tasks was complainant performing?
10. Was complainant able to remove his/her own clothing?

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Definition of “Consent”

Consent “means a clear willingness to participate in the sexual act (e.g., clear communication through words or actions). While consent may be expressed by words or by actions, it is highly recommended that consent be expressed and obtained verbally.”

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What are examples of "words or action" that show willingness to engage in sexual activity?

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Definition of “Coercion”

“The use of express or implied threat or intimidation which places an individual in reasonable fear of immediate harm or physical injury.”

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Audience Questions – Volume 4

- What are the requirements when providing an advisor?
- Can a student's advisor be another student?
- Do you recommend issuing con contact orders if the students do not request them?
- What if the complainant (alleged victim) does not want to part. In the interview w/you b/c she is female & you are male (or vice versa)?
- How do you deal with a conflict of interest w/an employee in the Title IX process & a student being investigated?
- Victim requests not to investigate, but other student conduct policies may have been violated.

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Advisors – Interviews

Section 106.45(b)(3) Investigations of a formal complaint

“[W]hen investigating a formal complaint, a recipient must—

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

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Advisors – Cross-examination

(vii) For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under paragraph (b)(3)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;

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Advisors – Reviewing the Evidence

(viii) Provide both parties an 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give

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Bias Example

Investigator for college is on record as saying “every person who reports sexual assault should be believed. In my twenty years in this industry, I have never seen a false sexual assault report.”

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Bias Examples – cont’d

- Institution’s mandatory Title IX training contains statistics showing that men are the perpetrators of sexual misconduct in 97% of reported cases?
- Hearing panel member is in the feminist studies department?
- Hearing panel member for male athlete Respondent is the institution’s Athletic Director?

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Conflict of Interest Examples

Title IX panel member is:

- The coach of the Respondent?
- The faculty advisor for the Complainant?
- The uncle of a key witness?
- The institution's Victim Services Coordinator?

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**Special Issues in
Dating Violence,
Domestic Violence,
& Stalking Cases**

The Salt Lake Tribune

Lauren McCluskey's parents are suing the University of Utah for \$56 million. Here's what their lawsuit says.



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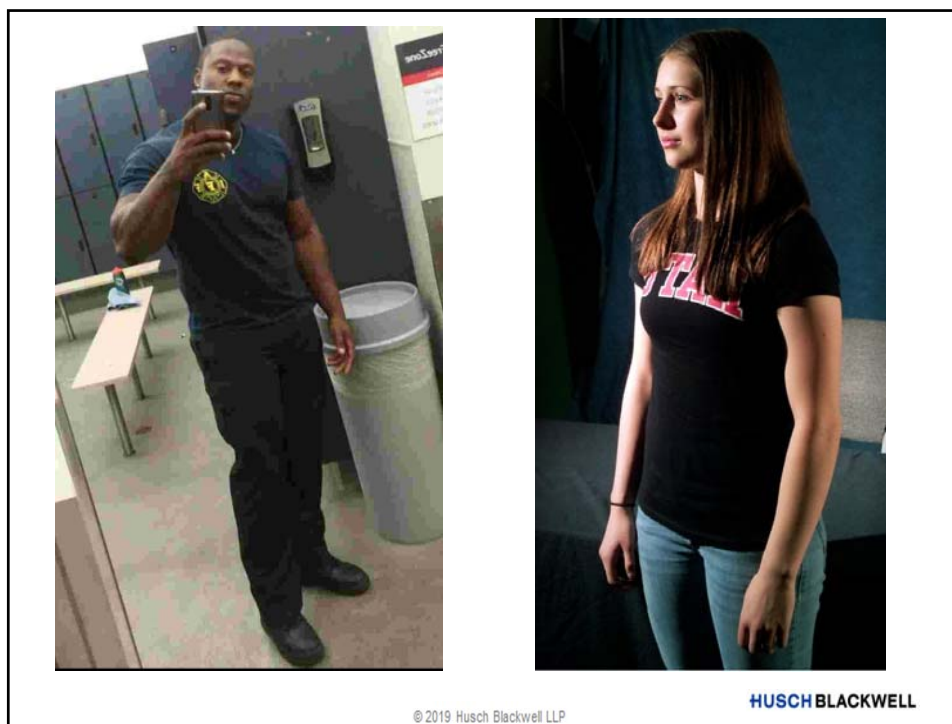
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In Plain Sight

The killing of a student, one in a growing list of victims, opened her university's eyes to the unseen danger of intimate-partner violence.

By EMMA PETTIT



- **Sep. 30** → Two of McCluskey's friends tell a graduate assistant in the housing department that they are concerned about McCluskey's relationship.
- **Oct. 2** → Graduate assistant tells a supervisor over email that Rowland was tracking McCluskey, who was "not taking care of herself."
- **Oct. 6** → McCluskey discovers Rowland's real age, name, and that he's a registered sex offender.
- **Oct. 8** → Housing TA meeting cancelled. Housing official says not to "overstep."
- **Oct. 9** → McCluskey breaks up with Rowland.

Oct. 10 Call to Police Dispatcher

- **Jill McCluskey:** Hi. I would like to request some help for my daughter who is a student at the University of Utah.
- **Dispatcher:** OK, what is the situation exactly? What does your daughter need help with?
- **Jill McCluskey:** OK. So, she was dating someone who is not a student, and he has her car.
- **Dispatcher:** Sorry?
- **Jill McCluskey:** He has her car.
- **Dispatcher:** OK.
- **Jill McCluskey:** And he's supposed to return — she broke up with him — and he's supposed to return it to the parking lot at the stadium.
- **Dispatcher:** Uh huh.
- **Jill McCluskey:** And I'm worried that he's dangerous.
- **Dispatcher:** OK. We can definitely have someone help her out.

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- **Oct. 10** → McCluskey receives a text from someone claiming to be Rowland's friend, telling her to kill herself.
- **Oct. 11** → McCluskey gets texts telling her Rowland has been hospitalized.
- **Oct. 12** → McCluskey gets a text telling her that Rowland is dead. But McCluskey sees that Rowland has posted on social media.
- **4:24 p.m.** → McCluskey calls university police to report the texts, which she thinks are coming from Rowland's friends. Also expresses concerns that Rowland has mentioned bringing a gun to campus.

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October 13

- **6 a.m.:** McCluskey gets an email, saying if she wants to protect her image and dignity, contact them. If she calls the police, the email says, embarrassing photos of her will go viral.
- **8:15 a.m.:** Through an app, an account linked to Rowland's phone number asks McCluskey for \$1,000 to delete the photos.
- **8:57 a.m.:** McCluskey calls university police about the extortion. Rowland is the one who is messaging her, she tells them.
- **11:16 a.m.:** McCluskey and her friend meet university police in the lobby of their headquarters. During the visit, an officer also searches Rowland's name in the student database. The officer mistakes a student for the 37-year-old, and tells McCluskey's friend, "Shawn seems like a good guy." Police also run a criminal history check on Rowland. Neither police nor the dispatcher realize that Rowland is still on parole.
- **5:48 p.m.:** McCluskey calls the Salt Lake City Police Department.

Oct. 16: Detective assigned to case returns to work after 3 days off, but she works on other cases

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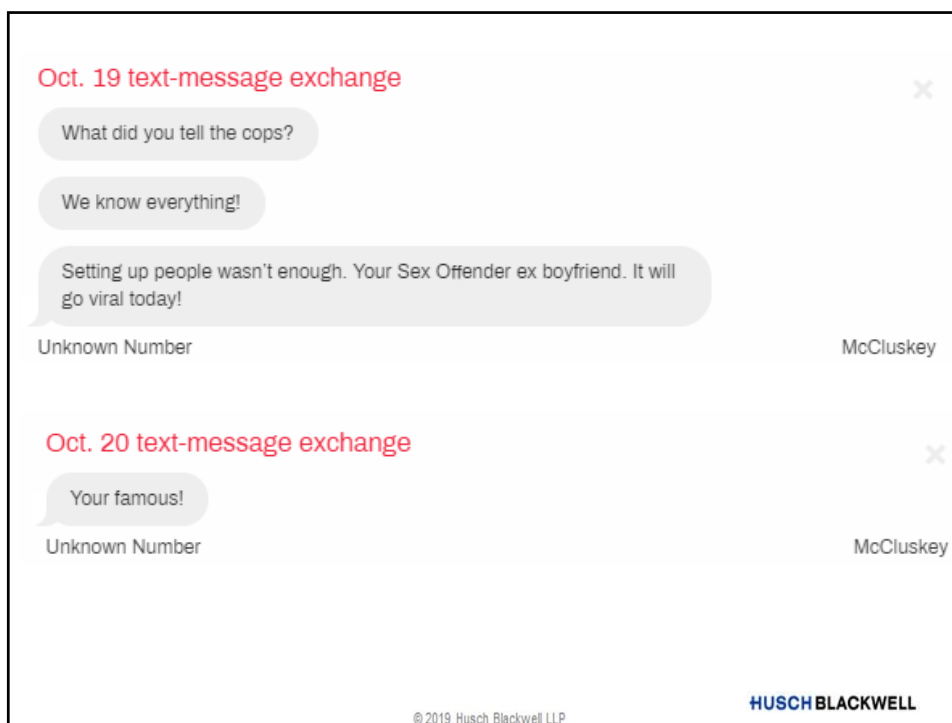
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Oct. 19 Call to SLC Police Department

- McCluskey: Hi. I'm worried because I, I, I've been working with the campus police at the U —
- Dispatcher: Uh huh.
- McCluskey: — and, uh, last Saturday I reported, and then, um, and I haven't gotten an update.
- Dispatcher: OK.
- McCluskey: But but someone contacted me today, someone who is harass — [inaudible] and said that that they know everything about the police.
- Dispatcher: OK. So you already spoke to the campus police. Did some, did this happen on the University of Utah campus?
- McCluskey: Um, yes. Yes. They haven't updated or done anything. So the case, it involves [inaudible] and extortion and those people are still [inaudible] me.
- Dispatcher: So have you notified the campus police about this?
- McCluskey: Yes, I have.
- Dispatcher: OK. What prompted you to call Salt Lake City police?
- McCluskey: Well, I thought it was weird that, that there are people who know about the entire case and the harassers seem to know about it more than me. And I'm concerned there might be an insider who's letting them know about the, about the case.
- Dispatcher: OK. So with some —
- McCluskey: Because I haven't gotten updates.
- Dispatcher: Yeah.
- McCluskey: And it's been a week.

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- **Oct. 22 – 23** → Officials in the housing department meet. No one has any updates about McCluskey.
- **Oct. 23 (6:22 a.m.)** → Rowland parks a gray Buick in the parking lot outside McCluskey's dorm.
- **10 a.m. to 12:08 p.m.** → McCluskey calls police three times.
- **8:17 p.m.** → Rowland grabs McCluskey outside her dorm.
- **9:55 p.m.** → University police find McCluskey's body in the backseat of the gray Buick.

What are things you would have done differently here?

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Some Practical Takeaways

1. No one on campus who had direct contact with McCluskey was **trained** to recognize the full array of domestic-violence signifiers.
2. There was only one **face-to-face meeting**.
3. Housing officials eventually decided not to “**overstep**” because McCluskey herself had not come forward. On the day of her death, officials did discuss her case, but no one in attendance had “any more information or updates on Lauren.”
4. Never referred to the university’s **victim-survivor advocates**.
5. Police and victim-survivor advocates did not have a **coordinated, working relationship**. No victim advocates within the police department.
6. No report to **BIT**.
7. Lethality Assessment

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Domestic/Dating Violence Other Difficult Practical Issues

1. What if complainant refuses to participate (and you have reliable third party report)?
2. On-going check in with multiple involved witnesses (sometimes regardless of outcome)
3. What happens when meetings become confrontational?
4. Reasonable steps we can take to manage concerns about retaliation?
5. Potential high risk area – are we involving other relevant stakeholders?

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QUESTIONS?

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Report Writing

What is the most difficult aspect of report writing?

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Report Writing: Notes from the Interim Guidance

- “The investigator(s), or separate decision-maker(s), with or without a hearing, **must** make **findings of fact and conclusions** as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy.”
- “The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.”
- “The decision-maker(s) **must** offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report. The parties **should** have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.”

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Scott’s Common “Mistakes” With Report Writing

- Conclusory determination of credibility
- General lack of clarity
- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- Including insufficient information on important issues
- Including too much information about irrelevant details
- Leaps of logic

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Critical Elements

1. Summary of the Allegations
 - Preliminary case information
 - History of the Case, if any
2. Applicable policies/procedures
 - Misconduct Policy
 - Standard of Proof
3. Evidence considered
 - Undisputed facts
 - Disputed facts
4. Factual findings
5. Analysis and conclusion
6. Maybe (depending on policy)
 - 1) Recommendations and/or sanctions
 - 2) Other elements

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History of the Case

- How did the institution respond to the report?
 - E.g., rights and options provided, notification of respondent
- When, how, and where were parties and witnesses interviewed?
- Explain any apparently unreasonable delays.
- What role does the investigation report play in the overall process?

Summarizing Allegations



- Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy
- Focus on who, what, where, when, how
- Match with notice

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Applicable Policies and Procedures

- Reference sexual misconduct policy and procedures, including specific language which is pertinent to the allegation
 - E.g., include relevant definitions
- Attach full copy of sexual misconduct policy and procedures to report

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Standard of Proof



- Preponderance of the evidence
- Be sure to actually apply it in your analysis
 - You will never know exactly what happened

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Evidence Considered



- Include a summary of evidence collected and reviewed during investigation
 - Parties' correspondence with institution
 - Summary of party and witness interviews (by person)
 - Text messages, emails, tweets, posts, letters, etc.
 - Police/medical reports
 - Video from surveillance cameras
 - Card key data
 - Phone logs

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Audience Questions – Volume 5

- If you record interviews, how do you give access/transcripts? (Do you transcribe)
- If we record an interview, do we have to include full transcript in the report?
- How to effectively take notes to make a record of interview for the interviewee to review?
- What do we do with investigator notes & drafts of documents?
- How do we incorporate changing testimony from the parties in a report?
- Written statements – yea or nay?

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Factual Findings

- Goal: reaching resolution of disputed facts
- How to do this?
 - Show your work
 - Explain your credibility assessments



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Language Considerations

- Use objective terms (i.e., “complainant” and “respondent” rather than “victim” and “perpetrator”)
- Avoid vague phrasing like “had sex”
- Do not include speculation
- Do not include irrelevant points and discussion

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Example

- “Jane alleges that John had sex with her without her consent.”
- vs.
- “Jane alleges that John laid on top of her, penetrated her vagina with his penis, and held her down so she could not move.”

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Analysis and Conclusion

- Put everything together
- Analyzing whether a violation of policy occurred (not the law)
- Discuss each allegation and your decision on each
- Explain your reasoning
- Deal with inconvenient facts
- Phone a friend if necessary

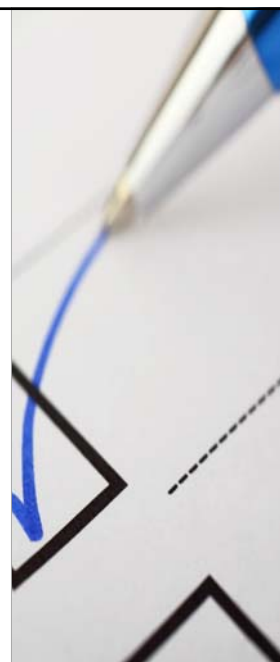


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Check your Work

- The report must be able to stand on its own
- Spelling and punctuation matter—have the report proofread
- Double check that your allegations match your notice
- Include the good, the bad and the ugly



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Audience Questions – Volume 6

- Do you share the written conclusion from the investigation report with the parties or only share verbally?
- Long or short rationales?
- OTHERS

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QUESTIONS?

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