

California State University: DHR Investigations Training

August 11, 2022

Presented by:
Natasha Baker
Managing Attorney
Novus Law Firm, Inc.



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Agenda & Logistics

Session One: Preparing for an Investigation (9:15-10:45)

Session Two: Conducting Effective Interviews (11:00-12:30)

Session Three: Evidentiary Analysis and Report-Writing (1:30-3:00)

Questions/recording/participation

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Reminders

- This presentation is not legal advice.
- Investigations are challenging.
- There are no bad or dumb questions.
- You have to be neutral if you are an investigator.
- Burnout is real so take care of yourself.

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Qualities of a Good Investigator

- Open-minded
- Courageous
- Culturally conscious
- Aware of own biases

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Session One: Preparing for an Investigation

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Session One: Preparing for an Investigation

- 1**
Understand how and why an investigation is scoped and what to do if the scope should be modified
- 2**
Formulate an investigation plan based on the scope and the applicable policy, including the timelines for review and drafting
- 3**
Determine a strategy for ordering witnesses and gathering evidence
- 4**
Identify strategies to use when supervising a third-party investigator



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Scoping

- **Parties**
- **Location**
- **Definitions of prohibited conduct**
 - Dates of incident(s) for prohibited conduct determine definitions
- **Procedures** (see Section VI. Applicable Complaint Procedures)
 - Track 1 (federally-required hearing), Track 2 (state-required hearing), Track 3 (no hearing)
 - Tracks 1 and 2 investigators gather evidence; Track 3 investigators also analyze evidence and determine policy violation

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Article VI. Applicable Complaint Procedures

A. Complaints against Employees, former Employees, and/or applicants for employment Complaint of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, or Retaliation against an Employee, former Employee, or an applicant for employment should be made using the Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation Made Against an Employee or Third-Party.

B. Complaints against Students

A Complaint of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, or Retaliation against a Student should be made using the Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation Made Against a Student.

C. Complaints against Student-Employees

A Complaint of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, or Retaliation against a Student-Employee where the alleged violation arose out of the person's status as an Employee and not their status as a Student should be made using the Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation Made Against an Employee or Third-Party.

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D. Complaints against Third Parties

A Complaint of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, or Retaliation against a Third Party should be made using the *Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation Made Against an Employee or Third-Party*.

E. Complaints against a President

Complaints against a President should be made to the Chancellor's Office (CO) using the Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation Made Against an Employee or Third-Party. However, Complaints against a president shall be processed by the campus if the president's role in the alleged incident was limited to a decision on a recommendation made by another administrator, and the president had no other substantial involvement in the matter.

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F. Complaints against a Chancellor's Office Employee or a Title IX Coordinator/DHR Administrator

- For Complaints against CO employees or a campus Title IX Coordinator/DHR Administrator, the responsibilities identified in the Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, and Retaliation Made Against an Employee or Third-Party as those of the President are the responsibilities of the Chancellor.
- Complaints that involve allegations against the Chancellor or a member of the Board of Trustees shall be referred to the chair or vice chair of the Board and the CO Title IX Coordinator/DHR Administrator for processing and investigation. Complaints against a Chancellor's Office employee, or a campus Title IX Coordinator/ Discrimination, Harassment, and Retaliation Administrator ("DHR Administrator") will be made to the Chancellor's Office at eo-wbappeals@calstate.edu. In that event, the chancellor assumes all responsibilities identified as those of the campus president.

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F. Complaints against a Chancellor's Office Employee or a Title IX Coordinator/DHR Administrator (continued)

- Complaints against a campus president will also be made to the Chancellor's Office, but only if it is alleged that the president directly engaged in conduct that violates the Policy. Any other Complaints against a president (for example, that the president had no substantial involvement other than to rely on or approve a recommendation made by another administrator) will be made to and addressed by the campus.
- Complaints against the chancellor or a member of the Board of Trustees will be referred to the chair or vice chair of the Board via the Board of Trustees' Secretariat at trusteesecretariat@calstate.edu, but only if it is alleged that the chancellor or a member of the Board of Trustees directly engaged in conduct that violates the Policy. Any other Complaints against the chancellor or a member of the Board (for example, that the chancellor or member of the Board of Trustees had no substantial involvement other than to rely on or approve a recommendation made by another administrator) will be made to and addressed by the Chancellor's Office at eo-wbappeals@calstate.edu.

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Assessing Conduct Outside the Original Scope

- First consideration: stay in your assigned investigation lane.
- Second: what is the behavior/who was it/where?
 - Behavior not covered by the DHR policy but covered by other campus policies.
 - Behavior not covered by any policy.
 - Behavior involving parties who are not any part of your noticed investigation.

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Example

Professor C says to their department chair that they are experiencing a hostile work environment (based on a protected category) that is being created by their colleagues in the department.

During the interviews, the investigator obtains information that establishes that the department chair has largely been absentee in this situation because they are having a prohibited relationship with a current student.



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Modification to Scope

- What is the change?
- Which procedure is the investigator using for the initial investigation?
- To whom should the investigator report the new allegations?
- What happens next?
 - Notification and modification requirements?

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Formulating an Investigation Plan

Importance
of having a
plan

Elements of
a plan

Using the
plan

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Elements of an Investigation Plan



Procedures, deadlines and proposed timeline including time for review, notices, scheduling, Working Days, etc.



Definitions at issue



Standard of proof



Anticipated witnesses (to the extent known)



Anticipated evidence (to the extent known)

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Example of Professor C

Procedures, deadlines and proposed timeline:

Interim Procedures for Complaints of Discrimination, Harassment, Sexual Misconduct, Sexual Exploitation, Dating Violence, Domestic Violence, Stalking, and Retaliation Made Against an Employee or Third-Party.

Definitions at issue

Harassment – sub definition hostile environment

Standard of proof

Preponderance of the evidence

Anticipated witnesses (to the extent known)

Chair, colleagues, others

Anticipated evidence (to the extent known)

Professor C's notes, emails, messages

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Strategies for Gathering Evidence

Order of witnesses

- Procedural – notice of investigation and initial meeting with respondent under Article VII(B).
- Strategic
- Information flow

Obtaining evidence from witnesses, from campuses

- Timing
- Trust
- Volume (Track 1 vs. Track 2 and 3)

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Example

Professor C has reported that the hostile environment began when they were granted tenure and another faculty member was not. This created factions within the department, led by Professor R, who was named as the respondent.

The hostile environment is in the form of caustic group emails from Professor R, comments during department and committee meetings, and other microaggressions and forms of sabotage. Professor Aider and Professor Abetter also contribute to this hostile environment.

Professor C reported that several faculty members left the department as a result of this toxic environment and that everyone in the department would be able corroborate Professor C's report of the meetings.

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Example of Professor C



Procedural requirements?



Preferred order? Why?



Strategic considerations?

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Supervising a Third-Party Investigator

Scope

Timing and
deadlines

Communication and
expectations

Input on strategy
without affecting
neutrality

Reviewing a draft
report appropriately

- missing data/gaps in analysis/procedural errors

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Break Time
10:45 – 11:00

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Session Two: Conducting Effective Interviews

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Session Two: Conducting Effective Interviews

1

Prepare for an interview, including strategies for required notices and managing attendees.

2

Understand notetaking and data gathering techniques

3

Ask effective questions to gather the best information possible

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Preparing for an Interview

Purpose of the interview

Standard admonitions

Outline of questions (yours and those proposed by the parties)

Evidence handling

Notice

Disclosures of information to third party witnesses

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Initial Meeting – Purpose/Objective



INSTILLING CONFIDENCE
IN THE SYSTEM AND YOU



GATHERING FACTS



IDENTIFYING ISSUES

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Considerations When Planning Respondent's Interview

Sufficient details in advance?

Who will be there? Advisor?

What will be disclosed?

When?

What does the interviewee already know?

Opportunity for follow up?

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Standard Interview Opening/Closing

Who you are

Your role

Process

Confidentiality
vs. privacy vs.
secrecy vs.
anonymity

Retaliation

Expectations,
timing

Other
admonishments
(advisor)

Repeat and
document



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Interviews: Outlining Your Approach

- **OUTLINE YOUR ISSUES** – carefully analyze all issues raised
- **LIST THE FACTS** that relate to each issue
- **LEAVE ROOM** underneath each fact to work in the individual's answers
- **RESPONSE CHART** for RESPONDENT



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Asking Effective Questions

- **GO BACK TO WHO, WHAT, WHEN, WHERE...**(caution on WHY)
- Broad to narrow questions
- Caution: Leading questions
- Prepare: Tough questions
- Ask: Follow-up questions
- Avoid compound questions and inserting your own words – i.e., was the workplace demeaning?
- Avoid asking for conclusions – i.e., did you experience harassment?
- Commit every interviewee to their report (repeat back)

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Professor C reported that several faculty members left the department as a result of this toxic environment and that everyone in the department would be able corroborate Professor C's report of the meetings.

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Example: Who/What/When/Where



If you wanted to isolate the issue to Professor C's allegations about Professor Aider, what W/W/W/W questions would you prepare for Professor C?



How would you confront Professor Aider with those allegations?

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Note-taking/data gathering

NOTE TAKING IS CRITICAL – do the best you can to get down key facts during the interview and complete your notes IMMEDIATELY after the interview is completed while the information is still fresh.

- Options for note-taking
- Best practices regardless of form
 - Scheduling time
 - Capturing what the witness said – not your analysis
 - Capturing what you said – easier with W/W/W/W questions
- Obtaining evidence in the moment

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When Do You Have Enough?

- Duplicative or cumulative testimony?
- Preponderance of the evidence (Track 3).
- Check the elements of the definitions.
- What was promised to the parties?
- Optics interviews

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Assessment of Allegations

- Assess what was conveyed by the Complainant.

- Assess the scope of the investigation.
 - Does the Notice need to be amended?
 - Should any claims be dismissed?
 - Has another policy been triggered?
 - Who else should be consulted?

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Example

When interviewed, Professor C reported that Professor R had hit on them once and, when rejected, began a campaign to torpedo their tenure application. Professor C reported that when they received tenure and another faculty member did not, Professor R used that as an opportunity to develop factions.

Professor C reported that several other members of the department feel that tenure is now being awarded as part of the University's attempt to be "overly woke" and eagerly jumped on Professor R's team. When interviewed, they each denied any problems in the department and focused on the mission of the University and their perceptions of it.

Professor C reported that several faculty members (Professors Goodbye and Goodluck) left the department as a result of this toxic environment. When interviewed, they confirmed that they left due to racial tensions.

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Example

Professor Introverted and Professor Checked Out corroborated Professor C's statements that Professor R made condescending comments about Professor C's academic qualifications in department and committee meetings and that a side conversation on Zoom between Professors R, Aider and Abettor had been inadvertently shared with the department after a meeting - in which they blamed Professor C's grant of tenure on gender and race.

Citing a happy marriage, Professor R. denied "hitting on" Professor C. and claimed academic freedom to speak about the quality of tenure candidates.

Professor R. denied discussing Professor C. with Professors Aider and Abettor. When confronted with the Zoom chat, Professor R's position was that the chat had been altered. When reviewing the draft evidence, Professor R's response to Professor Aider's confirmation of the chat was that Professor R's Zoom login had recently been hacked so that they were not part of the chat.

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Break Time
12:30 – 1:30

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Session Three: Evidentiary Analysis and Report Writing

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Comparison of Investigation Reports

Track 1

- [A] final investigation report...will summarize all Relevant evidence (inculpatory and exculpatory), including additional Relevant evidence received during the review of evidence. Any Relevant documentary or other tangible evidence provided by the Parties or witnesses, or otherwise gathered by the Investigator will be attached to the final investigation report as exhibits.

Track 3

- The final investigation report will include a summary of the allegations, the investigation process, the Preponderance of the Evidence standard, a detailed description of the evidence considered, analysis of the evidence including relevant credibility evaluations, and appropriate findings. Relevant exhibits and documents will be attached to the written report.

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Example: Track 3 Report

- A summary of the allegations
- The investigation process,
- The Preponderance of the Evidence standard
- A detailed description of the evidence considered
- Analysis of the evidence including relevant credibility evaluations, and appropriate findings

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Summary of the Allegations



Precision



Check notices and amended notices



Quote the policy – the exact definitions of prohibited misconduct

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Investigation Process



Audience



Tone



Strategy



Include minor procedural details that you will not remember

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Detailed Description of Evidence

- Reminder Track 1 vs. Track 2 vs. Track 3
- Organization of this section is critical.
- This is not the same as findings. This is what was gathered and where it came from. There is no analysis yet.
- Demonstrating amendments/modifications after the review process.

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Analysis, Credibility Resolutions, Findings

This is AFTER
the summary
of evidence.

This is
analysis of the
evidence.

Only analyze
what you need
to.

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Analyzing Evidence

What facts are not in dispute?

What facts are in dispute?

What undisputed facts are important?

Do you need more information about anything?

On which points are witnesses NOT credible and why?

What do you think probably happened?

Was there a policy violation?

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Credibility Analysis

- Motivation/relationships
 - Reluctant witnesses
 - Witness who loves the limelight
 - Witness with an ax to grind
- Demeanor (?)
- Logic/consistency of story
- Corroborating evidence
- Circumstantial evidence

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Analysis Tips

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

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Example

- Put it together for the reader. Show your work.
- Example:
- *I find, by a preponderance of the evidence that the door to the residence hall was accessed by the Respondent on October 12, 2021 at 6:03 p.m. This was confirmed by Witness A and Witness B, who observed Respondent entering the residence hall. This was further confirmed by the access log. I did not find Respondent's explanation that they lost their key card to be credible, given the testimony of Witness A and B and that the hall camera corroborated that a person matching Respondent's description entered at that time.*

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Other Best Practices

- Write for an audience who knows nothing about the case.
- This is technical writing. Not persuasive writing. Put it together piece by piece.
- Use the language of the case. Quotes – not your language.
- Be very clear what is an allegation vs. what is a factual finding. (Reminder only Track 3 reports have findings.)
- Set it aside, come back and review for errors, typos, gaps in analysis.

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Example

Professors Aider and Abettor noted that Professor R. would never demonstrate romantic interest in a colleague – that would be unprofessional. However, Professor Introverted disclosed that upon joining the department, Professor R. had sent them a Valentine’s gift and an invitation to a getaway at a winery, which Professor Introverted had declined. It had never been discussed after that.

The winery is owned by Professor Abettor’s family and Professor R. has shown several pictures of the winery on Instagram.

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Application of Track 3 to Example

- A summary of the allegations
- The investigation process
- The Preponderance of the Evidence standard
- A detailed description of the evidence considered
- Analysis of the evidence including relevant credibility evaluations, and appropriate findings



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Questions?

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Date
Presented by:
Natasha Baker
Managing Attorney
Novus Law Firm, Inc.
natasha@novuslawfirm.com

Clients and colleagues can
schedule a call or
videoconference [here](#)



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