



#aiTIXAdvInvestigator

Advanced Title IX Investigator Training and Certification

West Hollywood, CA | October 2 - 4, 2019



#aiTIXAdvInvestigator

WELCOME & INTRODUCTIONS

2



LEARNING OUTCOME

After participating...

... you will be able to increase your capacity to investigate more complex sexual harassment/gender-based discrimination cases for your campus.

ADVANCED TITLE IX INVESTIGATOR TRAINING AND CERTIFICATION

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October 2 - 4, 2019

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TITLE IX PROPOSED REGULATIONS: ANALYSIS AND APPLICATION



POLL

How many had working
knowledge of the proposed
changes?



LEARNING OUTCOME

After participating...

... you will be able to identify and explain at least three pivotal proposed changes and develop strategies to modify current practice, if necessary.

AGENDA

- I. The proposed regulations
- II. State law
- III. Case law
- IV. Miscellaneous

NPRM - "PROPOSED REGS"

Proposed: *MOVING toward courts of law?*

- Cross-examination will be conducted by an advisor aligned with the party and direct line of sight or using technology to see each other
- Presumption of "not responsible"
- Faculty and staff hearings may be required
- Flexibility to resolve cases short of a hearing (RJ)

NPRM CONTINUED



Proposed

- Standard of proof - SAME in all grievance procedures
- "Reasonably prompt timeframes" — delete 60 days
- Right to inspect evidence directly relating to...
- Decision-makers will have to give on the spot reason for excluding question/evidence

NPRM CONTINUED



- Interim measures okay to do even if no formal Title IX process
- ER removal of RS if threat to health/safety
- Reasonable time for parties to prepare for interview
- Objective evaluation of evidence – cannot use sex stereotypes in credibility evaluation
- If appeals allowed, both parties receive it
- "Actual knowledge" standard for university's requirement to act

STATE LAW

Examples

CA = "preponderance" is state law

NC = support person/advisor not a potted plant

IL = prohibits cross exam between RP and CP in Sexual Harassment case

CASE LAW

DOE v. USC (2018)

- No fair hearing because three key witnesses not interviewed
- No ability to assess credibility
- University's procedures for hearing weren't followed
- Failed to request tangible, available evidence

CASE LAW

University of Cincinnati Cross-Examination

- Serious allegations, but
- No opportunity for cross examination
- Findings based solely on credibility determination
- Must have "circumscribed" form of cross-examination to assess alleged victim's credibility

CASE LAW

Cross Examination CIRCUIT SPLIT (2019)

Doe v. Baum, UofM 6th Cir.

– RS gets to cross

Haidak 1st Cir.

– Panelists doing the
“cross” is sufficient; no
need for direct cross by
respondent or his
advisor

CASE LAW

Recent cases:

DOE v. Claremont McKenna (State appeal)

COURT: “We agree that [Roe’s] not appearing at the hearing either in person or via videoconference or other means deprived [Doe] of a fair hearing where [Doe] faced potentially serious consequences, and the case against him turned on the committee’s finding [Roe] credible.”

CASE LAW

Recent cases: DOE v. U of Michigan (Federal district court)

COURT:

1. The University must provide a live hearing
2. "RS may engage only in circumscribed cross-examination, a process through which he may submit questions to the Resolution Officer ("RO"), Resolution Coordinator ("RC"), or Student Resolution Panel to be asked of Claimant."

MISCELLANEOUS

- VAWA expired in Feb — House passed but Senate did not
- Public v. private schools — TX new laws apply to both*
- Be Heard Act — Expands sex harassment protections in workplace and limits NDAs (states are doing this too)
- Military convening National Discussion
- NASEM report — undertook a study of the influence of sexual harassment in academia on the career advancement of women in the scientific, technical, and medical workforce



CHAT

Identify & explain
pivotal proposed
changes/strategies to
modify your current
practices.



RESOURCE

Handout — ACE letter re: NPRM

<https://www.insidehighered.com/news/2019/08/08/ruling-umass-amherst-title-ix-lawsuit-may-lead-supreme-court-case-experts-say>

<https://implicit.harvard.edu/implicit/takeatest.html>



RESOURCE

Harvard - Implicit Bias Test

<https://implicit.harvard.edu/implicit/takeatest.html>



QUESTIONS



TAKEAWAYS

- Cross- examination and live hearings
- Standard of proof
- 60 days will be deleted – “reasonably prompt”
- Can use alternative methods like restorative justice to resolve cases
- If you have appeals, both sides receive it.

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STARTING WITH YOUR MOST COMPLEX CASES

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Complaint, Counter-Complaint, Retaliation

THE SCENARIO

AGENDA

- I. The Complex Scenario
- II. Qualities of an Investigator
- III. Where to Start - Shell
 - i. Pre-Flight
- IV. Step by Step Approach - 11 Steps
- V. Approaches to Specific Types of Cases (Session 3)
- VI. Harvard IAT - Check Your Own Biases (Session 3)



ACTIVITY

What are you thinking now?

What's your game plan?

Qualities of An Investigator



KEY TO APPROACH

"Of all the ploys and techniques, the most important and, sadly, the most usually neglected is good organization. While this principle is the oldest and most widely recognized, it is the one that is most frequently violated."

- McElhaney, Trial Notebook, *An Introduction to Cross-Examination*, 2 Litig 37, 48 (Spring 1976).

WHERE TO BEGIN?

- Investigate one time or separate investigations?
- OUTLINE your approach — deliberate, methodical; set expectations for time to completion
- Send out new notices of investigation for each complaint with specificity

WHERE TO BEGIN?

- Frame the beginning by what you'll need at the end
- A report that sets forth each complaint (e.g., harassment, stalking, sexual contact)
- The elements of each
- The evidence that addresses each

1. Identify Violations and Elements

2. Gather Information
3. Determine Interview Logistics
4. Review and Outline
5. Developing Questions
6. Using Documents
7. Starting the Interview
8. Questioning
9. Wrapping it Up
10. Specific Techniques/Situations

Example: Stalking.

1. repeated following, watching or harassing
2. of a specific person
3. that would cause a reasonable person to
 - a. fear for their safety or the safety of others, or
 - b. suffer substantial emotional distress

You will target questions to these elements and will frame your report around the elements

LEGAL DIGRESSION

reasonable person:

a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of negligence)
(m-w.com)

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10. Specific Techniques/Situations

- Information gathering.
 - Documents **BEFORE** interviews
 - Student files, class schedules, activities
 - Identify the location of the incident
 - surveillance camera (eyewitnesses identified from these)
 - Cultural issues
 - Documents **FROM** interviews
 - Social media and chat logs; IPs?
 - Photos/videos
 - Gather as much prior interactions between the parties as possible
 - Ask to read/copy their text messages

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10. Specific Techniques/Situations

- Order of interviews
 - Usually going to be reporter/respondent first
 - CP then her witnesses?
- Try not to schedule interviews for more than 2 hour sessions
- Neutral place

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10. Specific Techniques/Situations

- REVIEW all the documents/evidence **BEFORE** your first interview
- START chronology
- OUTLINE your interview
 - Outline should start with what you think you know and be designed to help you figure out:
 - What you don't know
 - Whether what you think you know is correct (confirming or refuting what you do "know")
- BRAINSTORM your outline
- ELEMENTS and source of them (policy)

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- Using Documents
 - Organize documents by witness
 - Two sets: one with your notes about what you want to ask, the other clean for use with the witness
 - If it is to or from that witness, lay groundwork BEFORE you show them the document
 - Emails, texts, photos, videos, chat logs, social media

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- Organizing them
 - On your copy, mark (for example: 1) in big marker on the first page. Have a folder marked "1" for the associated document, clean copy, for your witness
 - Put your own copy in whatever order makes sense to you
 - When you get to the document in your outline, just find the folder with the same number, pull it out, and go!
 - You and/or your interview partner in taking notes can refer to the document as #1 instead of "showed email of 9/4/2019," "showed doc 1."
 - Keep an index of the documents so you can be sure what you were asking about later



ACTIVITY

Prepare a Document



ACTIVITY

Uncommon Commonality



QUESTIONS

Each table will need to designate one volunteer for an activity tomorrow.

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NETWORKING RECEPTION

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REVISING INTERVIEW TECHNIQUES



LEARNING OUTCOME

After participating...

... you will be able to review your current interview strategy and identify opportunities for revision or modification.

AGENDA

- I. Continuation of Interview Steps – IN THE INTERVIEW ROOM
- II. Approaches to Specific Types of Cases
 - DV or IPV
 - Stalking
 - Cultural
- III. Harvard Implicit Bias Test (IAT)
- IV. Demo and Practice

The interview

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10. Specific Techniques/Situations

- Interview in pairs
- Record the interview?
- Don't dive right in
 - Establish rapport
 - Establish ground rules

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The interview

- Consider techniques for survivor interview/traumatized people:
 - Avoid judgmental attitudes
 - Recognize that events do not need to be extreme to be traumatic
 - Concurrent crises can occur
 - Make referrals to proper resources
 - Recognize resilience
 - Provide clear guidance on process

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Pre-flight

- Create a habit of establishing neutrality
- Follow your checklist of what you say to each party/witness

I am a neutral investigator in an adjudicative process – that means I do not take sides, and I am here to do my job. I collect facts and treat everyone with respect and fairness. I may have to make judgments of credibility based on the evidence and my experience and expertise. I will be friendly, but I am not your support person; if you need one, I can connect you with one. While this is confidential, we cannot require people to not discuss their experience with others, but we caveat that with “be careful about retaliation.” We know how sensitive this investigation, and we take great care with personal privacy. Only officials with a need to know will read/review the report without a subpoena, court order, or FERPA release. The report and the witness statements are university records and will not be released. What questions do you have?

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Pre-flight

-Create a habit of establishing neutrality
-Follow your checklist of what you say to each party/witness

- ☐ *neutral investigator*
 - ☐ *Don't take sides*
 - ☐ *Collect facts*
 - ☐ *Everyone gets respect/fairness*
 - ☐ *May make credibility assessments*
 - ☐ *Friendly but not your support (do you need/want, let's make it happen)*
- ☐ *Confidential*
 - ☐ *But can't require people not to talk*
 - ☐ *Retaliation — caution!*
 - ☐ *We are careful with your private info — need to know*
 - ☐ *No release of records of this investigation without subpoena, court order, or FERPA release*
- ☐ *Questions*

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Ground Rules - use same with everyone

- What they know v. what they know about
- Find out everything you can
- Explain the various levels of credibility of evidence
- Always hard to be a witness, but is there any particular reason they aren't able to give their best recollection today?
- Don't expect they'll have answers to every question - normal


Ensure case management is happening, so the care and feeding of parties and witnesses is robust.

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- Start at the beginning. People can follow a chronology.
- **GOAL:** Breadth, or open phase ("What happened?" "And, what next?")
- **GOAL:** Depth, or clarification phase
 - Where were you when that happened?
 - How did you know that happened?
 - Will you draw me a map of the room and where everyone was?
- **GOAL:** Closing off
 - Did anything else happen?
 - Anything else ?
 - Yes, great, anything else?


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- GOAL:** Additional evidence gathering
Corroboration phase
- Did you document that?
 - Texts?
 - Other people there?
 - Who?
 - Who else knows about this?
 - Where else can I find documentation of this?

- 
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Wrapping up

- Check things off your outline as you go or during breaks.
- Take your time. Take breaks. If too emotional, then reschedule. Ensure lucidity. Bring tissues.
- BEFORE YOU FINISH, take a break and go over your outline with your interview partner. What did and didn't remember to ask
- Ask before you leave: What else do you think I need to know? What have I forgotten to ask?

- 
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Wrapping up

- Ask for evidence
- Note evidence you can get without witness participation/consent
- Physical evidence (must have a plan for maintenance)
- Access to phone/computer
 - Forensics on computers/phones/etc.

- 
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Ending

- Thank them for their time.
- Acknowledge the difficulty of the situation.
- Invite them to contact you with additional information as it comes back to them.
- Provide a list of documents/evidence you discussed that they have indicated they might have. Let them know next steps.
- Check on crunch times coming up (or vacations or whatever) that would make it difficult to re-interview.
- Advise them; likely you'll need to conduct some follow up with them.

- 
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Ending

- Log all evidence acquired
- Note all witness interview specifics
- Draft memorandum of interview (if not recorded) within 24 hours
- Resource (Investigation Tracking)

Specific approaches: DV or IPV

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10. Specific Techniques/Situations

- Delicate with trauma
- Photos of injuries
 - Medical records too?
- Texts of apologies/texts of threats if disclosed/texts of cover-up requests
- Disclosure to confidants
- Behavior consistent with covering up physical injuries
- Behavior consistent with making excuses for partner's behavior
- Alcohol problems of partner?

Specific approaches: Stalking

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5. Developing Questions
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10. Specific Techniques/Situations

- Follow the popcorn trail of evidence
 - Text messages
 - Social media and other on-line platforms
 - Phone calls/emails
 - Stalker reaching out to friends/family of complainant
 - Check RS's phone for evidence – consent first
 - Notes/letters/gifts/cards/offers of the same
- Observed in complainant's spaces: e.g., dorms, dining halls, common spaces
- Behavior consistent with obsession with/compulsion

Specific approaches: Cultural Issues

1. Identify Violations and Elements
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5. Developing Questions
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8. Questioning
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10. Specific Techniques/Situations

- Language issues, e.g., idioms, translations
- Cultural differences – what's allowed in country of origin
- The WAY the opposite sex intersects
- LGBTQ issues in home country
 - Family norms and what's acceptable
- Religion

Check your own implicit bias

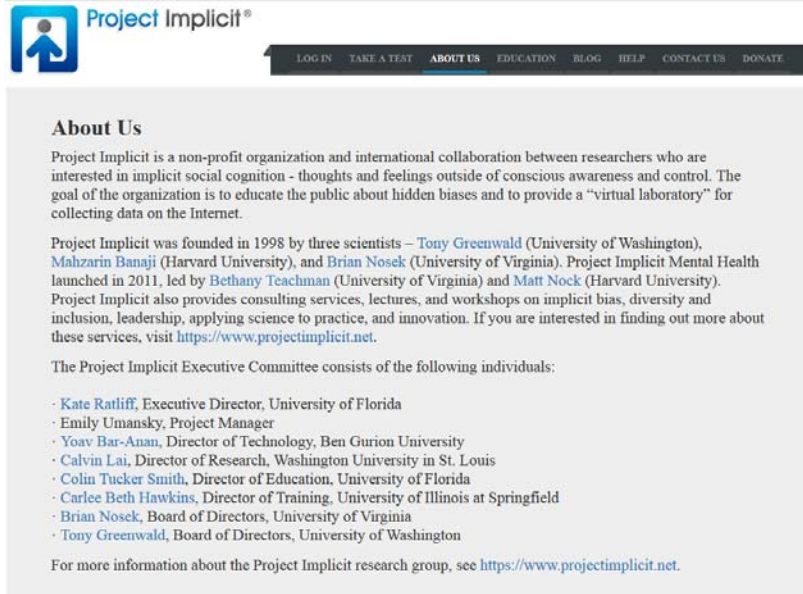


RESOURCE

Implicit Bias Test

<https://implicit.harvard.edu/implicit/takeatest.html>

Understanding Bias - Project Implicit



The screenshot shows the Project Implicit website. At the top is the Project Implicit logo and a navigation bar with links: LOG IN, TAKE A TEST, ABOUT US, EDUCATION, BLOG, HELP, CONTACT US, and DONATE. The 'ABOUT US' section is highlighted. Below the navigation bar, the 'About Us' section contains the following text:

About Us

Project Implicit is a non-profit organization and international collaboration between researchers who are interested in implicit social cognition - thoughts and feelings outside of conscious awareness and control. The goal of the organization is to educate the public about hidden biases and to provide a "virtual laboratory" for collecting data on the Internet.

Project Implicit was founded in 1998 by three scientists – [Tony Greenwald](#) (University of Washington), [Mahzarin Banaji](#) (Harvard University), and [Brian Nosek](#) (University of Virginia). Project Implicit Mental Health launched in 2011, led by [Bethany Teachman](#) (University of Virginia) and [Matt Nock](#) (Harvard University). Project Implicit also provides consulting services, lectures, and workshops on implicit bias, diversity and inclusion, leadership, applying science to practice, and innovation. If you are interested in finding out more about these services, visit <https://www.projectimplicit.net>.

The Project Implicit Executive Committee consists of the following individuals:

- [Kate Ratliff](#), Executive Director, University of Florida
- [Emily Umansky](#), Project Manager
- [Yoav Bar-Anan](#), Director of Technology, Ben Gurion University
- [Calvin Lai](#), Director of Research, Washington University in St. Louis
- [Colin Tucker Smith](#), Director of Education, University of Florida
- [Carlee Beth Hawkins](#), Director of Training, University of Illinois at Springfield
- [Brian Nosek](#), Board of Directors, University of Virginia
- [Tony Greenwald](#), Board of Directors, University of Washington

For more information about the Project Implicit research group, see <https://www.projectimplicit.net>.

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Male

Female

Husband
Uncle
Grandpa
Son
Boy
Girl
Mother
Daughter
Grandma
Wife

Liberal Arts

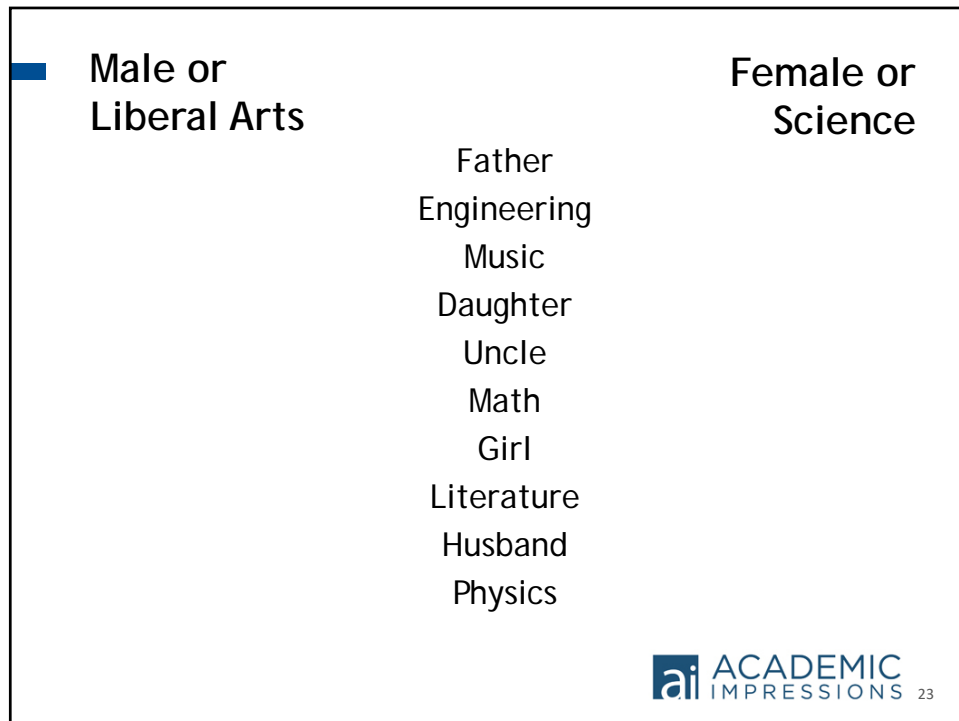
Science

Engineering
Biology
Music
Chemistry
Literature
Geology
English
Humanities
Physics
Math

Female or Liberal Arts

Male or Science

Music
Mother
Philosophy
Father
History
Wife
Engineering
Son
Chemistry
Physics



75% of population who took this test had a faster response time when **Male** was tied to **Science** and **Female** was tied to **Liberal Arts**.

ai ACADEMIC IMPRESSIONS 24



CHAT

At your tables, please take a moment to discuss your current interview strategy and identify opportunities for revision or modification based on the information provided in this session.



QUESTIONS

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APPLYING NEW-FOUND INTERVIEW TECHNIQUES TO AN EXISTING CASE



ACTIVITY

Time to Practice Case Study Introduction

COMPLAINT

To: Title IX Office

I need to report another student who is stalking me. Eliza Darcy has been following me around campus, lurking around my dorm and my classrooms, sneaking up on me in the dining hall, and yelling at me when I told her to stop. I told my RA today, and we called the police and told them about it. I wanted to also tell the Title IX office. I can't learn on a campus where I don't feel safe. Something has to happen; she has to leave me alone.

Sincerely,
Jane Bingley



CHAT



Rapport Building



CHAT



Volunteer A: Plays CP
Volunteer B: Plays Investigator



CHAT



Add New Volunteer: Difficult Witness
Ability to Tag Team



ACTIVITY

Large Group Debrief



QUESTIONS

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LUNCH



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UNDERSTANDING WITNESS TESTIMONY CHALLENGES



ACTIVITY

What are some of your
challenges related to
analyzing witness testimony?



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FILLING THE GAPS: ANALYZING INCOMPLETE TESTIMONY



LEARNING OUTCOME

After participating...

... you will be able to explain at least two new techniques that will help you best analyze witness testimony that may be incomplete.

■ AGENDA

- I. Overarching Principles
- II. Do You HAVE to Confront? What Does Confrontation Mean?
- III. What Type of Witness Do You Have?
- IV. Witness Type Techniques
- V. Demonstration (Time Allowing)

■ OVERARCHING PRINCIPLES

- You don't have a bet on this race.
- You don't have to "win" the interview.
- You don't have to make the witness defensive.

MUST YOU CONFRONT?

- Is inconsistency significant?
- If it's significant, and very clearly a lie, why confront?

WHO IS YOUR WITNESS?

- Hostile
- Clearly lying/grossly inconsistent
- Traumatized
- Drama Monarch
- Trickle Witness

■ WHAT ASPECT OF CREDIBILITY?

- Oath — How seriously are they taking their role in investigation?
- Perception
- Recollection
- Communication
- Bias/Interest/Motive
- External Credibility Issues

■ HOSTILE WITNESS

- Likely bias/interest issue
- “I get the sense that you don’t want to participate. I get it, these situations are never anyone’s first choice. Can you help me understand your reluctance?”
- Make clear the stakes, that non-participation doesn’t help who s/he’s aligned with.

CLEARLY LYING

- Once you understand someone is likely lying, start pinning down surrounding details — no confrontation.
- Key is you MUST know the evidence you prepared to review with that witness so you can do this.

CLEARLY LYING

BEFORE YOU CONFRONT

- Nail down all surrounding details
- S/he should commit to the details of the “story”
- Hard to maintain a lie with a lot of details

CLEARLY LYING

- Make him/her commit to details of narrative.
 - So, this happened first?
 - This never happened?
 - George was(n't) there at all that night.
 - Lisa was there.
 - No one had anything to drink.
 - No one touched anyone.

CLEARLY LYING

Confronting - Style

- Start from a place of confusion
- "I'm struggling with [X piece of evidence], can you help me understand how it fits with what you've said?"
- "I think most people looking at this would think it showed Y, would you agree? Why/why not?"
- "Can you give me your perspective on why you wrote this?"

Reasonable Person
Alert!!!

CLEARLY LYING

Confronting — Substance

- Have you ever said X to someone?
 - Yes? GREAT! Dig in.
 - No? Maybe confront.
- If someone said Y about that, how would you respond?
- Break it down: “You told me 1. Then you told me 3. Right? Doesn’t it seem like there’s something missing in the middle?”

CLEARLY LYING

Confronting — Substance

- Video/audio/photo contradiction
 - Review his/her version of events.
 - “I’ve reviewed this video, and it appears to me that [George was right there]. Can you help me understand why the video shows that, but your statement contradicts it?”

CLEARLY LYING

- Don't sweat the response, just record it.
- Can remind them of the importance of the process and being truthful

CLEARLY LYING

What happens if you're not prepared enough to confront?

**SHE WHO FIGHTS
AND RUNS AWAY
LIVES TO FIGHT
ANOTHER DAY**

■ TRICKLE OR RELUCTANT WITNESS

- E.g., person will provide one-word answers, shrug, or not remember
- Take breaks — give them time and be patient
- Ask questions they do know to get them warmed up — first, get them talking about subjects they like/know better
- Gently ask them what is going on with them that they are reluctant to talk (with empathy/compassion)
- Another day is better? unknown if something is going on in their life

■ TRAUMATIZED

- Give them time and space
- Make them comfortable
- Ask rapport building questions
- Offer services for support
- Offer to reschedule
- Offer non-verbal methods where you can (pen/paper to draw)
- Recognize that you may not be the right interviewer for this witness
- FETI



QUESTIONS

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STRATEGIES FOR DETERMINING A DECISION



LEARNING OUTCOME

After participating...

... you will be able to utilize a new formula that will help you reach your designated burden of proof to determine a decision for sexual harassment and gender-based misconduct cases.

■ AGENDA

- I. Standard of proof
- II. Tools to use
- III. Activity to understand burdens: Walk the line

■ STANDARD OF PROOF

- Types
 - Preponderance — 50% plus a feather? — more likely than not
 - Clear and Convincing

COMMON STANDARDS

- Preponderance
- Clear & Convincing
- Beyond a Reasonable Doubt

“More likely than not”

COMMON STANDARDS

- Preponderance
- Clear & Convincing

Court instruction: A preponderance of the evidence means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

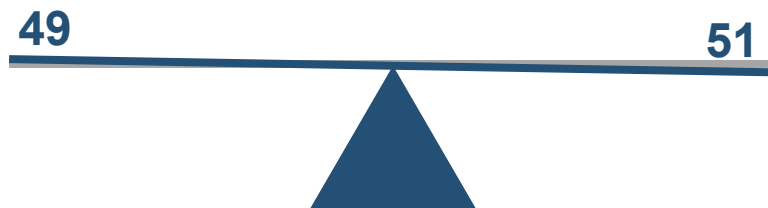


COMMON STANDARDS

- Preponderance
- Clear & Convincing

Court instruction: A preponderance of the evidence means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.



COMMON STANDARDS

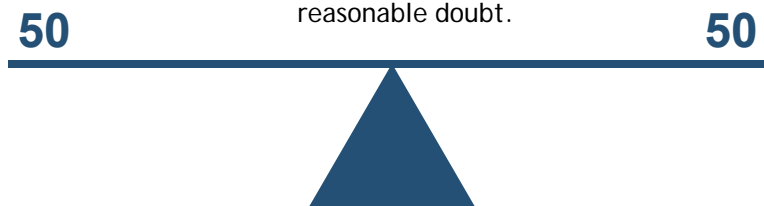
- Preponderance
- Clear & Convincing

- Evidence supports a "firm belief" that events alleged "highly probably" occurred
- More than a preponderance, less than beyond a reasonable doubt

COMMON STANDARDS

- Preponderance
- Clear & Convincing

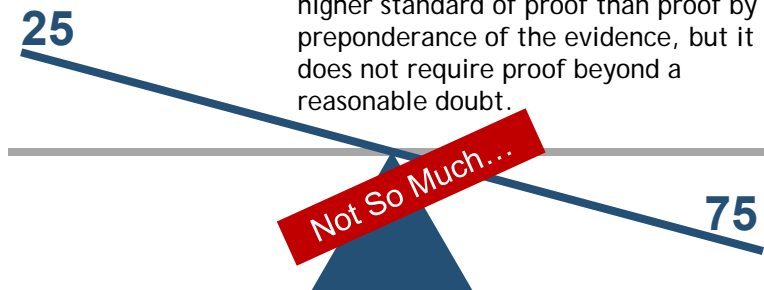
Court instruction: Clear and convincing evidence means that the evidence leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.



COMMON STANDARDS

- Preponderance
- Clear & Convincing

Court instruction: Clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.



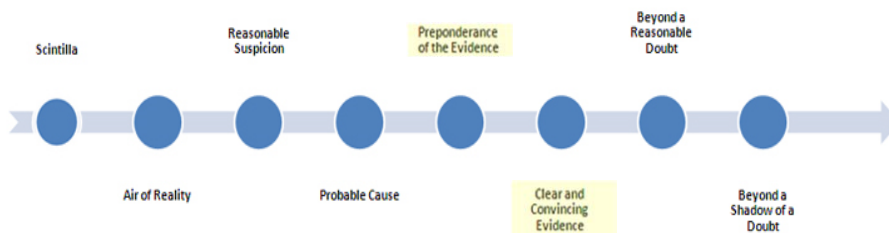
COMMON STANDARDS

- Preponderance
- Clear & Convincing

- Informally surveyed, judges assign 60% to 75% certainty to clear and convincing standard.
- Law professor studying this said "[i]t seems pretty obvious to me that 'clear and convincing' clocks in at about 65%, give or take a point or two."
- The standard is "vague and impressionistic." 477 U.S. at 272, 106 S.Ct. 2505 (Rehnquist, dissent).
- This is probably why most institutions want to use a simpler, quantified standard (preponderance).

COMMON STANDARDS

- Preponderance
- Clear & Convincing





ACTIVITY

Walk the Line of Proof



RESOURCE

Proof Analysis



POLL

How many found Student A responsible?



QUESTIONS

#aiTIXAdvInvestigator

ADVANCED CREDIBILITY ASSESSMENT



LEARNING OUTCOME

After participating...

... you will be able to more effectively and efficiently make sense of consistent and inconsistent information gathered during the interview process for the final investigation report.



■ CREDIBILITY VERSUS LYING

- Human nature to have imperfect or inconsistent recall
- Just because it doesn't make sense to you does not mean the person saying it is lying
- Just because someone is inconsistent (or flat wrong) doesn't mean s/he's a liar

■ MUST HAVE STRUCTURE

Where do you get a disciplined approach to determining whether someone is giving you accurate information?

■ EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION

1.7 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

■ EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;

■ **EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION**

- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

■ **EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION**

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it. What is important is how believable the witnesses are, and how much weight you think their testimony deserves.

■ CREDIBILITY OF OTHER EVIDENCE

- Primary evidence
 - Authentic, relevant tangible evidence
 - Firsthand, uninvolved, unimpaired witness reports
- Secondary or tertiary
 - Secondhand reports (rumors)
 - Relevant, tangible evidence that can't be authenticated
- "Anti-evidence"
 - Fabricated or tainted evidence

■ EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION

The trick is to apply the structure consistently.

Every time.

To every witness.

And to add in how their own or other evidence corroborates or contradicts their testimony.

■ BIASES

- General biases need to be left at the door.
- Bias/concern about false rape reports
- Biases about how sexual assault victims “should” react should be left at the door, too.

■ BIASES

- “Anatomy of Doubt”
 - 18-year-old foster who had just aged out raped in her apartment (stranger)
 - Her foster mother reported to police her doubts about the rape allegation based on the young woman’s behavior the following day
 - Young woman ultimately pleaded guilty to a false report
 - Later her photo, naked and bound, showed up in a search of a serial rapist’s home

BIASES

- Common for victims of sexual violence to delay reporting.
- Common for victims of sexual violence to remember some things very clearly and some things not at all.

"Indelible in the hippocampus is the laughter. The uproarious laughter between the two. They're having fun at my expense. They were laughing with each other...I was underneath one of them, while the two laughed...Two friends having a really good time with one another."

- Dr. Christine Blasey-Ford

BIASES

- Doesn't mean you don't consider all standard factors in evaluating credibility in a sexual assault case.
- Just recognize the difference between a lack of credibility and your own biases about how a sexual assault victim "should" behave.

OTHER ACTS

- Area is fraught with danger
- If you are aware of other incidents of behavior that cast doubt on the veracity of one of the parties, consult with counsel before considering it.
- General principle:
Similar incidents can be considered NOT FOR GUILT but for similar motive, opportunity, lack of mistake, intent, *modus operandi*.

POLL

Is Circumstantial Evidence
Less Credible than Direct
Evidence?

CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

PUTTING IT TOGETHER

1. Assess the person's testimony standing alone.
2. Assess the person's testimony with evidence received from that person over time.
3. Assess the person's testimony with testimony from others (consistent/inconsistent?).
4. Assess the person's testimony with evidence received from others (e.g., video, documents, etc.).



RESOURCE

Tool for Analyzing Credibility



POLL

What Corroborates a Witness?



ACTIVITY

Applying New Credibility Strategies to a Case



QUESTIONS

#aiTIXAdvInvestigator

ADVANCED CREDIBILITY ASSESSMENT



ACTIVITY

Applying New Credibility Strategies to a Case

(Break into 6 groups of 5-7 people)

■ SCENARIO 1

- Fraternity party
- Bart and George were alone with Cassie in an upstairs room.
- The following semester, Bart ran for the office of president of the campus diversity and inclusion group.
- Upon hearing this, Cassie reports what happened as a sexual assault.

■ SCENARIO 1

Bart's interview:

- This didn't happen.
- No one has ever accused me of anything like this.
- I would never do anything like this.
- Maybe something happened to her, but it wasn't with me.
- Her story doesn't make sense.
- I don't socialize with her sorority.
- I have so many female friends. Ask any of them. I have never done this with them.
- Sure, I drink some, but I don't get drunk.
- I have a sister — I totally respect women.
- I have a long history of community service.

Scenario 1

George's interview:

- George has left the school and declines to be interviewed

Scenario 1

Our lease starts on Saturday the 18th at 3:00 pm. I will not be there until Sunday night, because I'll be in [REDACTED]. Therefore, one of you must take the lease to Leland Realty and pay the remaining money which is \$398, \$50 from each of us. The place is the Atlantis #1408 on 103RD St. Leland Realty is on 87th or 89th. If you guys want to get in on Saturday, you must arrive at Leland by 7:00 pm on Saturday. The money must be in cash. One of you has to grab the bull by the horns and take charge. We must supply our own TOWELS, sheets, pillow cases, blankets, etc. Our problem down there might be too many people. We're going to have to decide while we are there who we want and don't want. Possibilities for stays of a few days or more.

[REDACTED] Feeley

SCENARIO 1

etc. If half of [redacted] starts coming we might have to give the boot or else we might get it ourselves. I think we are unanimous that any girls we can beg to stay there are welcomed with open arms. Anyway I think we're all set. Remember that the eight of us are in charge - we get beds and we kick people out - no one else. The danger of eviction is great and that would suck because of the money and because this week has big potential. (Interpret as wish). I'm leaving for [redacted] on Wed - the 8th so someone has to volunteer by then to be in charge of money and signing lease. (It will still be in my name).

FFFFF,
Bart

S. It would probably be a good idea on Sat. the 18th to warn the neighbors that we're loud obnoxious drunks with prolific poker among us. Advise them to go about 30 miles if

SCENARIO 2

- Two months after a sexual encounter, Jane brings a complaint against John that he forced her into non-consensual oral sex, had vaginal sex with her after she withdrew consent, and had non-consensual anal sex with her.
- She also alleged a separate inappropriate touching incident occurring about a month after the initial events.

■ SCENARIO 2

- Jane states her roommates heard her crying.
- John states she was not crying and consented with enthusiasm.
- Jane is only witness to inappropriate touching.
- Jane initially stated non-consensual vaginal sex but later stated consent was withdrawn.
- Jane's statement to a nurse indicated she suffered vaginal bleeding. She stated during Title IX interview she had anal bleeding.

■ SCENARIO 2

- John produced a text in which he expressed his concern about pregnancy to Jane, since they had not used a condom.
- The day after the initial events, the two texted, and Jane invited John to her room. He had a prior commitment.
- They went with a group to a fraternity party.
- John began avoiding Jane when he heard rumors that she was telling others he had done "unspeakable" things.

■ SCENARIO 2

- During interview, John is visibly angry but cooperative. He reacts negatively to questions but takes a breath and answers.
- During interview, Jane is upset and crying. It is difficult to obtain details from her as a result; although, she is not apparently avoiding the question.

■ SCENARIO 3

- Emily, a college student from a different school, visited her sister at Texas University, and the two went out with friends, drinking.
- Emily and her friends got “buzzed” before they left for a party.
- At the party, Emily drank more and described her intoxication level as “very out of it” and stated she got very quiet, as she generally does when drunk.

■ Scenario 3

- At approximately midnight, Emily called her boyfriend and left him a voicemail that was very slurred, nearly incoherent.
- Matt and his buddy Tony arrived at the party at about 11 p.m. Both had been drinking pretty heavily.
- Matt saw Tony kissing several different girls at the party.

■ SCENARIO 3

- At one point, Matt was on the porch with Tony and Emily, and that was the last he saw Tony that night. He did not see Tony kiss Emily.
- At about 1 a.m., Lisa was walking past a closed restaurant on campus and saw people having sex just around the corner of the building as she was passing. When she looked, she saw the woman was unconscious.

■ SCENARIO 3

- Lisa yelled, and the man, Tony, jumped away from Emily and started running. Lisa recognized Tony from one of her classes and called the police, who found Tony at his dorm room 20 minutes later.
- Emily remained unconscious for over three hours after she was found. She had wounds on the backs of her hands and elbows.
- When she woke up, she did not recall meeting Tony, leaving the party, or anything that happened after leaving the party.

■ SCENARIO 3

- Tony stated that he did not get Emily's name and would not recognize her again.
- He said he consciously decided to have sex but thought Emily was "into it."
- He told the school that all the women he kissed that night would say he hadn't forced them.
- He told the school that he was a good citizen and lots of other people would tell them the same.

■ SCENARIO 3

- Video of the two leaving the party at about 12:45 a.m. shows Tony supporting a very drunk Emily, who barely appeared to be moving her own legs.
- Emily appeared to push at Tony's face with one arm, after which he tucked her arm between his body and hers, and continued in the direction of the nearby, closed restaurant.



ACTIVITY

Large Group Share Out



QUESTIONS

#aiTIXAdvInvestigator

FINAL INVESTIGATION REPORT



LEARNING OUTCOME

After participating...

... you will be able to review your current investigation report template and identify at least two major improvements.

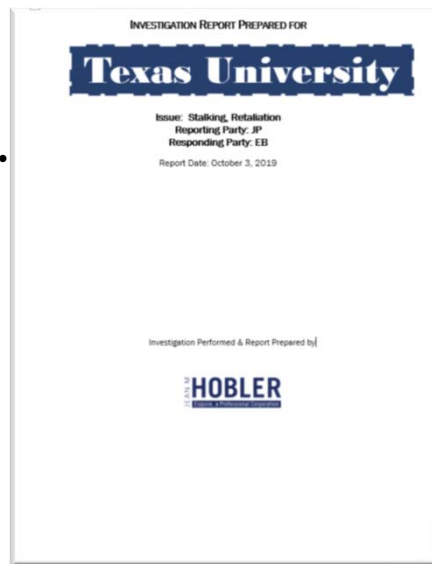
■ AGENDA

- I. Overall discussion of concept for format/elements
- II. Focus on structure of analysis
- III. Point by point format

■ CONCEPT



REPORT FORMAT



POLL

What is the longest report
(page length) you've ever
written on an investigation?

REPORT FORMAT

- Table of Contents
 - Include all the usual report headings
 - ALSO INCLUDE: resolution of issues (particularly for those of you who make findings)
 - Will show you a sample at the end, after we've discussed
 - Easy to create a TOC when you use Styles in Microsoft Word.

REPORT FORMAT

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

REPORT FORMAT

- **Executive Summary**
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

Executive Summary: Example

JH is a female first year student who filed a reporting indicating that SC, a male third year student, made deliberate sexual contact with her without her consent on three occasions. As reported, the first was in JH's dorm room, the second was in a hallway in the STEM building, and the third was at a party in the middle of a group of dancers. [After investigation, as set forth further herein, I find the allegation regarding the first incident unsubstantiated, and find the allegations for the second and third incidents to be substantiated.]

REPORT FORMAT

- **Executive Summary**
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

Executive Summary: Example

JH and SC are tenure track professors in the underwater basket-weaving department, which currently has no tenured professors due to faculty retirements. SC is a year ahead of JH in tenure track and is the department chair. JH alleged that SC removed responsibilities from him and changed department policies to his disadvantage in retaliation for a prior report by JH that SC engaged in unprofessional conduct, an allegation that was substantiated in a prior investigation. [After investigation, as set forth herein, I find JH's allegations partially substantiated.]

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Background
 - General Background
 - Who's who in re: the complaint itself (major players, not all witnesses)
 - Complaint
 - Summarize what the complaint said
 - Summarize any related complaints
 - Include timing
 - Investigation (detail coming up)
 - Evidence Collection (detail coming up)

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Background
 - General Background (covered)
 - Complaint (covered)
 - Investigation
 - Who was interviewed, when, who they are, if they haven't already been introduced
 - Did they provide you any hard evidence (e.g., video, emails, text messages etc.)?
 - Were interviews recorded?
 - Evidence Collection (detail coming up)

REPORT FORMAT

- Executive Summary
 - **Background**
 - General Background
 - Complaint
 - Investigation
 - **Evidence Collection**
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Background
 - General Background/Complaint/Investigation (covered)
 - Evidence Collections and References
 - Where is the evidence obtained from different sources?
 - How is it organized?
 - How is it referenced in the report?
 - Audio: (JH [date of interview], 1:41)
 - Memo (JH Memo, at p. 2)
 - Memo (JH Memo, at ¶ 3)
 - Is there a transcript of any recorded audio?
 - Are there memoranda of interviews and, if so, where do they live?
When and how were they produced?



POLL

Where do you put your
interview summaries?

A - in the report

B - in a separate memo

C - who writes summaries?

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Evidence [and Factual Findings]
 - Introductory Material: “Unless otherwise noted, the facts stated herein were reported in material ways consistently among the witnesses and by reference to the evidence. Where, however, a material fact was presented differently by different witnesses, I provide some analysis and a finding. [All findings in this report are based on a preponderance of the evidence standard.]

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Evidence [and Factual Findings]
 - Start from the beginning
 - Chronology or Chronological?
 - Can start with some background if that is relevant.
 - “JH and SC have a shared, 150-person class, but otherwise did not know each other before the first incident reported.”
 - Use subheadings to guide the reader through the events
 - Pre-incident Interactions Between JH and SC
 - The First Reported Incident: Unwanted Touching on X Date

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Evidence [and Factual Findings]
 - Set forth in neutral, narrative form
 - Acknowledge conflicts in the varying accounts
 - “JH stated that she and SC had never met before the first incident.”
 - “By contrast, SC indicates he and JH sat next to each other in their shared class and regularly chatted before and after class. On one occasion a week before the reported incident, SC said he and JH got coffee at Insight Roasters.”

REPORT FORMAT

- Executive Summary
- Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
- Evidence [and Factual Findings]
 - Subheadings depend on events in your case
- Analysis
 - Credibility Analysis
 - Issue Analysis
- Report Conclusion

WRITE LIKE A LAWYER

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- IRAC
 - Issue
 - Rule
 - Application
 - Conclusion

WRITE LIKE A LAWYER

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- What is the Issue in this case?
 - Did JB stalk EB?
 - Is JB credible?
 - Is EB credible?
 - Is [other witness] credible?

WRITE LIKE A LAWYER

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- What is the rule in this case?
 - Stalking is the repeated following, watching or harassing of a specific person that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress. [cite to policy]
 - Credibility standards

WRITE LIKE A LAWYER

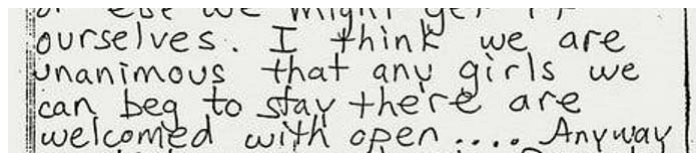
- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- How do the facts in this case apply to the rule in this case?
 - Stalking is the repeated following, watching or harassing of a specific person...
 - Facts supporting or contradicting this, with analysis of how strong the evidence is
 - ...that would cause a reasonable person to (a) fear for their safety or the safety of others, or (b) suffer substantial emotional distress.
 - Facts supporting or contradicting this, with analysis of how strong the evidence is

SIDE NOTE

Don't make your reader search out key information. If a piece of tangible evidence is key, put it right in the report.

EXAMPLE

Bart stated that he had a great deal of respect for women and would never have engaged in, or even spoken about, a woman in a disrespectful manner. The handwritten note from Bart, however, suggests otherwise:

A photograph of a handwritten note on lined paper. The text is written in cursive and reads: "ourselves. I think we are unanimous that any girls we can beg to stay there are welcomed with open ... Anyway".

ourselves. I think we are
unanimous that any girls we
can beg to stay there are
welcomed with open ... Anyway

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Analysis Structure in Report
 - Credibility Assessments (Issue)
 - Rule (applies to all credibility assessments)
 - Application (by witness)
 - Conclusion (by witness)
 - Issue Analysis
 - Rule (applies to each issue specifically)
 - Application (by issue, credibility assessment completed above will play a part here)
 - Conclusion (by issue, only if investigator is decision-maker)

REPORT FORMAT

- Executive Summary
 - Background
 - General Background
 - Complaint
 - Investigation
 - Evidence Collection
 - Evidence [and Factual Findings]
 - Subheadings depend on events in your case
 - Analysis
 - Credibility Analysis
 - Issue Analysis
 - Report Conclusion
- Conclusion
 - Probably don't need one if you are not making findings
 - If you're making findings, it's a summary, by complaint, of your findings
 - Stalking by A v B
 - Stalking by B v. A
 - Retaliation by A v B



RESOURCE

Mock Incident Report



QUESTIONS



EVALUATION

Thank you!

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

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