

Investigation Skills

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Seattle Colleges
October 16, 2024
9:00 a.m. to 4:00 p.m.
College Human Resource Professionals



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Disclaimer – I'm a lawyer but..



- This training is not legal advice
- Consult with your counsel/AG regarding specific situations
- Review your own college's policies, procedures, and practices
- For confidentiality, speak in generalities – "Hypothetically..." or "For the sake of discussion.."



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Ground Rules

- Questions are encouraged
- Courtesy is expected
- We are all experts
- Be aware of your own responses and experiences
- Breaks are built in, but you can take them as needed
- Other rules or requests?




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Today's Agenda

- Why and When to Investigate
- Investigating Impartially
- Identifying the Issue / Defining the Scope
- Developing a Method for Investigation Planning
- Gathering Evidence and Interviewing
- Using a Trauma-Informed Approach
- Findings of Fact - Relevance & Credibility
- Report Writing



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Teaching Goals

- Compliance with standards
- Efficiency
- Effectiveness
- Skill building
- Confidence
- Reassurance



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Learning Goals

- Limiting bias
- Planning for efficient investigations
- Identify issues and define scope
- Effective evidence-gathering and interviewing
- Applying trauma-Informed practices
- Report writing



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What if we don't investigate?

- Can make unfair judgments and decisions
- Don't have the information needed to effectively address concerns
- Send a message that the college is nonresponsive
- Increase the risk of litigation and investigations by outside agencies
- Failure to promptly and effectively investigate or provide appropriate remedies can also create greater risk



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When do we investigate?



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Easy Decision-making

- Investigate every complaint that suggests potential harassment, discrimination, retaliation, and unethical/illegal conduct, regardless if it is:
 - Filed anonymously
 - Second-hand reports or rumors from someone other than the person (purportedly) aggrieved*
 - Direct complaint by (purportedly) aggrieved student or employee
 - By frequent complainant



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Purpose of Investigations

- Provide facts that advise the decision-maker:
 - Whether conduct, more likely than not, occurred and
 - If so, was policy violated?
- Provide other information to assist in answering questions:
 - What is the appropriate decision? Substantiated and/or Sustained*
 - What is needed for an effective response?
 - Response to respondent's conduct (discipline or other action)
 - Remedy for the complainant (restoration), and
 - Other actions (prevent recurrence and correct systemic issues)



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The Purpose is Not to...

- Make *legal* determinations
 - This is the attorney general's job
 - Doing so can be considered an admission on behalf of the college
 - Policies are often written or interpreted stricter than or different than the law
 - Finding that the college's policy was violated does not equate to a finding that the law was violated.



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Who should investigate?



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Factors for Consideration

- Competency
- Necessary skill set, including any special expertise
- Potential or actual conflict of interest
- Sufficient time and resources to conduct a prompt and thorough investigations
- Parties' comfort level with the investigator
- Pressure to protect the organization



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Ethical Issues for Investigators*

- Contribute to the college's ethical success
- Must strive for the highest standards of competence
- Maintain the highest standards of ethical conduct
- Ethically responsible for promoting and fostering fairness and justice for all employees
- Protect stakeholder's interests and professional integrity by not engaging in activities that create an actual, apparent, or potential conflict of interest.



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Impartial Investigator

EEOC

- "The investigator must be and maintain the appearance of being **unbiased, objective**, and thorough."
- "They must be **neutral** in their approach to factual development."

The U.S. Department of Education

- "In all cases, the [college] must conduct a prompt, thorough, and **impartial** inquiry."



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Impartiality Considerations

- Is the investigator a party to the situation, e.g., other involvement or potential witness?
- Any prior history or relationship with any of the parties?
- Has the investigator had multiple investigations with a party or work group?
- Will the investigation impact on ongoing relationships given the parties' positions?



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Impartiality Considerations

- Any preconceived knowledge?
- Has the investigator spoken to peer investigators who have previously investigated the parties?
- Can the investigator put aside any personal feelings?
- Is the investigator pushing for admissions?
- Is there a vested interest in the outcome?
- Are there actual or perceived breaches of confidentiality?



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How do we
avoid bias in
investigations?



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Definitions of Bias

- Biases can be conscious or unconscious/implicit
- "Preconceived opinions or irrational preference for a person, group, idea or thing"

"An inclination, tendency, feeling or opinion that prevents an unprejudiced consideration of a question."

In other words, prejudice with positive or negative consequences that affect fairness.



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Bases of Biases

- Race, national origin, or ethnicity
 - Gender
 - Sexual Orientation
 - Religion
 - Age
 - Disability
 - Language or culture
- Investigator-specific biases**



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Cognitive Biases

- Confirmation bias** – seeking evidence to support existing belief
- Priming bias** – exposure that influences responses to information
- Anchoring bias** – relying on an initial piece of information or evidence
- Favoritism bias** – bias toward an individual or group that is like us or that we like personally
- Other biases for** – employers or clients, simple answers, people with power, high performers, and people we sympathize with
- Other biases against** – delivering bad news, bad employees/ "screw-ups," complainers or "whiners," or repeat reporters



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The “Not Me” Effect



- We all have unconscious biases and act on them
- We are not “bad” people
- It is our professional and ethical responsibility to recognize and understand our own biases
- The more open we are to thinking about our own biases, the more we can overcome them
- Lean into cultural competency and personal humility



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Mitigating Bias

- Don't assume anyone's experience or identity
- Be clear about roles and expectations
- Build rapport
- Seek clarification
- Appreciate multiple alternate interpretations
- Seek contradictory evidence
- Analyze both sides
- Avoid known biases
- Prioritize objective evidence
- Be self-aware
- Peer review
- Slow down
- Educate yourself
- Use neutral language



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Tips for Mitigating Bias



- Monitor your feelings
- Acknowledge your feelings
- Trauma - understand secondary trauma and stress
- Express your feelings and have compassion for yourself

There is no perfect investigation and
no perfect investigator.

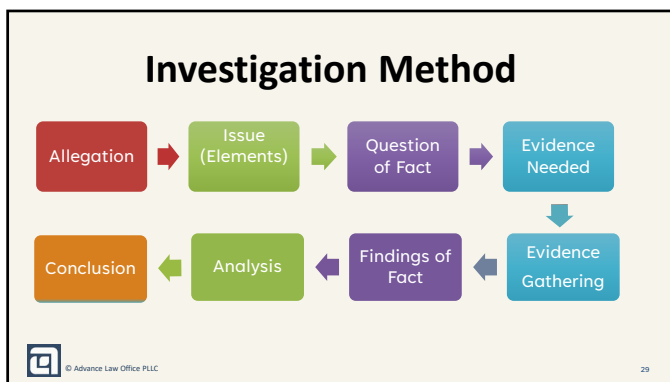


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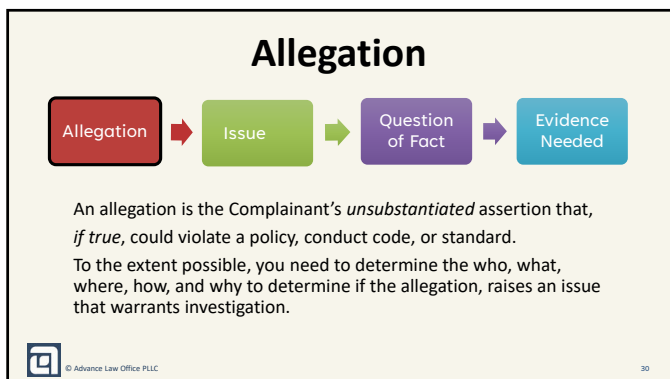
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Scope: What's the concern?

Personality conflict?

Performance issue?

Policy violation?



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Is Investigation Warranted?

Personality conflicts: informal resolution

Performance issues: feedback and PIP

Policy violation: address or investigate



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Hypothetical



Quincy filed a report in Maxient that says:

- Their coworker, Pat, has violated Quincy's boundaries and harassed them by repeatedly asking them out.
- Tired of being subjected to a hostile environment, Quincy told Pat to stop.
- Yesterday, their supervisor assigned them to work on a new project together.
- Quincy feels unsafe working on the project with Pat.



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Complexity of Language

Legal or
layperson
terms?

“harassment”
“hostile”
“unsafe”



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Questions for Intake

1. Who is making the allegation? What occurred?
Action, event, incident
2. When (and how) did it occur or is it ongoing?
3. Where (and how) did it occur?
4. Who engaged in action, event or incident?



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Hypothetical - Quincy

You talk with Quincy –

- They tell you Pat invited them for coffee three times. They said “no” each time. The third time Quincy told Pat not to ask again.
- They are also concerned that because they set a boundary with Pat things may be awkward, which will affect the project and their job.
- Quincy recently received a poor performance review and is worried that their job is unsafe.



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Hypothetical - Pat

Pat heard about Quincy's report and called you -

- Pat admitted they had invited Quincy to join them to get coffee at a nearby café three times.
- Pat said they are not romantically interested in Quincy. They were just trying to be kind because Quincy seemed to be struggling and stressed.
- Pat understands Quincy is not interested in coffee and will not ask them again. Pat assures you they are professionals, and their project will not be affected.

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Quincy & Pat - Hypothetical

It is your decision, so...

- What, if any, additional information do you need?
- Do you investigate?
- What do you do next?

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Quincy & Pat - Hypothetical

What if...

- Quincy said to stop asking at the first invite?
- Pat was Quincy's supervisor?
- Quincy said she believes Pat has asked out other employees?
- Pat denied the behavior?

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Defining the Scope

- Assess, *if true*, is what the complainant alleged a potential issue for investigation?
 - Parties (who)
 - Policy (what/how)
 - Jurisdiction (where)
 - Timeliness (when)



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Other Scope Issues

- Other misconduct alleged
- Reciprocal complaints
- Retaliation
- Scope can change over time...
 - Who decides?
 - How are parties notified?



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Investigation Notice

- Allegation
- Policy and issue being investigated
- Rights in process
- Prohibition of retaliation and contact
- Other Essentials?
 - Required participation
 - Confidentiality / "gag orders"
 - Right to representative



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Investigation Planning:

Staying focused



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Issue



Issue - The question that arises from the complainant's allegation that suggests a possible violation of a college's policy, procedure, or practice.



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Allegation → Issue

Pat violated Quincy's boundaries, harassed them with repeat invitations, and made them feel unsafe.

Whether Pat harassed Quincy in violation of the college's policy 282, which prohibits harassment, discrimination, and bullying.



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Understanding Standards

Investigation Standard (Professional)

"Good faith investigation with a reasonable conclusion"

Standard of Proof (Evidentiary/Facts)

Preponderance of the evidence*
"More likely than not" or "Greater than 50/50 chance proposition is true"

Policy Standards (Analysis)

Identify the policy (name/number)
Policy define the issue(s) and their elements will drive your findings of fact



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Hypothetical – Maria & Sami



- Maria has been working on a team project with her coworkers, Sami, Pat, and Quincy.
- Maria alleges Sami has been harassing and bullying her based on national origin and race.
- Maria and Sami both identify as Black.
- Maria says Sami's parents are from the Dominican Republic and Sami is hostile toward her (Maria) because she is Haitian.
- Maria says Sami has thrown things at her, sent "nasty" team emails about her, and posted mean things about her on social media.



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Allegation → Issues

Sami has harassed and bullied Maria based on national origin and race by throwing things, sending emails, and making posts on social media.

Whether Sami (1) harassed and (2) bullied Maria in violation of the college's policy 282, which prohibits harassment, discrimination, and bullying.



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Retaliation Hypothetical:

Participant's Exercise
Pages 1 and 2




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Gayle and Sukhi

Write a statement of the issue you are investigating.

Are there any issues you are not investigating (dismissing)?


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Gayle and Sukhi

Issue for investigation:

Whether Sukhi retaliated against Gayle in violation of College Policy 282.1


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Questions of Fact



- Questions of fact are derived from the policy at issue.
- These are the individual elements of the law or policy that must be proven to determine whether a violation occurred.
- Each element of the policy will provide a question(s) of fact.
- These guide your evidence gathering and help you determine what's relevant.
- Once all questions of fact are answered, you can write your findings of fact, apply your analysis, and reach conclusions.

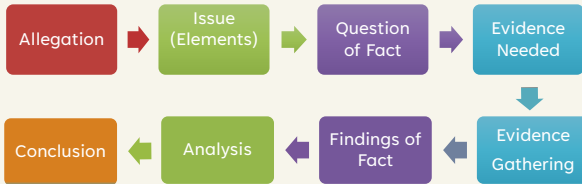


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Investigation Method



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Hypothetical – Maria and Sami



Whether Sami
 (1) **harassed** and
 (2) **bullied** Maria
 in violation of College Policy 282, which
 prohibits harassment, discrimination, and
 bullying.



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Elements - Questions of Fact

Harassment is, per the College's Policy 282.1 :

A form of discrimination consisting of

1. physical or verbal conduct
2. that denigrates or shows hostility
3. toward an individual *because of*
 - their membership in a **protected class** or
 - Their perceived membership in a **protected class**.



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Elements - Questions of Fact

(1) Harassment occurs when

1. Conduct is
2. Objectively offensive* AND
3. Sufficiently severe, persistent, or pervasive
4. That it has the effect of
5. **Substantially** altering the terms or conditions of employment



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Elements - Questions of Fact

6. Directed towards an individual based upon their membership in a protected class.
 - Petty slights, annoyances, offensive utterances, and isolated incidents (unless extremely serious) typically do not qualify as harassment.
 - Conduct that could be discriminatory harassment:
 - Epithets, "jokes," ridicule, mockery, or other offensive or derogatory conduct, or
 - Verbal or physical threats of violence or physical contact



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Elements - Questions of Fact

(2) Bullying is, per College policy 282.1

1. Unwelcome
2. Conduct, whether verbal, physical or otherwise, including "cyber" bullying, that is
3. Objectively offensive, **and**
4. Sufficiently severe, persistent, and/or pervasive
5. As to alter the terms or conditions of employment.



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Evidentiary Information



1. What was the conduct (verbal, physical, or "cyber")?
2. Was it unwelcome?
3. **Was it based on protected status?** (discriminatory harassment vs. bullying)
4. Was it objectively offensive? **AND**
5. Was it sufficiently severe, persistent, and/or pervasive?
6. Did it alter the terms or conditions of Maria's employment?



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Questions

1. What was the conduct (verbal, physical, or "cyber")?
2. Was it unwelcome?
3. **Was it based on protected status?** (discrim. harassment vs. bullying)
4. Was it objectively offensive? **AND**
5. Was it sufficiently severe, persistent, and/or pervasive?
6. Alter terms or conditions of Maria's employment, i.e. impact?

Evidence

1. Interviews (Maria and Sami)
2. Interviews & physical evidence: emails, social media posts, site visit
3. Interviews
4. Interviews and research
5. Timeline, frequency, severity
6. Interviews, attendance record, performance, etc.



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Gayle and Sukhi

What evidence do you want to review?
Who do you want to talk to?
What challenge do you foresee?
What assistance may you need?

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Lunch Break

Please Return at 1:00 p.m.

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Gathering Evidence and Conducting Interviews

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Thoughts on Interviewing

- Where and when will interviews take place
- What order for interviewees
- How will you document interviews
- What do you need to know from the interviewee?
- How will you ask questions? "Funnel approach?"
- Express curiosity rather than doubt



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Admonitions

Display consistency, competency, and calm by explaining:

- Your role
- Why you want to talk to them
- Privacy vs. Confidentiality
- Prohibition of retaliation
- How the interview will be documented



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Documenting Evidence

- Organize and log it as you get it!
- Who originated it?
- When did you get it?
- Who did you get it from?
- What is its importance / what does it relate to?
- Relevant or irrelevant?



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Challenges with Evidence



- Medical records
- Mental health records
- Attorney-client privilege
- Educational records
- Employment records



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How do we
apply a
“trauma-
informed”
approach?



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Definition of Trauma

“An event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotionally or spiritual well-being.”

Many people are impacted by trauma,
including trauma unrelated to the issue at hand.



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Effects of Trauma

- Leaves an indelible imprint on the brain
- Engages the “primitive” brain (limbic system and brain stem – fight, flight, freeze)
- Impacts memory, perception, and event recollection
- Interferes with the ability to recall or share details in a linear manner
- Inconsistency should be expected



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Trauma-Informed Interviewing



- Create a safe space
- Build rapport and explain roles
- Be explicit: emotions are normal
- Allow and encourage breaks
- Have tools ready or identified
 - water and tissue
 - tactile tools, fidget spinners, and pipe cleaners



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Trauma-Informed Interviewing

- “Start where you feel comfortable”
- “Tell me what you remember”
- “What else happened?”
- Use neutral language
- Express empathy without confirming facts– “I can see this is hard for you to talk about”



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Participant-Centered Process

- This is the interviewee's story, let them tell it.
- Focus on their needs, views, and perspectives and modify your approach, as needed
- If people feel respected and heard, they will be more open to sharing information
- Choose your words thoughtfully



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Findings of Fact

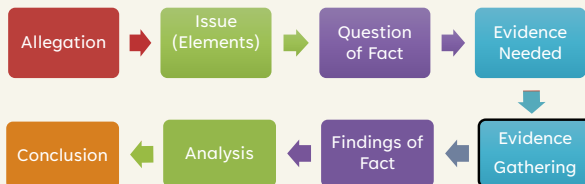


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Findings of Fact



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Finding of Fact



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graph RL
    A[Evidence Gathered] --> B[Findings of Fact]
    B --> C[Analysis]
    C --> D[Conclusion]
  
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- Findings of fact are the answers to the questions of fact we discussed earlier.
- Your investigation is essentially complete when you can answer the questions of fact.
- Referring back to the questions of fact will help you determine what is relevant, necessary, and useful.

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Relevant Evidence

Objectively evaluate "all relevant evidence."
 "Relevant" means related to the allegation under investigation. Evidence is relevant if:

- it will assist you in showing an action occurred
- it will help determine whether the policy standard has been met
- it is an admission
- it will establish innocence or alibi



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Gayle and Sukhi



Review the findings of fact provided

- What additional information do you need, if any?
- Is there anyone else you want to talk to?
- Any question of fact that's difficult?

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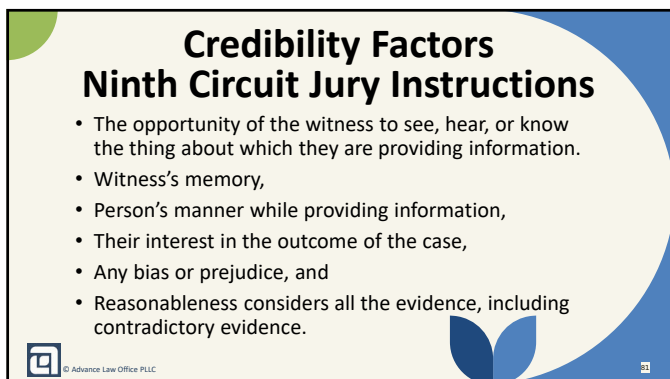
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Credibility Suggestions

Issue: how believable and how much weight do you give it?

- Demonstrate care, check bias, and let evidence be your guide
- Use efficiency tools – tables, charts, and relationships
- Assess their weight
 - What's inconsistent?
 - What are the different versions? Different doesn't mean untrue.
- Problems with memory (passage of time, impairment, input, or priming of others)



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Gayle and Sukhi

Do you find Sukhi's position that she did not know about Gayle's involvement credible?

Why or why not?

Does it matter?



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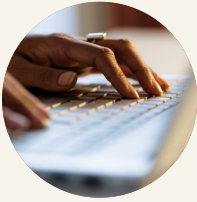
Report Writing



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Report Writing

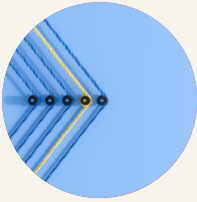


- Background information
- Allegation
- Issue
- Legal Standard
- Policy
- Findings of Fact

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Thoughts on Report Writing



- Who is your audience?
- What type of report?
 - Executive summary
 - Short report with just findings
 - Full report documenting information and perspectives
- Are you a decision-maker writing the analysis and conclusion too?

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How to Organize the Facts?

- With a simple issue, by interviewees
- With a more complex issue you might follow the elements of the legal standard, e.g. behavior/comments, unwanted, and impact
- With multiple issues, chronological order may be most helpful
- Consider charts, timelines, and other tools

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Report Writing Considerations

- Analyze, don't regurgitate
- Attribute information to witnesses? Use a key?
- Acknowledge various points of view
- Avoid extraneous and irrelevant information
- Consider peer review
- Is there required language?



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Decision-making/ Analysis

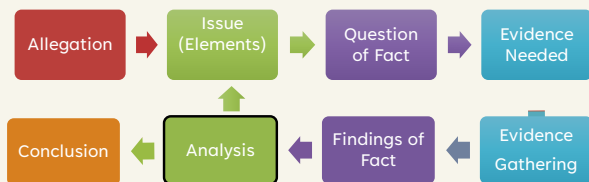
Putting it all together



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Analysis



Your analysis aligns the facts with the elements of the legal issue to make a reasoned decision as to whether policy was violated.



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Writing it Right

- Fact-finder: Lay out the facts that the decision-maker needs to make a determination
- Decision-maker: Apply the essential factual findings to the policy standard
- Develop an analysis and reach a reasoned conclusion



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Gayle and Sukhi

- Outline an analysis of the retaliation claim
- Draft a conclusion



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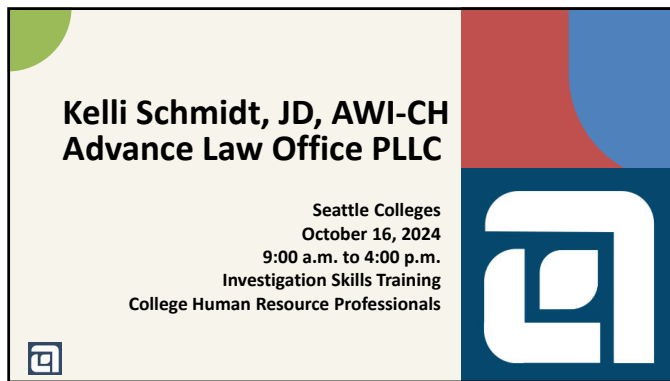
Questions and Answers



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Seattle Colleges
October 16, 2024
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Investigation Skills Training
College Human Resource Professionals

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