

# Conducting Effective Internal Investigations



## Module One: Planning the Investigation

**Katherine M. Allen**, Associate General Counsel, The Pennsylvania State University

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## Overview of Course

- Purpose: providing guidance for best practices in conducting internal investigations. **Any** type of internal investigation.



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# Overview of Course

- Series of modules on the following topics:
  - Module One: Planning the Investigation
  - Module Two: Conducting the Investigation, Interviewing, and Information Gathering
  - Module Three: Reaching a Conclusion and Credibility Determinations
  - Module Four: Writing the Report and Post-Investigation Considerations



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## Module Overview

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Types of Investigations

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Value of Good Investigative Practices

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Pre-investigation Considerations

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Choosing an Investigator

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Confidentiality v. Transparency

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Receiving and Evaluating the Complaint

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Notice

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Interim Measures

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Developing an Investigative Strategy or Plan

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Public Relations Considerations



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## Types of Investigations

- Employee Discrimination
- Academic Integrity
- Research Misconduct
- Athletics Compliance
- Tenured Faculty Discipline
- Financial or Time Fraud
- Student Conduct



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## Types of Investigations

- What is the subject matter?
- Who is the respondent, if any?
- What is the process?
  - Institutional policies and procedures
  - Regulatory or statutory process
  - Legal requirements

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## Types of Investigations

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What is the purpose of the investigation?

- Neutral?
- Privileged?



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## Types of Investigations

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What is the role of the investigator?

- Fact-gathering?
- Proposed findings?
- Making a decision?
- Recommended action?



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## Why Good Investigations Are Important

- It's about fair process for all institutions
- Procedural due process for public institutions
  - Property interest: notice and opportunity to be heard
  - Liberty interest: name-clearing hearing
  - Policy determines how much process is due



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## Why Good Investigations Are Important

Substantive due process: decision-making is not arbitrary or capricious

Judicial deference for internal administrative investigations

Good management



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## Pre-Investigation Considerations

- Interim safety/preservation measures
  - Interim leave/suspension
  - Document retention
  - Sequestration of evidence



## Pre-Investigation Considerations

- Concurrent investigations
  - Police involvement
  - Government investigator
  - Required notifications

## Choosing An Investigator

- What type of case is it?
- Consider actual or apparent conflicts of interest
- Internal or external investigator?



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## Choosing An Investigator

Are there “political” issues to consider?

- Who are the parties?
- What are the issues?
- Review investigator’s background and training
- Investigator’s credibility and the process is at stake



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## Confidentiality vs. Transparency

- Tension between maintaining privacy and assuring fair process
- Limits on absolute confidentiality



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## Confidentiality vs. Transparency

- Applicable policy and law
- FERPA
- Research misconduct
- Employee discipline



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## Confidentiality vs. Transparency

- Privilege/work product protections
  - Scope may be limited
  - Waiver possible
- Public records
  - State-specific



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## Investigative Steps

1. Receive/Evaluate Complaint
2. Initiate Investigation/Notification Letters
3. Develop Investigation Strategy
4. Conduct Interviews
5. Gather other Information
6. Write Investigation Report



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## Receive/Evaluate/Document Complaint

Written complaint vs. in person?

Determine what laws, policies, procedures/practices apply

Evaluate to determine if should be accepted



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## Evaluate/Document Complaint

- Harmani Case Study Issues:
  - Layoff
  - Harassment



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## **Notice: Notify Respondent/Parties of Complaint**

- Method of notification
  - Verbally?
  - In writing?
    - Letter or email?



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## **Notice: Notify Respondent/Parties of Complaint**

- Information to include:
  - What to expect during the process.
  - Any available resources, e.g., counseling, health/mental health services, representation
  - Prohibition against retaliation
- Timing – what rights are triggered once notification provided?
- Any required disclosures?



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## Interim Measures

- Purpose?
- Who has authority to impose?
- Types of circumstances that might warrant an interim employment/academic suspension?
- For employment, with/without pay?
- Process for implementing interim suspension? Due process considerations?



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## Investigative Plan

Benefits of written plan:

- Keep facts straight
- Keep investigation on course
- Fill in to become investigative report
- Particularly helpful with complicated cases

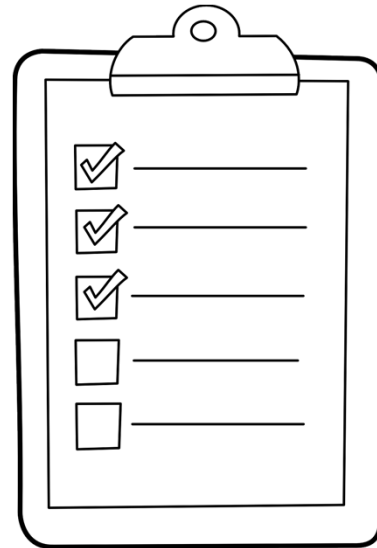


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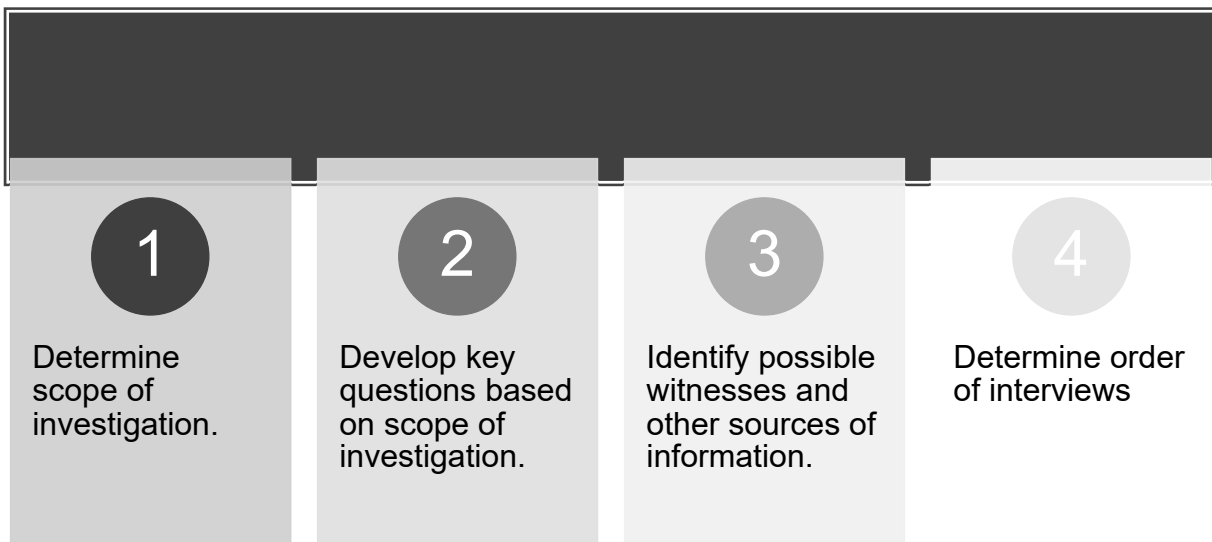
## Develop Investigative Plan

- Frame allegations – identify definitions and standards of proof.
- What evidence do you need and how will you get it?
- Scope of investigation.



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## Public Relations Considerations

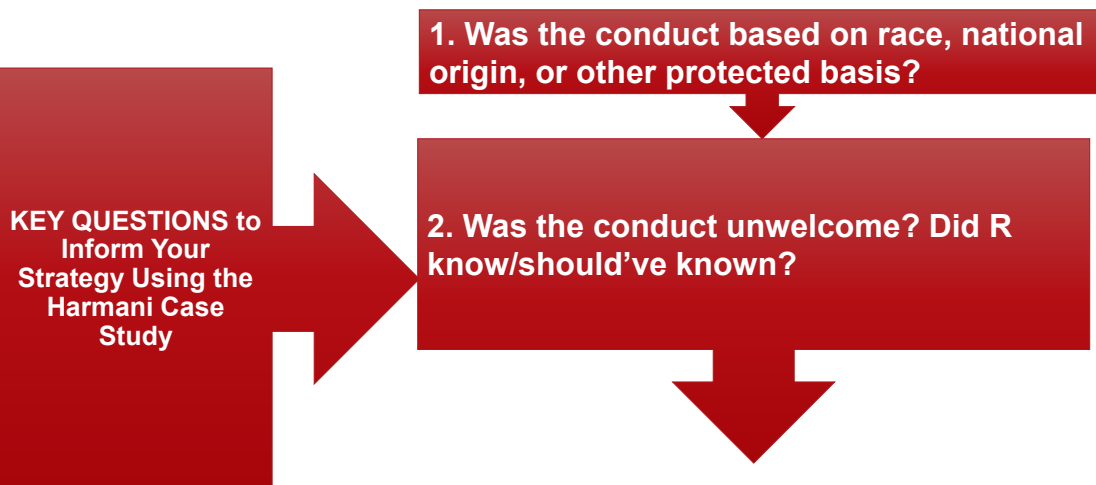
- Likelihood of publicity – Harmani has hinted about talking with the press
- Designated spokesperson?
- Limitations on information that can be disclosed



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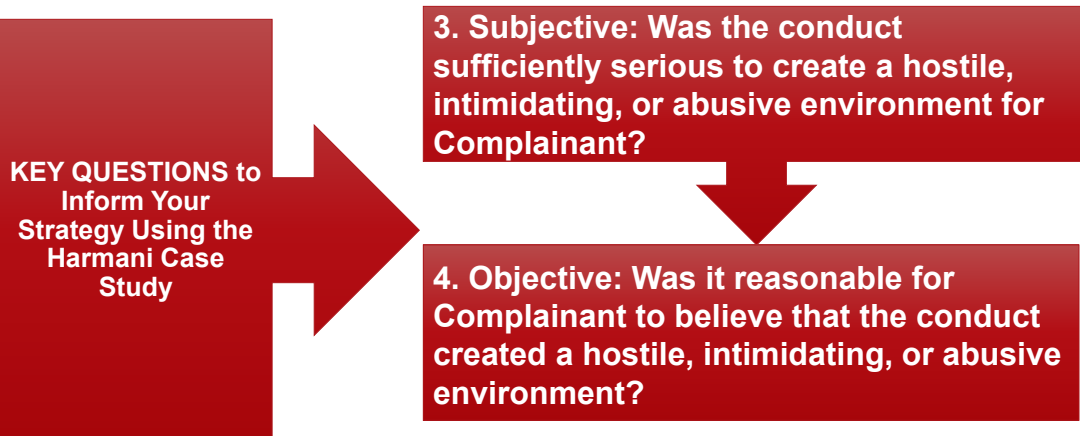
## Investigation Plan – Key Questions



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## Investigation Plan – Key Questions



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## Investigative Plan - Standards

What is the burden of proof?

- Preponderance?
- Clear and convincing?

Who bears the burden of proof?

- On institution?
- On parties?



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## Investigative Plan – Harmani – Layoff – Discrimination

**Guiding document:** East Coast University Policy on Discrimination and Harassment

- Basis for the alleged policy violation?
- Elements of the definition?
- *Prima facie* case – member of protected group, adverse action, others treated better?
- Legitimate, nondiscriminatory reason?
- Pretext?



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## Investigative Plan – Harmani – Layoff – Retaliation

**Guiding documents:** East Coast University Policy on Discrimination and Harassment, FMLA Policy, any relevant policies re whistleblowing

**Elements:**

- Protected activity
- Adverse action
- Causal connection
- Legitimate nonretaliatory reason
- Pretext



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## Investigative Plan – Harmani – Harassment

**Guiding document:** East Coast University Policy on Discrimination and Harassment

- Unwelcome conduct
- Based on (religion/sex?)
- Severe, persistent, and/or pervasive
  - Subjective/objective



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## Questions



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## Note

- This training does not cover investigations conducted under the 2020 Title IX Regulations. Other NACUA courses cover those types of investigations.
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# Conducting Effective Internal Investigations



## Module Two: Conducting the Investigation, Interviewing, and Information Gathering

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## Module Overview

- Interviews: Logistics, Who to Interview, and How to Interview Effectively
- Participation by Parties and Witnesses
- Amnesty
- Required Disclosures – Garrity Rights
- Conducting the Interview – Tips for Good Questioning
- Post-Interview Considerations
- Interviewing High-Level Employees and Police



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## Interviews – General Considerations & Logistics

Scheduling

Location/technology

Notes/recording/transcripts?

Accessibility



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## Interviews – Representation & Support

Right to representation/support?  
Permissible?

Representative's/support person's role during interview



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## Participation by Parties

- Reasons for not wanting to participate?
  - Discuss prohibition on retaliation
  - Ensure it isn't a barrier within the institution's control (e.g., amnesty)
- Make decision based on available evidence
  - Should you draw an adverse inference from a failure to participate?
  - Can you?



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## Participation by Witnesses

- Witness refuses to participate, and/or
- One of the parties asks that a particular witness not be contacted
- Ask why
  - Fear of retaliation?
  - Concern about own misconduct?
- Consider how important the information would be, and whether other ways to get it.



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## Amnesty

“Any individual who reports discrimination or harassment or participates in an investigation will not be subject to disciplinary action by the University for personal use of alcohol or other drugs at or near the time of the incident, provided that such use did not harm or place the health or safety of any other person at risk. The University may offer support, resources, and educational counseling to such individual.”



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## Purpose of the Interview

- Establish a narrative and timelines of events – get the facts!
- Gather information to answer key questions
- Clarify conflicting information
- Understand how all parties perceived events



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## Purpose of the Interview

In devising questions, consider:

- Do I need to know the information?
- Will an answer to my question help me understand what happened?
- Will getting an answer to this question inform the decision?



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## Interviews – General Considerations



Who to interview



Order of interviews



Status of the investigation



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## Who to Interview

- Complainant
- Named respondent/individual making the challenged decision



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## Who to Interview

- Witnesses
  - Employees (faculty, staff)
  - Students
  - Individuals not associated with university
    - Visitors
    - Contractors
    - First responders
    - Medical personnel



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## Interviews – General Considerations

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- Any required disclosures?
- Details of the incident/circumstances at issue



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## Interviews – General Considerations

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- Ask for other sources of relevant evidence – witnesses, documents, etc.
  - Who would have more information about...
  - Is there anything else?
- For complainant, perhaps: What would you like to see as outcome?



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## Interviews – General Considerations

1. Set the TONE
2. Develop rapport – put individual at ease
3. Explain your role – neutral, no conclusion has been reached
4. Offer paper copy of policy and where to find it online



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## Interviews – General Considerations

5. Explain the steps in process
6. Explain prohibition against retaliation
7. Discuss confidentiality/privacy/information security
8. Access to resources and support



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## Conducting the Interviews

### Do:

- Remain impartial and keep an open mind
- Ask relevant questions that are specific to the incident
- Importance of tone



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## Conducting the Interviews

### Don't:

- Make premature conclusions
- Allow personal biases, belief system, stereotypes to guide your questioning
- Badger the witness(es)
- Ask accusatory questions/blame the victim
- React to what the witness is saying



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## Conducting the Interviews

### Tips for Good Questioning

1. Ask open-ended questions
2. Listen more than talk
3. Give time to answer
4. Use appropriate tone
5. Be comfortable with silence
6. Avoid leading questions
7. Identify conflicting information
8. Ask questions that reveal attitude/belief
9. Avoid questions that imply judgment



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## Conducting the Interviews

### Types of Questions

- “**What**” questions ask for facts and details
- “**How**” questions ask about the process, sequence of events, or focus on emotions
- Closed “**Who/When/Where**” questions ask for the specifics of the situation



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# Conducting the Interviews

## Types of Questions

- Avoid “**Why**” questions
- Avoid **multiple choice** questions
- Avoid asking for **conclusions**



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# Conducting the Interviews

## Leading Questions

- Were you upset with Ms. Harmani’s work schedule?
- Did Ms. Harmani’s FMLA leave interfere with the work of the department?
- Were you worried after your conversation with your manager about the grant?



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# Conducting the Interviews

## Useful Phrases

- **Would you be willing to** tell me more about...?
- **How** did you feel about...?
- **What** did you do after...? **What** happened then?
- **What** did you mean when you said...?
- **What** was your reaction to...?
- **How** did you become involved in...?
- **What** is your understanding of...?



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# Concluding the Interview

Thank	Thank the party/witness
Remind	Remind them of institution's prohibition against retaliation
Inform	Inform parties of next steps
Discuss	Discuss confidentiality/privacy again



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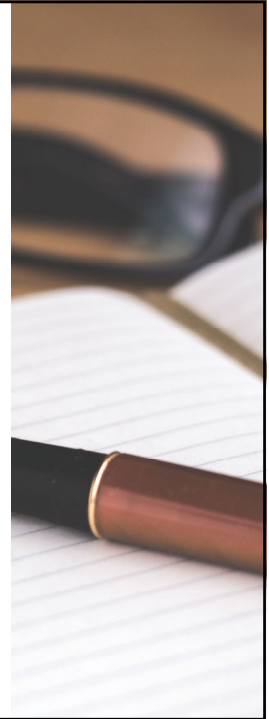
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## Post-Interview

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- Review interview notes/recording/transcript.
- What do you know to be true? Are there undisputed facts?
- What do you not know?



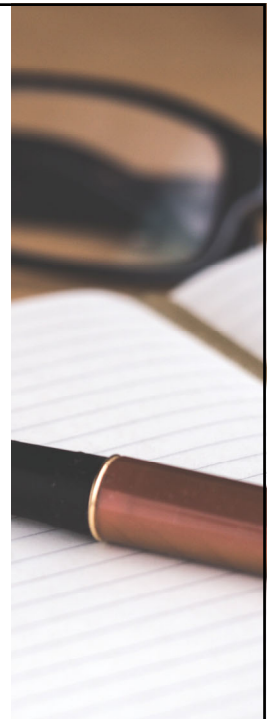
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## Post-Interview

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- How can you find this information out? Another witness? More evidence?
- Circle back to give each party a chance to respond to new information.



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## Thoroughness/Efficiency

- How many witnesses to interview?
- When to stop?



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## Interviewing High-Level Management Employees



LEGAL  
REPRESENTATION



NEUTRALITY



INFLUENCE

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## Interviewing Police

- As a witness in a non-criminal matter
- When investigating alleged misconduct by law enforcement



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## Gather Other Information



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## Prepare Timeline

- Use interviews and documentation to develop timeline.
  - Will help to determine relevant follow-up questions for parties and witnesses
  - Will help factfinder/decision-maker understand what happened



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# QUESTIONS?

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## Module Three: Reaching a Conclusion and Credibility Determinations

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**Pamela Heatlie**, Director of the Office for Institutional Equity, University of Michigan – Dearborn

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## Module Overview

Corroborating evidence

Direct and Circumstantial evidence

Other Types of Evidence

Weight of Evidence

Credibility determinations

- Inconsistencies
- Plausibility
- Motives
- Demeanor of parties and witnesses
- Effects of Trauma



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## **Corroborating Evidence**

- **Definition: Evidence that supports other evidence (Documents that support oral reports)**

- What is it?
- How do you get it?
- What weight is accorded?

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## **Circumstantial Evidence**

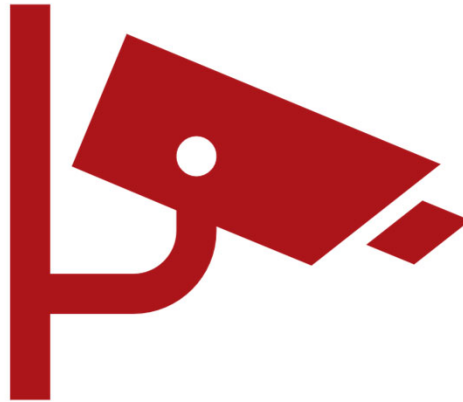
**Definition: Evidence that can be used to INFER but not prove a conclusion. Contrast: direct evidence.**

- Example: pattern evidence. Should be VERY similar in nature. NOT – general character/bad actor evidence
- Ask: Does our process allow circumstantial evidence?
- What weight is it accorded?

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## Other Types of Evidence

- Character evidence
- Recordings
- Polygraph/lie detector tests



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## Case Study Review

- What corroborating evidence do we have?
- What circumstantial evidence do we have?
- What else do we need?



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## Weight of Evidence

- Is all evidence created equal?  
No.
- Eyewitness vs second-hand/hearsay
- Corroborating evidence
- Direct evidence
- Circumstantial evidence
- Other evidence



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## Case Study Review

- Weighing the evidence
- What evidence is strong?
- What evidence is weak?



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# Credibility Determinations

## Factors to consider:

Inconsistencies

Plausibility

Motive

Demeanor

Effects of Trauma



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## Credibility Determinations: Inconsistencies

- Individual is inconsistent in own report.
  - Trauma or fear?
  - Lying?
  - ASK!
- Individual is inconsistent with others.
  - Anomaly?
  - Coached testimony?
  - ASK!

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## **Credibility Determinations: Plausibility**

- What is reasonable?
- Level of detail?
- Apply the appropriate standard of proof.
  - Preponderance of the evidence (maybe this)
  - Clear and convincing (maybe this)
  - Beyond a reasonable doubt (rare)
- You will very likely feel uncomfortable. It's okay.



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## **Credibility Determinations: Motive**

- What is the relationship?
- Classify the witness:
  - Witness with an axe to grind?
  - Witness who wants to protect?
  - Witness who loves the limelight?
  - Witness who doesn't want to be involved?



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## Credibility Determinations: Demeanor

- Controversial
- Need a baseline for comparison
- Don't usually know how the person "normally" behaves
- Cultural/regional/religious expectations may cloud assessment



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## Eyewitness Testimony

- Reliability
- Selective Attention
- **TIP:** Seek corroborating evidence



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## Case Study Review

- Assessing credibility
  - Inconsistencies?
  - Corroborating evidence?



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### **Credibility Determination: Impact of Trauma (Fear-based Response)**

- Impacts ability to retell and recall info
- Likely gaps in memory
- Memories are not encoded chronologically
- Shame, blame and fear
- Reluctance



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## Module Four: Writing the Report and Post-Investigation Considerations

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**Pamela Heatlie**, Director of the Office for Institutional Equity, University of Michigan – Dearborn

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## Module Overview

- Key components of a report (recommended)
- Style/audience/tone
- Disclosure of the report
- Best practices for document retention and use of the attorney-client privilege
- Notifications
- Final Decision
- Post-Decision Considerations
- Appeals
- Consultation with In-House Counsel

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## Key Components

- Executive Summary
- Allegations/Complaint
- Procedural History
  - Witnesses
  - Evidence
- Applicable Policies/Procedures (attach)



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## Key Components

- Evidentiary Standard (follow policy)
- Information Considered During the Investigation
  - Summarized by witness
  - What did people report?
- Undisputed Facts (can be resolved succinctly)



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## Key Components

- Factual Findings
  - Resolve KEY disputed facts
  - Resolve credibility issues
  - Show your work
  - Apply the correct standard of proof



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## Key Components: Factual Findings

- Put it together for the reader. Show your work.
- Example:
  - *I find, by a preponderance of the evidence that the door to the laboratory was left unlocked by the Respondent on October 12, 2016 at 6:03 p.m. This was confirmed by Witness A and Witness B, who observed Respondent leaving with both hands full of chemicals at that time. This was further confirmed by the access log. I did not find Respondent's explanation that they have never left a door unlocked to be credible. Moreover, the hall camera corroborated that Respondent's hands were full.*



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## Key Components

- Conclusions (if that is your role)
  - Based on the factual findings, was there a policy violation?
- Sanctions (if that is your role)
  - Based on the policy violation, what is the appropriate and consistent sanction?



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## Tips When Drafting

- Go back to your investigation plan.
- Remember what you are investigating.
- Look at the elements of each definition.
- Render factual findings that pertain to the elements of each definition.
- Do not make unnecessary factual findings.



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## Key Components

- Appeal Process
  - Describe
  - Note use of report in that process.
- Appendix (policy, witness summaries (if required), photos, etc.)



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## Style, Audience, & Tone

- Write for someone who knows NOTHING about the parties, the issues and the situation.
- No typos, spelling errors, assumptions, unexplained jargon.
- Ultimately writing for a reader later in the process.



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## Case Study Review

- What are the allegations?
- What are the undisputed facts?
  - Which ones are important?
- What are the disputed facts?
  - Which ones are important?



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## Disclosure of Report

- Depends on policy, applicable law, etc.
- Possibly redacted when disclosed. Not always!
- Internal (as part of process)
- External
  - Subpoena
  - Other legally required disclosure (state public records request)



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## Document Retention

- Follow your institution's policy.
- If the policy is silent, be consistent between investigators.
- If you are the only investigator – be consistent with your own practice.
- If you deviate, document your reasoning.



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## Use of Attorney-Client Privilege

- Covers communications sought in furtherance of legal advice.
- Should be marked and maintained separately – not in the investigation file and thus accidentally produced.
- Your attorney can't make the decision for you, but they can help spot holes, ask questions, or advise on process.

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## Notification

- Importance of notifying the parties
- How much information to provide?
- Who else should be notified?
- Any legally required notifications?



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## Final Decision

- What is the next step?
  - Does the report reach a conclusion?
  - Does it recommend sanctions/corrective action (if warranted)?
  - If not, who makes those decisions?
- Avoid a delay in process
  - Who ensures the next steps occur promptly?



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## **Post-Decision Considerations**

- Who receives a copy of the report/decision?
- Determining/implementing sanctions/corrective action/remedies
- Continued vigilance to avoid/address retaliation

## **Appeals**

- Check your policy or process
- Notify of right to appeal
- What are the grounds for appeal?
- What is the standard for review?

## Appeals

- Benefits of informal review even if no appeal rights
- Who should conduct the informal review?
- Notification of outcome



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## Consulting With Legal Counsel

- Understand their role
- Typically do not advise on substance of investigation
- May advise on procedure, notice and related issues



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## Course Conclusion

- Re-cap of Module 4
- Where we've been
- Road map for providing fair process

## Questions?



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