

CSU

The California State University

OFFICE OF THE CHANCELLOR

2023
Systemwide
Title IX
& DHR
Conference

July 25-27, 2023

SPONSORED BY
SYSTEMWIDE
TITLE IX AND DHR

MOVING FORWARD



AGENDA

Hosted By Systemwide Title IX and DHR Staff

TUESDAY, JULY 25 | 8:00 A.M. TO 4:45 P.M.

WEDNESDAY, JULY 26 | 7:30 A.M. TO 4:15 P.M.

THURSDAY, JULY 27 | 8:00 A.M. TO 3:15 P.M.

DAY 1: TUESDAY, JULY 25 | 8:00 A.M. TO 4:45 P.M. | DUMKE CONFERENCE CENTER

- 8:00 a.m. **BREAKFAST**
- 9:00 a.m. **WELCOME AND INTRODUCTIONS**
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
- 9:15 a.m. **PLAN FOR MOVING FORWARD**
Leora Freedman, Vice Chancellor for Human Resources
Sue McCarthy, Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services
- 10:15 a.m. **BREAK**
- 10:30 a.m. **DISCUSSION OF AUDIT RESULTS & Q/A**
Leora Freedman, Vice Chancellor for Human Resources
- 11:30 a.m. **ROUNDTABLES - COZEN RECOMMENDATIONS**
Infrastructure | Prevention & Education | Response to Other Concerning Conduct | Trust Gap | Accountability
MODERATOR: Laura Anson, Sr. SW Director DHR/Whistleblower/Equal Opportunity Compliance Services
- 12:30 p.m. **LUNCH**
- 1:30 p.m. **INTAKE AND INITIAL ASSESSMENT**
Ruth Jones, University Counsel - Civil Rights
Alex Pursley, Associate Director, Systemwide Title IX
- 2:30 p.m. **ADVANCED DHR HARASSMENT INVESTIGATIONS**
Jack Morse, Attorney | Oppenheimer Investigations Group LLP
- 3:30 p.m. **BREAK**
- 3:45 p.m. **INFORMAL RESOLUTION**
Sarah Clegg, Interim Systemwide Title IX Assistant Director
Gloria Godinez, Interim Assistant Vice President of Equal Opportunity and Dispute Resolution | Chico State
- 4:45 p.m. **CLOSE FOR THE DAY**

AGENDA, Continued

DAY 2: WEDNESDAY, JULY 26 | 7:45 A.M. TO 4:15 P.M. | DUMKE CONFERENCE CENTER (UNLESS NOTED)

7:30 a.m. BREAKFAST

8:30 a.m. WELCOME TO DAY TWO

Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
Sue McCarthy, Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services

8:45 a.m. INTERSECTION OF ADA AND TITLE IX/DHR

Mary Lee Vance, Director, Services for Students w/Disabilities & Testing Center | Sacramento State

9:45 a.m. BREAK

SESSIONS	GROUP 1: FOUNDATIONAL	GROUP 2: ADVANCED Title IX Coordinators and DHR Administrators	GROUP 3: ADVANCED Experienced Investigators
10:00 a.m.	<p>PREPARING FOR AN INVESTIGATION <i>ANACAPA CONFERENCE ROOM</i></p> <p>Natasha Baker, Managing Attorney Novus Law Firm, Inc.</p>	<p>CONSOLIDATION & NOTICES OF INVESTIGATION <i>DUMKE CONFERENCE CENTER</i></p> <p>Ruth Jones, University Counsel - Civil Rights</p> <p>Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services</p>	<p>EFFECTIVE COMMUNICATION WITH PARTIES AND WITNESSES <i>WALLACE CONFERENCE ROOM</i></p> <p>Kristen Entringer, Assistant Director and Investigator, Cal State Fullerton</p> <p>Dawnita Franklin, Asst VP, Office of Equity and Compliance Cal Poly Pomona</p> <p>Britnie Hopkins, Senior Investigator Sacramento State</p>
11:00 a.m.	<p>CONDUCTING EFFECTIVE INTERVIEWS <i>ANACAPA CONFERENCE ROOM</i></p> <p>Natasha Baker, Managing Attorney Novus Law Firm, Inc.</p>	<p>SUPERVISING INVESTIGATIONS PANEL <i>DUMKE CONFERENCE CENTER</i></p> <p>Maren Hufton, Associate VP, Civil Rights & Compliance Cal Poly San Luis Obispo</p> <p>Sarah Bauer, Title IX Coordinator Cal State Fullerton</p> <p>Skip Bishop, Executive Director for Equal Opportunity Sacramento State</p> <p>Larisa Hamada, AVP, Equity & Diversity/Title IX Coordinator Cal State Long Beach</p>	<p>CREDIBILITY ANALYSIS & FACTUAL FINDINGS <i>WALLACE CONFERENCE ROOM</i></p> <p>Sue Westover, Asst VC & Chief Counsel - Litigation</p>

AGENDA, Continued

DAY 2: WEDNESDAY, JULY 26 | 7:45 A.M. TO 4:15 P.M. | DUMKE CONFERENCE CENTER (UNLESS NOTED)

12:00 p.m. LUNCH

SESSIONS	GROUP 1: FOUNDATIONAL	GROUP 2: ADVANCED Title IX Coordinators and DHR Administrators	GROUP 3: ADVANCED Experienced Investigators
1:00 p.m.	EVIDENTIARY ANALYSIS AND REPORT WRITING <i>ANACAPA CONFERENCE ROOM</i> Natasha Baker, Managing Attorney Novus Law Firm, Inc.	EMPOWERING MANAGERS TO BOOST STAFF MORALE <i>DUMKE CONFERENCE CENTER</i> Cindy Sayani, Associate Marriage and Family Therapist LifeMatters	WHAT ARE THE ELEMENTS? APPLICATION OF FACTUAL FINDINGS TO POLICY <i>WALLACE CONFERENCE ROOM</i> Elisabeth Walter, University Counsel Sonoma State Sarah Clegg, Interim Systemwide Title IX Assistant Director

2:00 p.m. BREAK

2:15 p.m. **PAY EQUITY AND DISCRIMINATION**
 Marc Mootchnik, Assistant Vice Chancellor & Chief Counsel, Human Resources
 Lety Hernandez, Sr. Director Systemwide General Employment Services and Policy Administration

3:15 p.m. **PREVENTION AND EDUCATION RESOURCE FAIR**
WALLACE CONFERENCE ROOM
 Campuses are invited to bring your forward-thinking ideas (in a poster/brochure format) to share!

4:00 p.m. CLOSE FOR THE DAY

6:00 p.m. **RECEPTION**
 You're invited for an evening social hour. Appetizers will be provided and a cash bar.
 Hilton Hotel in Long Beach
 701 West Ocean Boulevard, Long Beach 90831 | 562.983.3400

AGENDA, Continued

DAY 3: THURSDAY, JULY 27 | 8:00 A.M. TO 3:15 P.M. | DUMKE CONFERENCE CENTER

- 8:00 a.m. **BREAKFAST**
- 9:00 a.m. **WELCOME, UPDATES AND HOUSEKEEPING**
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
- 9:15 a.m. **NON-DISCRIMINATION POLICY - ACADEMIC FREEDOM - FREE SPEECH RIGHTS**
Robin Webb, University Counsel
- 10:15 a.m. **BREAK**
- 10:30 a.m. **ADDRESSING OTHER CONDUCT OF CONCERN**
Gina Maisto-Smith, Chair, Institutional Response Group | Cozen O'Connor
Leslie Gomez, Vice Chair, Institutional Response Group | Cozen O'Connor
- 12:00 p.m. **LUNCH**
- 1:00 p.m. **UNCONSCIOUS BIAS**
Christina J. Ro-Connolly, Partner | Oppenheimer Investigations Group LLP
- 2:00 p.m. **BREAK**
- 2:15 p.m. **HIGHLIGHTS AND CLOSING THOUGHTS**
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
Sue McCarthy, Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services

2023 Systemwide Title IX & DHR Conference

GUEST SPEAKERS



JACK MORSE *Attorney | Oppenheimer Investigations Group, LLP*

Jack's legal career began at the U.S. Department of Justice in Washington, D.C. He served for eight years in the Civil Rights Division's Special Litigation Section, investigating law enforcement agencies, correctional facilities, and other state institutions to ensure they complied with state and federal law. He has investigated and monitored law enforcement agencies in Ohio, New York state, Arizona, and the U.S. Virgin Islands. Jack then moved to Southern California, working in private practice before joining Orange County's Inspector General's office, the Office of Independent Review. Here, he worked with various agencies, focusing on identifying and addressing high-risk and potential liability issues. He also led investigations of the Sheriff's Department and Probation Department, determining whether use of force complied with legal standards and best practices. While in law school, Jack worked in public affairs for a nonprofit global relief agency that provides healthcare for people in developing countries. He also served in the U.S. Army, deploying to Iraq in 2003, as a combat photographer and paratrooper.



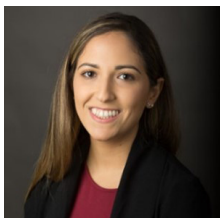
NATASHA BAKER *Managing Attorney | Novus Law Firm, Incorporated*

Novus is a Bay Area law firm that uses legal technology to deliver efficient legal advice on issues of labor, employment and higher education law. Natasha regularly advises and trains institutions of higher education around the country on conducting an effective response to campus sexual violence and harassment. She conducts program and policy reviews and answers day-to-day questions on the implementation of Title IX and VAWA. She is currently an instructor for the National Association of College & University Attorneys course "Conducting Effective Internal Investigations." She previously was a faculty member at the "Investigating and Adjudicating Sexual Misconduct Cases," National Center for Campus Public Safety Trauma-Informed Sexual Assault Investigation and Adjudication Institute. Natasha frequently speaks for NACUA, the Council of Independent Colleges and other higher education associations. She is based out of San Francisco, CA, where she was born and raised.



CHRISTINA J. RO-CONNOLLY *Partner | Oppenheimer Investigations Group, LLP*

Tina has more than a decade of labor and employment law experience. Her investigations include allegations of discrimination and harassment, allegations of abusive conduct, sexual misconduct, retaliation and workplace misconduct. She has handled investigations against high-level executives and elected officials. She has worked in both the public and private sectors. Tina conducts Title IX investigations and leads trainings on sexual harassment prevention, workplace investigations and unconscious bias. Tina spent 11 years at the Contra Costa County Counsel's Office, advising departments on labor and employment matters. This included representing departments in civil service hearings, arbitrations and before the Public Employment Relations Board. Tina is a member of the Executive Committee of the Labor and Employment Section of the California Lawyers Association, a graduate of the AWI's Training Institute for workplace investigators and a frequent trainer and presenter on employment law matters.



CINDY SAYANI *Associate Marriage & Family Therapist (AMFT11947) | Private Practice*

Cindy currently works at two private practices in the Los Angeles area. She received her bachelor's degree in psychology and disability studies from the University of California Los Angeles, and her master's degree in marriage and family therapy/counseling from California State University Northridge. Cindy works with a diverse array of clients, including adults, children, teens, families, and couples of diverse backgrounds on such issues as anxiety, depression, self-esteem, trauma, relationships, grief, chronic illness and life transitions. Previously, she was a clinician at a non-profit clinic in North Hollywood, CA, as well as multiple school settings where she worked with children on mindfulness, behavioral issues and emotional concerns. Cindy has provided educational training through Life Matters for two years. She greatly enjoys engaging with various workplace communities to advocate for personal and professional well-being and overall mental health.

GUEST SPEAKERS, CONTINUED



GINA MAISTO-SMITH *Chair | Cozen O'Connor Institutional Response Group*

Gina is the chair of Cozen O'Connor's Institutional Response Group and the founder of the nation's first practice dedicated to the institutional response to sexual and gender-based harassment, violence, child abuse, elder abuse, other forms of discrimination and harassment, workplace misconduct, and criminal conduct. Gina provides consulting, counseling, and legal advice on all aspects of the institutional response to misconduct. She assists institutions in designing effective institutional responses that integrate the complex federal and state regulatory framework with the unique dynamics of interpersonal misconduct and its impact on individuals, institutions, and communities. Gina is frequently called upon to advise institutional clients including presidents, boards, senior management, and counsel on the intersection of trauma-informed, fair, and impartial processes with the intersecting legal landscape.



LESLIE GOMEZ *Vice Chair | Cozen O'Connor Institutional Response Group*

Leslie focuses her practice on the institutional response to sexual and gender-based harassment and violence, child abuse, and other forms of harassment, discrimination, and criminal conduct. Leslie provides consulting, counseling, and legal advice on all aspects of the institutional response to misconduct. She assists institutions in designing effective institutional responses that integrate the complex federal and state regulatory framework with the unique dynamics of trauma and the impacts of interpersonal violence on individuals and communities. Leslie regularly advises presidents, boards, senior leadership, counsel, student affairs, human resources, campus law enforcement, Title IX Coordinators, and other campus partners in implementing trauma-informed, fair and impartial processes.

CSU UNIVERSITY SPEAKERS



LEORA D. FREEDMAN *Vice Chancellor for Human Resources | CSUCO*

As the Vice Chancellor, Leora provides strategic leadership and direction for the CSU's comprehensive human resources department (faculty and staff) and oversees collective bargaining, benefits, campus relations and dispute resolution, compensation, data research and analysis, policy development, learning and development, Title IX, discrimination, harassment, retaliation, equal opportunity, and whistleblower. Prior to joining the CSU, she began her legal career as a law clerk to the Honorable Harry L. Hupp, United States District Court for the Central District of California.



LAURA ANSON *Sr. SW Director for DHR/Whistleblower/Equal Opportunity Compliance Services | CSUCO*

Laura is currently the Sr. Systemwide Director responsible for providing systemwide support to campus DHR Administrators, overseeing the Appeals Unit, overseeing the Whistleblower Unit, and providing other EEO compliance services. Laura joined the CSU in 2019 and is a two-time CSU graduate, holding a Bachelor of Arts degree from Cal Poly, San Luis Obispo and an M.B.A. from California State University, Long Beach. In addition, Laura holds a J.D. from Loyola Law School, Los Angeles. Prior to joining the CSU, Laura was a partner in a large national law firm where she practiced labor and employment law and litigated in state and federal courts. Laura is admitted to the California bar, the U.S District Court for the Central District of California, and the Ninth Circuit Court of Appeals. She has extensive experience conducting workplace investigations and is a certified ATIXA Title IX investigator.



SUE McCARTHY *Senior Director, Title IX Compliance Services & Systemwide Title IX Officer | CSUCO*

Prior to joining the CO, Sue McCarthy was the Associate Dean, Title IX Coordinator, College Diversity Officer and Clery Officer for Pomona College and the Title IX Coordinator for the University of Illinois Chicago. Sue possesses an M.Ed in Counseling from Lynchburg College and a BA from Augustana College.

CSU UNIVERSITY SPEAKERS, CONTINUED



ALEX PURSLEY *Associate Director, Systemwide Title IX | CSUCO*

Alex Pursley is Associate Director for Systemwide Title IX at the CSU Chancellor's Office. She is responsible for providing technical assistance, guidance and training for the CSU campuses in relation to Title IX. Prior to this role, Alex was Deputy Director for Equity and Diversity and Deputy Title IX Coordinator at CSU Northridge. Alex also has experience conducting professional standards investigations for a large public school district and as an adjudicator for the Office of the Independent Adjudicator for Higher Education in England and Wales. She graduated from the University of Nottingham, UK with undergraduate and graduate degrees in law. Outside of work, Alex enjoys running, and she is trying to learn to knit.



SARAH CLEGG *Interim SW Title IX Assistant Director, Systemwide Title IX | CSUCO*

Sarah is a seasoned higher education administrator with 20 years of experience in higher education compliance and student affairs. She has expertise in departmental reorganization and reinvigoration, including growing headcount and services offered. She is skilled in campus policy review and revision and has worked in the areas of alcohol and other drug education, student conduct, civil rights/EEO compliance, DEI and Title IX compliance. Her roles have included positions at Duquesne University, Florida International University, Kennesaw State University and Sonoma State University. In addition, Sarah has delivered numerous presentations and trainings on policy revision, equity and inclusion, consent education and other topics. She has been an active member of professional associations such as the Association for Student Conduct Administrators, the Association of Title IX Administrators, ACPA and NASPA. In 2022, Sarah made the transition from campus leadership positions to working with the CSU Systemwide Title IX Compliance unit. Sarah holds a Master's Degree in Educational Leadership from the University of Connecticut and is an ATIXA certified Title IX Coordinator.



RUTH JONES *University Counsel - Civil Rights | CSUCO*

Ruth Jones joined the CSU's Office of the General Counsel in July 2019 as University Counsel-Civil Rights. Ruth's primary responsibilities are to provide advice and counsel to hearing officers, campus Title IX Coordinators, and other administrators involved in the responding to sex/gender and other DHR and whistleblower complaints. Ruth started her legal career as an Assistant District Attorney in the New York County District Attorney's Office where she prosecuted domestic violence, sexual abuse and street crime cases. After working at the District Attorney's Office, she was employed by NOW Legal Defense and Education Fund (Legal Momentum) where she focused on litigation, legislative drafting and training on gender violence and employment discrimination issues. Ruth then spent over a decade as a law professor at the University of the Pacific, McGeorge Law School. Prior to joining OGC, Ruth was the Interim Director of Equity & Diversity at California State, Northridge and the Title IX Coordinator at Occidental College. She is admitted to practice law in California, New York and the U.S. Supreme Court.



KRISTEN ENTRINGER *Assistant Director and Investigator | Cal State Fullerton*

Kristen Entringer serves as Assistant Director and Investigator in the Title IX and Gender Equity Office at California State University, Fullerton. In this role, she serves as the sole Title IX investigator for the campus, creates customized online annual Title IX trainings for all students, and conducts other trainings and prevention events. With a decade of experience at private Southern California institutions prior to joining CSUF in 2021, Kristen has primarily worked in Title IX since 2015. Her other areas of focus have included student conduct, bias incident response, student wellness, prevention programming, diversity and equity programs, campus climate initiatives, first-generation student retention and supporting students in distress. Kristen has a Bachelor of Fine Arts in Graphic Design from Chapman University and a Master of Education in Postsecondary Administration and Student Affairs from the University of Southern California. She is currently completing an Educational Doctorate at California State University, Long Beach.



DAWNITA FRANKLIN *Assistant VP, Office of Equity and Compliance | Cal Poly Pomona*

Dawnita Franklin has built a strong professional background in assuring institutional compliance with state and federal laws that protect people from discrimination based on protected classes and as a seasoned investigator. She comes to Cal Poly Pomona from UC Riverside where she served as interim Title IX Officer and Director of the Title IX office. She previously held relevant positions at UC Irvine, the State Bar of California, and the Los Angeles County Probation Department. A CSU alumna, she holds a bachelor's degree in Criminal Justice Administration from San Diego State University and a Master of Public Administration degree from California State University, Long Beach. In her spare time, Dawnita enjoys riding her Peloton bike and being a dance mom.

CSU UNIVERSITY SPEAKERS, CONTINUED



BRITNIE HOPKINS

Senior Complaint Resolution Officer | Sacramento State

Britnie Hopkins is a Senior Complaint Resolution Officer at California State University, Sacramento. She is passionate about creating safer, more equitable, institutions of higher education through exceptional prevention and response efforts. Britnie serves the Sac State campus by providing impartial investigations, resolution agreements and supportive measures. In addition, she helps design and implement prevention measures to help all campus community members create healthy, thriving relationships. Britnie has served in this capacity for the CSU for over four years, at both Sonoma State and Sacramento State – she has worked in the Title IX field for over nine years. Britnie earned her Master of Social Work from the University of North Carolina at Chapel Hill and her Bachelor of Arts in Sociology from Chico State. She is currently working on a second bachelor's degree in Spanish from Sacramento State. Outside of work, you can find Britnie running along Sacramento's Capital Mall, listening to a non-fiction audiobook, or rooting for the Tarheels and the Dodgers.



MAREN HUFTON

Associate VP, Civil Rights & Compliance and Title IX Coordinator | Cal Poly San Luis Obispo

Maren Hufton is the AVP, Civil Rights & Compliance and Title IX Coordinator at Cal Poly, San Luis Obispo, where she has served since 2019. Before joining the CSU, Maren was a partner in the Compliance & Corporate Governance, Enforcement Defense & Investigations group at Stradling in Newport Beach, where she spent her early years of practice as a business and securities litigator. Maren is a proud public-school graduate of both the University of Michigan Law School and the University of California, Davis. The Past President of the Women Lawyers Association of San Luis Obispo, Maren also is a Pepperdine-trained mediator and dog lover.



SARAH BAUER

Title IX Coordinator | Cal State Fullerton

Sarah Bauer currently serves as the Title IX Coordinator for Cal State Fullerton. Sarah has over 20 years of higher education experience including 17 years in the CSU system. Prior to joining the Title IX and Gender Equity department at CSUF in 2016, Sarah held positions with San Francisco State, Sonoma State Associated Students, Inc., Cal Poly Pomona, Allegheny College, and Clarion University of Pennsylvania. With a student affairs generalist background, she has worked in student conduct, student activities, residential life, fraternity and sorority affairs, career services, leadership programs, new student programs, and academic advising. Sarah earned her B.S. in Psychology from Muskingum University (New Concord, OH) and her M.A. in Student Affairs in Higher Education from Indiana University of Pennsylvania (Indiana, PA).



WILLIAM BISHOP

Executive Director for Equal Opportunity | Sacramento State

William "Skip" Bishop, J.D. Skip Bishop (he/him/his) is a husband, father, son, brother, friend, and long-standing member of the Sac State Hornet family—having joined the campus in 2013. Skip currently serves as Sac State's Executive Director of Equal Opportunity, Title IX Coordinator and DHR Administrator. Prior to joining Sac State, Skip was a litigator with Seyfarth Shaw, LLP and Shaw Valenzia, LLP where he focused on employment and intellectual property class action litigation. Skip spends his free time traveling with his family and coaching track and field.



LARISA HAMADA

AVP, Equity & Diversity/Title IX Coordinator | Cal State Long Beach

Larisa has worked in Equal Employment & Diversity for over 15 years within the higher education setting. She holds two Master's degrees from Princeton Theological Seminary in Religious Studies and Education as well as a certification in Career Counseling & Education from California State University Northridge. She has extensive training in Title IX, EEO compliance, ADA, diversity and workplace investigations. In her free time, she enjoys running on the beach with her friends and volunteering with an international career-coaching program.



GLORIA GODINEZ

Director of Equal Opportunity and Compliance | Chico State

Gloria was previously Director of Labor Relations & Compliance for the Human Resources Service Center at Chico State, where she has worked since 2015, is currently serving as Interim Assistant Vice President of Equal Opportunity & Dispute Resolution (Title IX Coordinator/DHR Administrator). She is a member of the California State Bar and worked as a litigation attorney in Sacramento for 11 years, most recently for the Attorney General's Office at the California Department of Justice. Gloria is a graduate of the UCLA School of Law and she received her bachelor's in psychology from Brown University. She is trained in restorative justice practices for campus sexual harm and a certified Green Dot interpersonal violence prevention trainer.

CSU UNIVERSITY SPEAKERS, CONTINUED



SUE WESTOVER *Assistant Vice Chancellor & Chief Counsel - Litigation | CSUCO*

Susan Westover serves as the Assistant Vice Chancellor & Chief Counsel, Litigation at the California State University Office of General Counsel. Her expertise includes employment, civil rights and constitutional law litigation. While also handling her own active caseload, she supervises the in-house team of litigators and is the Office of General Counsel's liaison with outside counsel and the Office of the Attorney General. Sue serves as the Office of General Counsel's resource attorney for legal holds and State Personnel Board matters. In the past, she also held the stop payment notice and unlawful detainer assignments. Sue's first 10 years as a lawyer were spent in private practice, first as an associate and then as a partner, with the Irvine, California, law firm Murtaugh Miller Meyer & Nelson. There, Sue's practice largely involved defending companies in employment litigation. She also served as a judge pro tem for the Orange County Superior Court for 10 years. Sue is admitted to the California bar, all federal districts in California, and the Ninth Circuit Court of Appeals.



MARC MOOTCHNIK *Assistant Vice Chancellor & Chief Counsel, Human Resources | CSUCO*

Marc D. Mootchnik joined the California State University Office of General Counsel in April 2001. He is the University Counsel for California State University Channel Islands and previously served in a similar role at San Diego State University, California State University San Marcos, California State University Monterey Bay, California Maritime Academy, and the CSU Chancellor's Office. He is also Assistant Vice Chancellor & Chief Counsel, Human Resources within the Office of General Counsel and the Office of General Counsel's resource attorney for Collective Bargaining/PERB, Wage and Hour/FLSA/Fair Pay Act, and Governance/Open Meetings. Prior to joining the Office of General Counsel, he worked in private practice at law firms for 12 years, practicing in the areas of business litigation and labor and employment law.



LETY HERNANDEZ *Sr. Director SW General Employment Services and Policy Administration | CSUCO*

Lety Hernandez is responsible for oversight of Systemwide Compensation and Classification programs, HR Data Analysis, Recruitment, General Employment and Policy Administration for the CSU. Prior to joining the CSU, she worked in the private sector in different areas of Human Resources including Compensation, Benefits, Recruitment and HRIS. She possesses an BS in Psychology from ITESO University.



ROBIN WEBB *University Counsel | CSUCO*

Robin Webb joined the California State University Office of General Counsel in 2017 and is University Counsel for the California State University, San Luis Obispo. Robin was previously University Counsel for California State University, San Bernardino. She also serves as resource attorney for First Amendment, Information Security and CSURMA. Before joining the CSU, Robin was a partner in the Irvine law firm of Grant, Genovese & Baratta, where she was a trial attorney and insurance coverage counsel in many different types of civil litigation matters, including recreational sports, fair housing, real property disputes, premises liability, construction defects, toxic exposure, landslides and more. Robin also advised businesses regarding risk analysis and contracts. She has served as a settlement officer for the Los Angeles County Superior Court and as a mediator in various jurisdictions and is admitted to the California State Bar and all California districts of the United States District Court.



ELISABETH WALTER *University Counsel | Sonoma State*

Elisabeth Walter re-joined the Office of General Counsel in March 2019, and is currently University Counsel for Sonoma State University. She previously served in a similar role at the Office of General Counsel from 1997-2010, representing California State University, San Bernardino, California State University, Dominguez Hills, California State University, Stanislaus and the Chancellor's Office. In addition to her responsibilities as University Counsel, Ms. Walter also serves as a member of the Human Resources team and as an Office of General Counsel resource attorney for Family Medical Leave Act, Employee Discipline and Title V issues. Prior to joining California State University in 1997 Ms. Walter was a litigation associate at a small, boutique firm in Los Angeles representing local, government agencies in employment litigation matters.

CSU UNIVERSITY SPEAKERS, CONTINUED



MARY LEE VANCE

Director of Services to Students with Disabilities | Sacramento State

Mary Lee Vance, Ph.D. is currently the Director of the Disability Access Center, Testing Center, Disability Cultural Center, and Assistive Technology Lab at California State University Sacramento, where she also served as interim Director for the Office of Equal Opportunity, Title IX and Discrimination, Harassment and Retaliation (DHR). She has taught undergraduate and graduate courses including disability studies, successfully written federal grants, published in referred journals, books, and periodicals, lead edited 5 books published by NASPA, NACADA and AHEAD, serves as a reviewer for the AHEAD and NACADA refereed journals and for over 16 years taught disability law classes and seminars with Grossman, Axelrod and Vance Consulting with attention to the intersection ableism and racism, as well as the intersection between ADA and Title IX, among other subject areas. She was recently elected to the AHEAD Board of Directors, to serve as the Equity Officer.

*Thank you for attending the annual systemwide conference!
We look forward to our important work together in the coming year.*

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OFFICE OF THE CHANCELLOR

WELCOME!

**2023 TITLE IX & DHR
ANNUAL CONFERENCE**

DAY 1 - JULY 25, 2023





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Gloria Godinez, Interim Assistant Vice President of Equal Opportunity and Dispute Resolution | Chico State
- 4:45 p.m. CLOSE FOR THE DAY



WELCOME & INTRODUCTIONS

Laura Anson

**Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity
Compliance Services**

9:00 a.m. – 9:15 a.m.

HOUSEKEEPING

- No food or drinks in the Dumke Auditorium.
- Breakout sessions will be held at the Wallace, Coronado and Anacapa rooms.
- Bathrooms/nursing rooms available.
- Sessions will be recorded but we will pause the recordings during Q&A.
- Please be courteous regarding laptop/cellphone use to avoid distractions for surrounding attendees.

The logo for The California State University, featuring the letters 'CSU' in white on a red square background.

The California State University
OFFICE OF THE CHANCELLOR

2023 TITLE IX & DHR ANNUAL CONFERENCE

PLAN FOR MOVING FORWARD

Leora Freedman

Vice Chancellor for Human Resources

Sue McCarthy

Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services

9:15 a.m. – 10:15 a.m.



DISCUSSION OF AUDIT RESULTS & Q/A

Leora Freedman

Vice Chancellor for Human Resources

10:30 a.m. – 11:30 a.m.

California State Auditor Report



Chapters and Themes

Chapter 1

The Chancellor's Office Has Not Ensured That Campuses Adequately and Consistently Investigate Allegations of Sexual Harassment

Chapter 2

The Chancellor's Office Has Not Always Ensured That Campuses Address Sexual Harassment Through Discipline and Corrective Actions

Chapter 3

The Chancellor's Office Must Take a More Active Approach to Preventing and Addressing Sexual Harassment



Recommendations

Timeframes

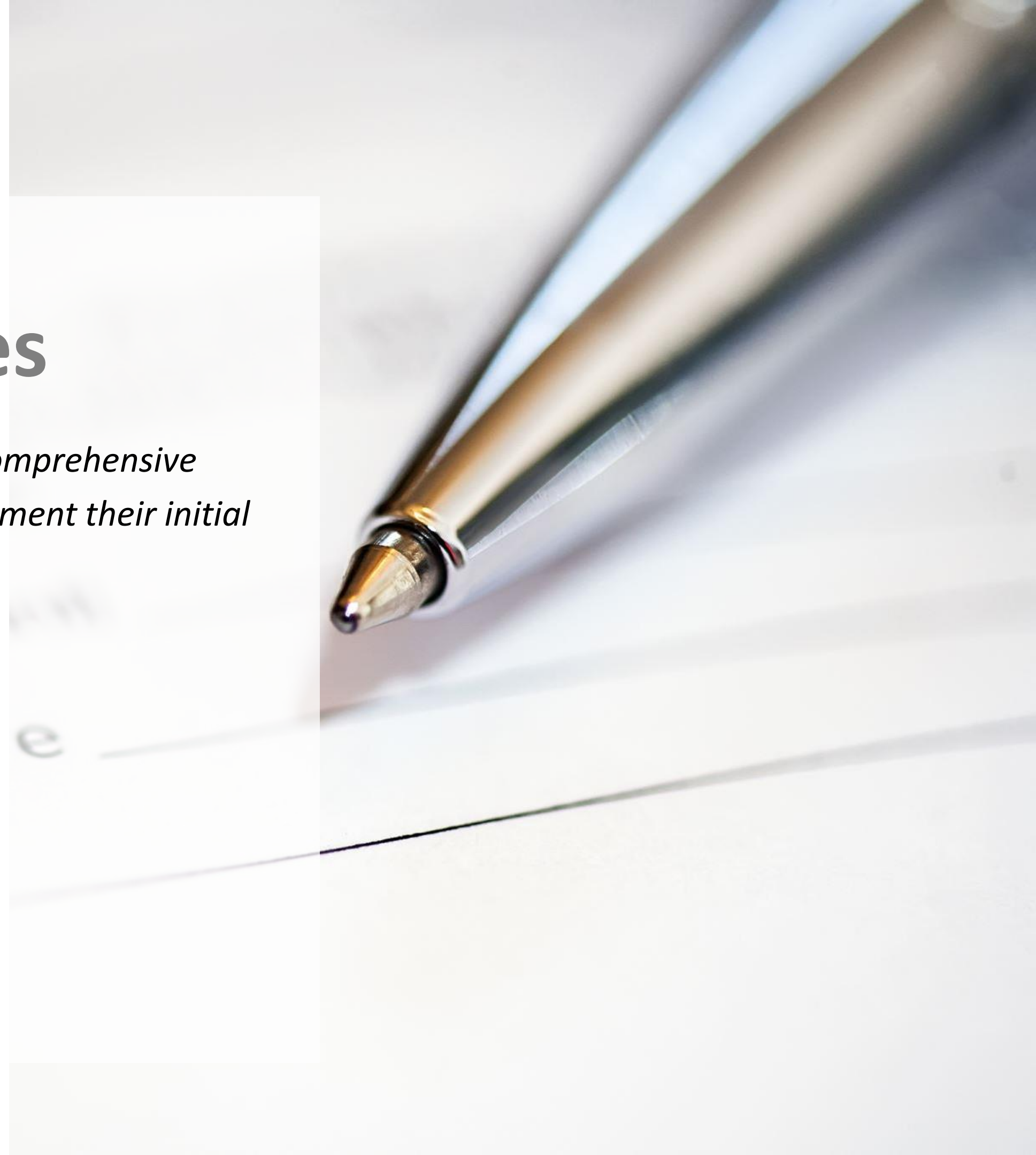
Over the next three years

- July 2024 (majority of recommendations)
- January 2025
- July 2026 (case management system)



Initial Assessment and Investigation Procedures

The Chancellor's Office should create clearer and more comprehensive expectations for how campuses should perform and document their initial assessments of allegations.



Initial Assessment & Investigation Procedures:

- Require campuses to determine whether a respondent has been the subject of multiple or prior reports of misconduct.
- Clarify how to assess the benefits and risks of conducting or not conducting an investigation when there are challenges with or ambiguities about a complainant's desire or ability to participate.
- Provide guidance about attempting to identify or contacting any potential complainants mentioned or discovered during the intake and initial assessment process and about evaluating the likelihood that an investigation could reveal new allegations, context, or information.
- Specify that if a campus decides not to conduct an investigation because a complaint fails to allege a sexual harassment policy violation, the campus must explain why there are clear indications that the alleged conduct, even if true, could not reasonably meet CSU's definition of sexual harassment.
- Require a thorough, documented rationale for campuses' decisions about whether to conduct an investigation that addresses, at a minimum, any applicable factors listed above and any other relevant factors in CSU's policy.

Initial Assessment and Investigation Procedures

The Chancellor's Office should establish more specific expectations for how investigators should structure their analyses of evidence and their determinations in sexual harassment investigation reports.



Initial Assessment & Investigation Procedures:

- Specifics about how investigators should perform and document credibility evaluations.
- A requirement that before investigators assess whether alleged conduct violated policy, they must document an assessment of each allegation that establishes whether the alleged conduct likely occurred and that these assessments consider all relevant conduct for which the investigator has identified evidence.
- A requirement that investigators document analysis specific to each relevant component of CSU's sexual harassment definition that addresses whether conduct met or did not meet the particular component of the definition.
- A requirement that an investigators' analyses and final determinations about whether conduct violated the policy take into account the cumulative effect of all relevant conduct found to have likely occurred.

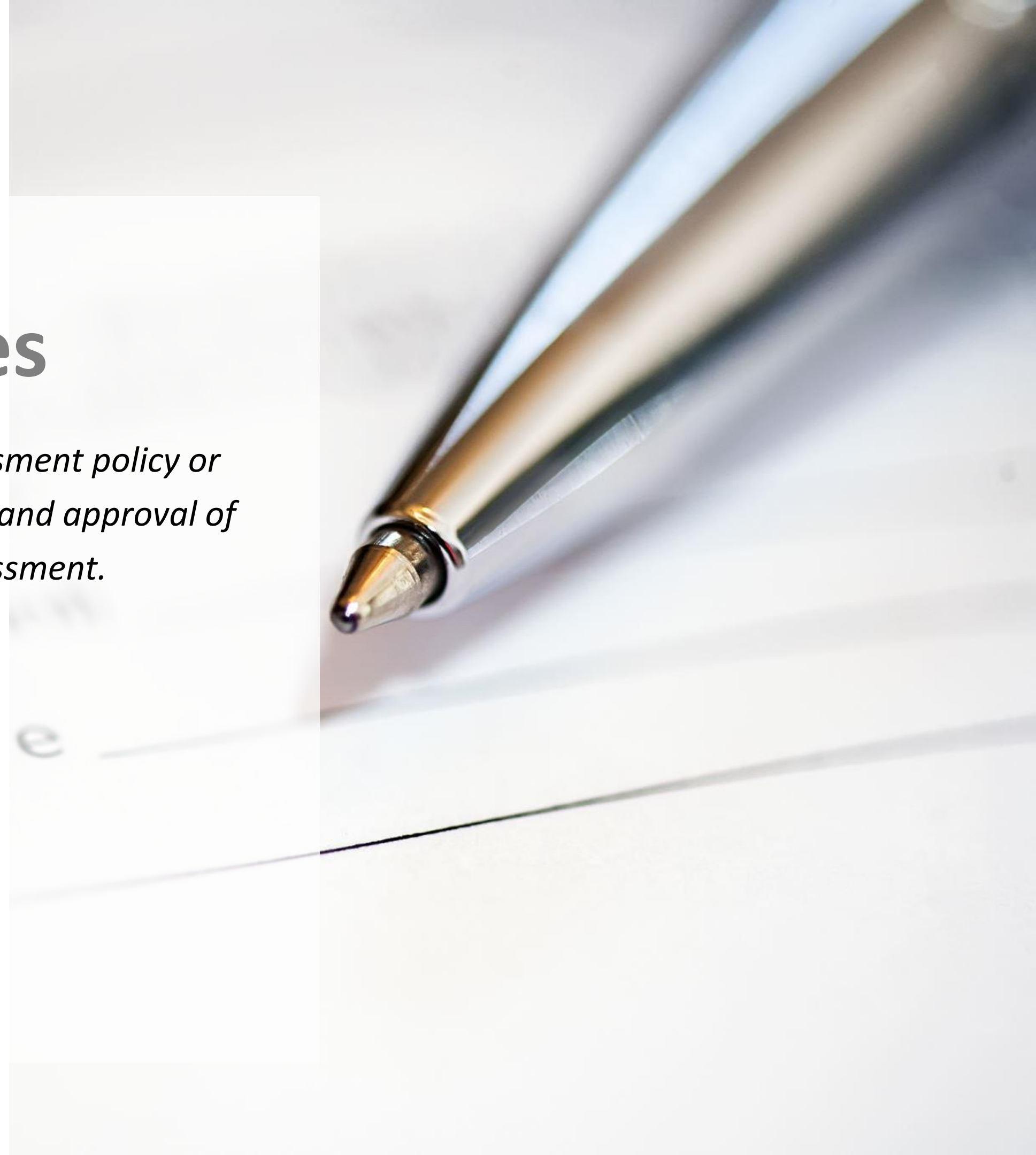
Initial Assessment and Investigation Procedures

The Chancellor's Office should create and disseminate written guidance that provides a framework for how investigators should interpret each component of CSU's sexual harassment definition and how they should determine whether alleged conduct meets that definition.



Initial Assessment and Investigation Procedures

The Chancellor's Office should amend CSU's sexual harassment policy or create other procedures to require a documented review and approval of the analyses and outcomes of each report of sexual harassment.

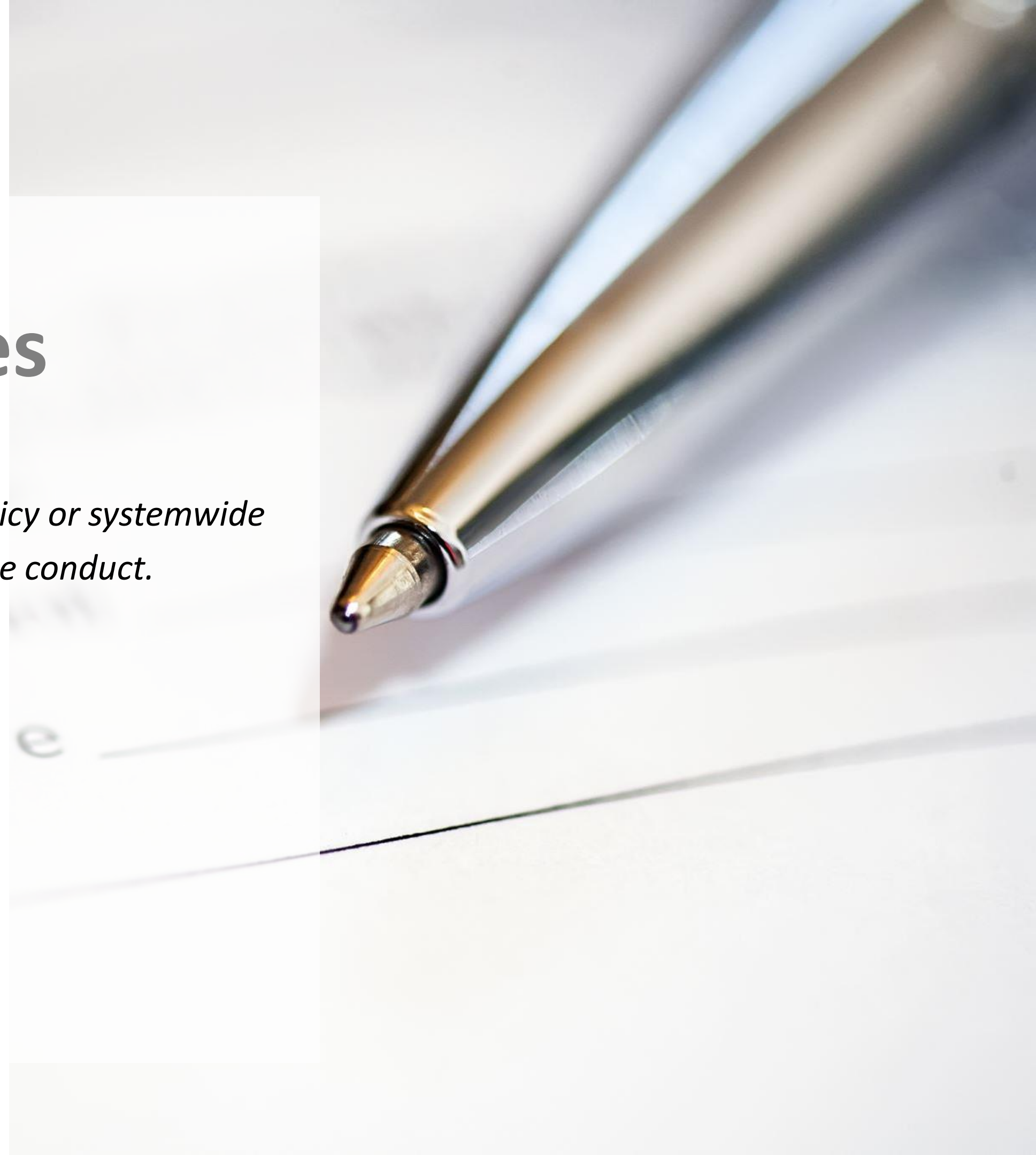


Initial Assessment & Investigation Procedures:

- Unless resource constraints or other good causes exist, the campus Title IX coordinator should assign each case to another staff member or investigator.
- The coordinator should then document his or her review of each case, including certification that the case's resolution—such as the initial assessment or the investigation and related report, as applicable—aligns with policy requirements.
- For exceptions such as cases that the Title IX coordinator handles directly, another qualified reviewer should document his or her review and approval of the analyses and outcomes.

Initial Assessment and Investigation Procedures

The Chancellor's Office should establish a systemwide policy or systemwide procedures for addressing unprofessional or inappropriate conduct.



Initial Assessment and Investigation Procedures

The Chancellor's Office should provide additional guidance related to the Informal Resolution process.



Timeliness of Investigation and Discipline Process

The Chancellor's Office should require all campuses to track key dates and timeline extensions related to reports of sexual harassment in a consistent manner. (July 2024)



Timeliness of Investigation and Discipline Process

- *The Chancellor's Office should identify a solution for ascertaining that campuses have adequate resources for conducting formal investigations. (July 2024)*



Timeliness of Investigation and Discipline Process

- *The Chancellor's Office should amend CSU's sexual harassment policy to include specific requirements for campuses to provide regular status updates to complainants and respondents unless those parties request not to receive them. (January 2025)*



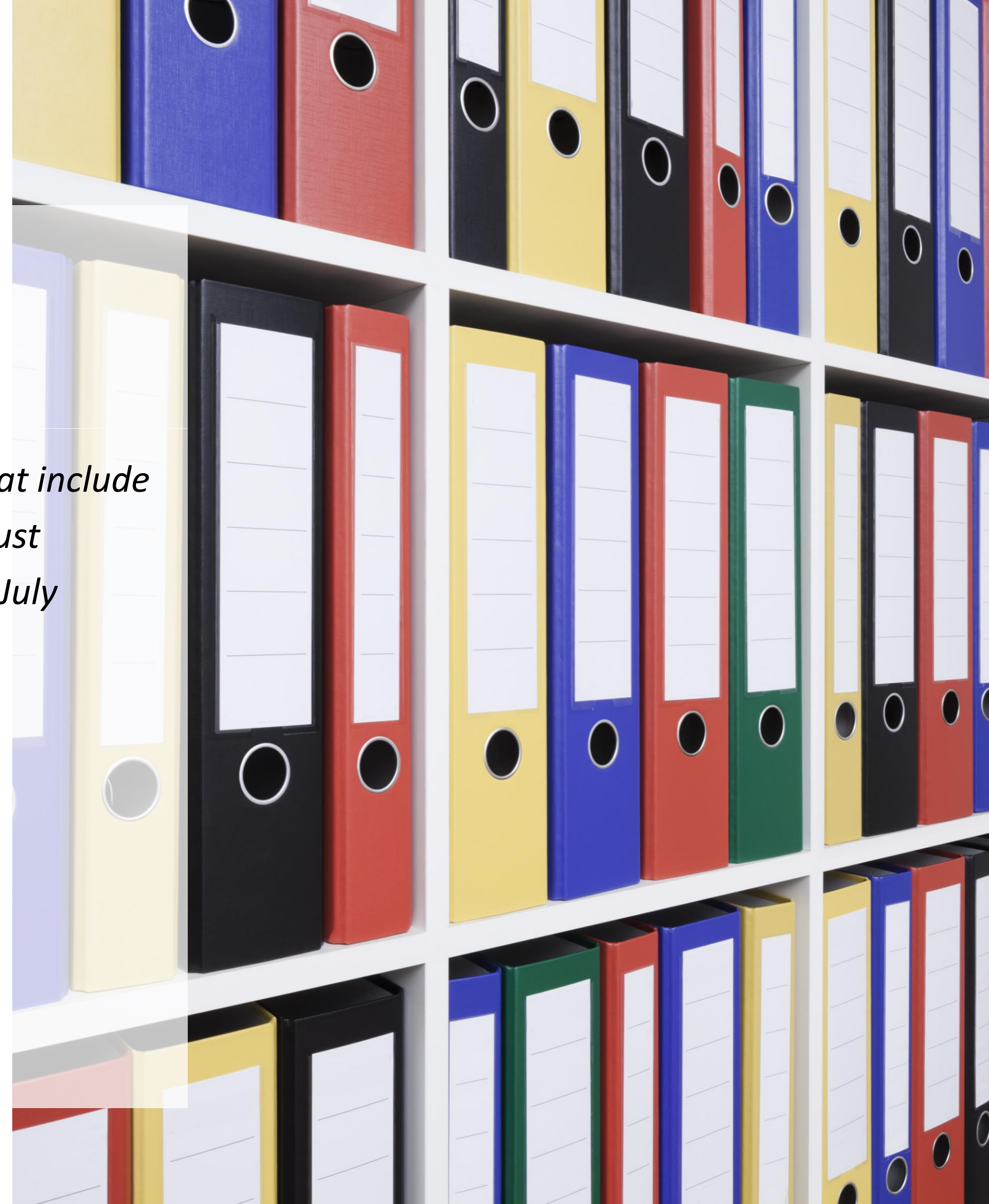
Timeliness of Investigation and Discipline Process

The Chancellor's Office should provide guidance to campuses about best practices for initiating, carrying out, and documenting timely disciplinary or corrective actions after a finding of sexual harassment. (July 2024)



Case File Documentation

The Chancellor's Office should develop procedures or guidelines that include a specific list of documents that the campus Title IX coordinator must maintain in a sexual harassment case file before closing the case. (July 2024)



Case File Documentation:

- Documentation of the campus's initial assessment of allegations and its rationale for whether or not to conduct an investigation.
- Any evidence relevant to the allegations and documentation of all interview notes or transcripts.
- If applicable, an informal resolution agreement signed by all parties and documentation of the agreed-upon outcomes.
- Any significant correspondence between Title IX staff and the parties, from the report stage through case closure, including emails and notices of allegations, investigation, extension, and outcome.
- If applicable, the preliminary investigation report or review of evidence and the final investigation report.
- Evidence of and specific details about the disciplinary or corrective actions that the campus took to resolve the case.

Case File Documentation

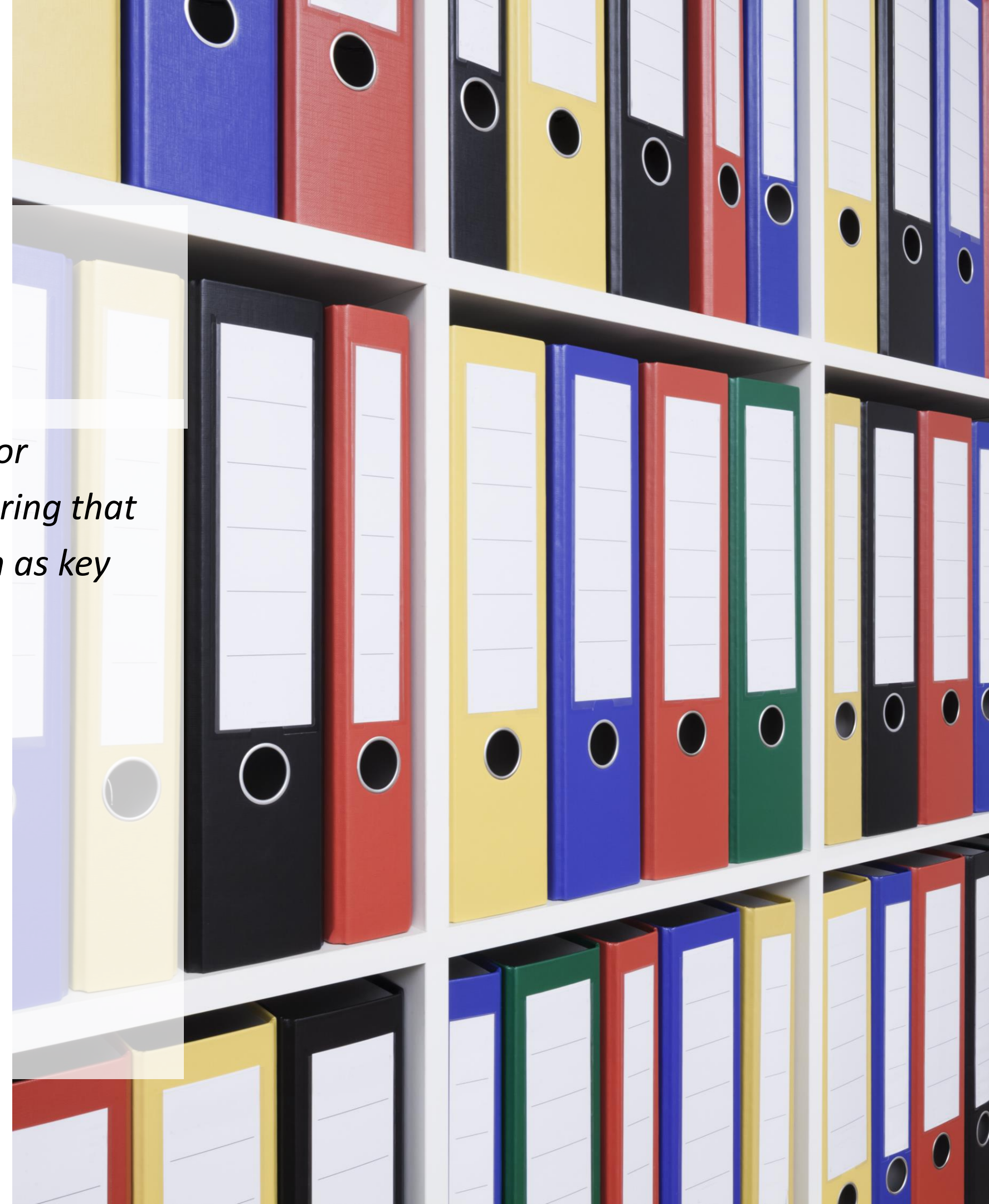
The Chancellor's Office should require that all campuses use the same electronic case management system to securely maintain sexual harassment data and case files and ensure that all campuses' case management systems are also accessible to systemwide Title IX staff. (July 2026)



Case File Documentation

The Chancellor's Office should develop and disseminate guidance for consistently tracking data in each campus's system, including requiring that each system include the same fields for entering relevant data such as key dates and corrective actions taken.

(July 2026)



Systemwide Data and Oversight

The Chancellor's Office should establish a process for regularly collecting and analyzing sexual harassment data from all campuses. (July 2024)



Systemwide Data and Oversight

The Chancellor's Office should create a policy—such as an attachment to its sexual harassment policy—for conducting regular compliance reviews of its campus Title IX offices to determine whether they are complying with relevant portions of federal law, state law, CSU policy, and best practices for preventing, detecting, and addressing sexual harassment and related misconduct. (July 2024)



Systemwide Data and Oversight

The Chancellor's Office should make revisions to its systemwide prevention policy or otherwise provide written guidance to campuses reflecting comprehensive best practices for preventing, detecting, and addressing sexual harassment.

(January 2025)



Systemwide Data and Oversight:

- How campuses should maintain accessible options for reporting sexual harassment.
- How campuses can widely disseminate information about their sexual harassment reporting options and related processes through methods such as campus-wide emails, social media platforms, on-campus postings, and student handbooks.
- How campuses can develop and distribute streamlined informational materials that explain key aspects of their processes related to sexual harassment.
- How campuses can monitor whether students and employees have completed required training.
- How campuses can most effectively make use of climate surveys through steps such as surveying both students and employees, designing surveys to assess the effectiveness of their sexual harassment prevention and education efforts, and establishing a documented process for taking action in response to survey findings.

Letters of Recommendation

The Chancellor's Office should amend its policy for letters of recommendation to prohibit official positive references for all employees or former employees with findings of sexual harassment, including those who have received less severe discipline than termination, such as suspension or demotion. (July 2024)

The logo for The California State University, featuring the letters 'CSU' in white on a red square background.

The California State University
OFFICE OF THE CHANCELLOR

2023 TITLE IX & DHR ANNUAL CONFERENCE

INTAKE & INITIAL ASSESSMENT

Ruth Jones

University Counsel

Alex Pursley

Associate Director, Systemwide Title IX

1:30 p.m. – 2:30 p.m.



Intake and Initial Assessment

RUTH JONES, UNIVERSITY COUNSEL – CIVIL RIGHTS

ALEX PURSLEY, ASSOCIATE DIRECTOR – SYSTEMWIDE TITLE IX

TITLE IX AND DHR ANNUAL CONFERENCE

JULY 25, 2023



01

Initial
Assessment of a
Complaint

02

Planning an
Intake Meeting

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Complainant's
Request Not to
Investigate

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The Preliminary
Inquiry

05

Assessing
Whether the
Complaint
Should be
Investigated

06

Putting it into
Practice:
Discussion of
Hypothetical

Today's Session

Initial Assessment of a Complaint

- Review written submission (if available)
 - To the extent you can from the information provided, identify factual allegations and any potential corresponding policy definitions (i.e., do not solely rely on what the Complainant identifies)
 - Example: Allegation of “inappropriate touching” – possible policy definitions include:
 - Sexual Assault – Fondling, Sexual Misconduct, Sexual Harassment
 - You will not be able to make the determination until after intake – we do not yet have sufficient factual information
 - Send appropriate outreach (and follow-up)
- Is an intake meeting required?
 - In what circumstances would an intake not be required?
- Is a preliminary inquiry necessary?
 - Keep in mind, you may not be able to determine this until after the intake

**Clery
Requirements**

- Clery Report
- Timely
Warning

Planning an Intake Meeting

CONSIDERATIONS

What is the purpose of intake?

- Assessing complainant needs
- Explaining options and processes
- Set reasonable expectations and clarify misconceptions
- Clarifying factual allegations

Who conducts intake?

Immediate safety and well-being, including medical needs

Explaining confidentiality, privacy, and “need to know”

PLANNING FOR THE CONVERSATION

Safety and well-being

Right to file a criminal complaint

Preservation of evidence

Supportive measures

Resource referral

Barriers to proceeding

Balancing complainant’s agency with campus safety and Title IX obligations

REPORTING TO LAW ENFORCEMENT

“Complainants will be informed during the intake meeting of their right to make a criminal complaint with university police or other appropriate law enforcement.

The Title IX Coordinator/DHR Administrator will offer to assist the Complainant and will assure them that filing a criminal complaint will not unreasonably delay the campus investigation.”

SUPPORTIVE MEASURES

“The Title IX Coordinator/DHR Administrator will describe and offer Supportive Measures to Complainants during the initial assessment (even if the Complaint is ultimately not investigated), and to Respondents during the initial meeting.”

TIPS FOR PREPARATION – CONDUCTING AN EFFECTIVE INTAKE

- ❖ Refresh on your trauma-informed techniques
- ❖ No need for a “script,” but a key points sheet can be helpful
- ❖ Gather resource brochures and arrange in an organized (and discreet) package
- ❖ Depending on the report, can your campus advocate be available/on-call in case the complainant wishes to engage with them?
- ❖ Always plan to leave time for questions



THE INTAKE ENVIRONMENT

- Consider not only the meeting space, but also the waiting area
- Colors - Cool colors (i.e., blue, green, purple) have a calming effect
- Neutral/calming artwork (nature, landscapes, waterscapes, etc.), plants
- Extend yourself to greet the individual (and their advisor, if present) in the waiting area and show them to the meeting space
- Privacy – “Is it ok if I close the door for privacy?” Proximity to waiting area?
A sound machine outside the door?
- Is it possible to remove barriers such as a desk between you and the complainant, while also maintaining adequate space?
- Where possible, offer for the individual to choose where to sit
- Availability of tissues, water, snacks, small fidget items – point out early on and invite the person to help themselves at any time
- Address option for breaks at the outset – offer again throughout

Clarifying the Factual Allegations

Who, What, Where, When

What does the complainant allege that the respondent did?

“Created a toxic environment” “Harassed me”

What specifically is the respondent alleged to have said and/or done?

“Tell me in detail...”

“Is there anything else that happened?”

Clarifying alleged adverse action for discrimination and retaliation – the “what happened to complainant because of respondent’s conduct?”

What did **respondent** do or say to cause the adverse action?

Protected status – nexus – insufficient to say “I fall within [x] protected status and [y] happened” – what is the connection? Why does complainant believe it occurred because of their protected status? Did the respondent make comments? Do they have information about differential treatment?



After the Intake Meeting



Plan to send a follow-up e-mail – do not expect that the complainant will remember everything



What to do when the complainant wants to “think about it”?



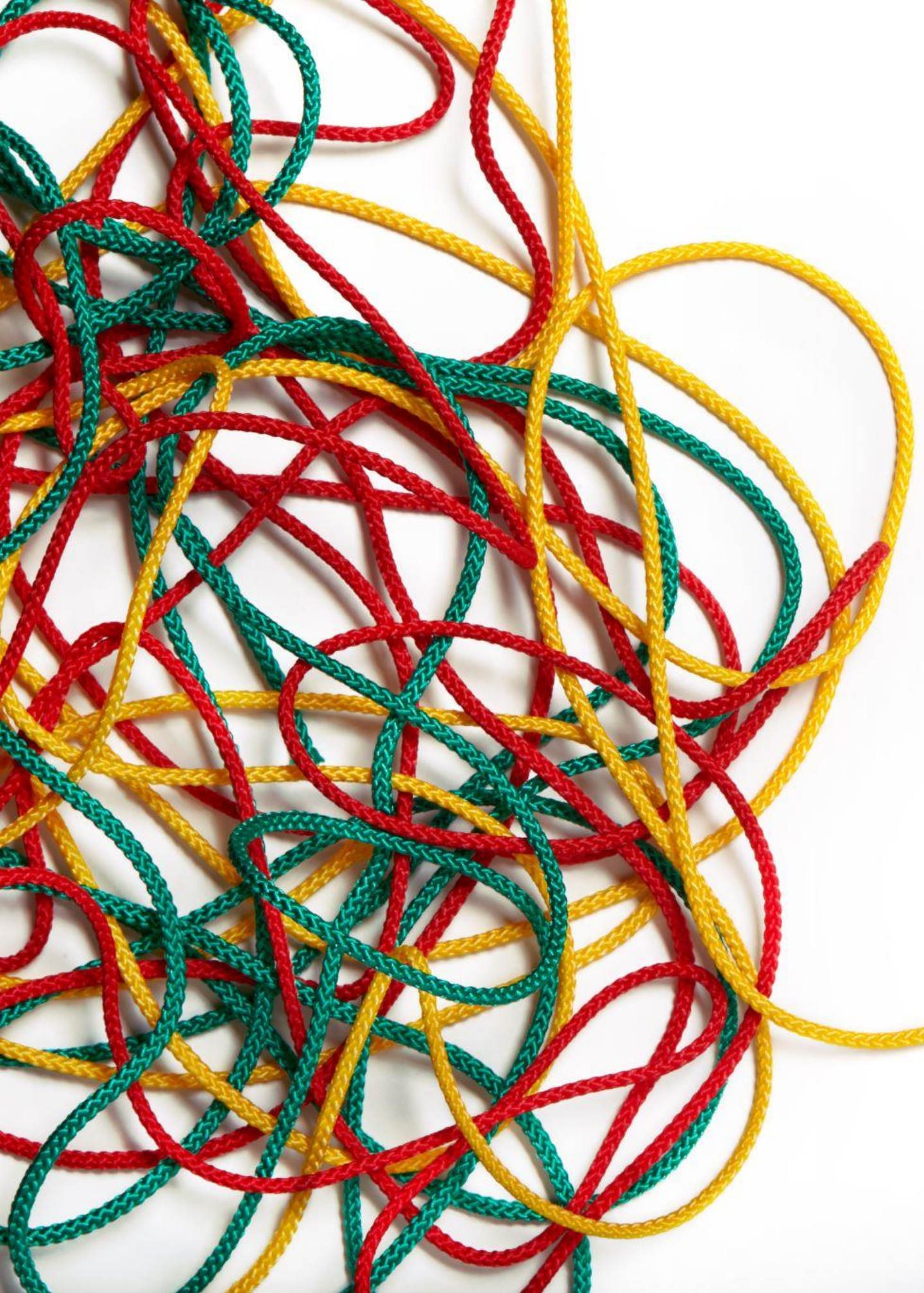
Implementing Supportive Measures



Assessing for pattern



Administrative Leave/Emergency Removal/Interim Suspension Consideration



Untangling the Allegations

- Complainants tend **not** to use “magic words” such as “adverse action,” “disparate treatment,” “affirmative consent”
 - “You said that respondent did [xyz] – how did that affect you? What was the consequence of that for you?”
 - “Are you aware of any other employees in your area who were treated differently to you?”
- Consider whether there are aspects of the report that fall within the Nondiscrimination Policy and some that do not
- Consider creating a list of the alleged factual occurrences
- Consider creating a chart that breaks down the elements of the potential prohibited conduct – ask: **if the factual allegations were proven, would they meet the elements of this definition?**

A REMINDER...

Intake is not just for complainants – although it will happen later, conduct an intake meeting with the respondent too

The respondent should have an opportunity to meet with you, learn about the process, and to ask questions before they are expected to provide a statement

Balancing the Complainant's Request with Community Safety

There are multiple or prior reports of misconduct against the Respondent.

The Respondent poses an imminent threat to the campus community, which may include violence, threats of violence, use of a weapon, physical restraints, or engaged in battery.

There is a power imbalance between the Complainant and Respondent.

The Complainant reasonably believes that they will be less safe if their name is disclosed or an investigation is conducted.

The Title IX Coordinator/DHR Administrator anticipates that it will be possible to conduct a thorough investigation and obtain relevant evidence without the Complainant's cooperation.

If the Complainant is an **Employee**, the campus will also consider its obligation to maintain a safe work environment in determining whether an investigation is necessary.

Other Factors
to Consider
When
Evaluating
Requests Not
to Investigate

What is the severity of the conduct alleged?

What evidence is currently available?
What additional evidence may be available during an investigation?

What is the possible other evidence if the Complainant does not participate in the investigation?

What is the status of the potential parties, e.g., are they the same class, housing unit, share courses?

PRELIMINARY INQUIRY

“The Title IX Coordinator/DHR Administrator will determine whether to open an investigation after making a preliminary inquiry into the allegations. An investigation may not be warranted where the reported information is insufficient. These determinations will be documented in writing by the Title IX Coordinator/DHR Administrator and maintained in accordance with systemwide records retention policies.”

Preliminary Inquiry vs. Investigation

PRELIMINARY INQUIRY

To ascertain if there are sufficient factual allegations to conduct an investigation

Initiated after a complaint or report is filed and before notice of allegations or investigation is initiated

Should not include credibility assessments

Should not include interviewing the respondent

Generally, should not include witness interviews

No specific policy procedural requirements

INVESTIGATION

To gather evidence for factual and policy findings by either the investigator or hearing officer

Initiated after the notice of allegations is issued

Includes credibility assessments

Includes Respondent interview

Includes witness interview summaries

Specific procedural requirements e.g., evidence review

Assessing Whether the Complaint Should be Investigated

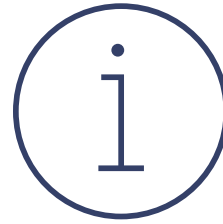
- What are the proposed policy violations?
- Only one possible policy violation is necessary to initiate an investigation but consider all policy violations possible based on the factual allegations
- Consider both the policy violations raised by the Complainant and others that may be applicable based on the factual allegations
- What does the Complainant allege that each Respondent did or said that caused the policy harm, e.g., for discrimination what did the proposed Respondent do or say to cause the adverse action?
- Is Respondent's alleged conduct protected by the First Amendment or Academic Freedom?
- Has the Complaint requested no investigation?
- If the factual allegations are true, would the conduct constitute a policy violation?
 - If you need to determine credibility, an investigation is necessary
 - If you need to hear the "other side" from the Respondent than an investigation is necessary

The Decision to Not Investigate

- Is a Track 1 dismissal (and possible referral) required?
- Determination that the complaint fails to allege a violation of the Nondiscrimination Policy
 - The Title IX Coordinator/DHR Administrator will notify the complainant **in writing** that the complaint will not be investigated without further information
 - Timeframe: Within **10 working days** of the date of the intake or receipt of written request for investigation (whichever is later)
 - The Title IX Coordinator/DHR Administrator will refer the Complaint to another campus office if appropriate and will notify the Complainant of any referral – is a referral appropriate?
 - The Title IX Coordinator/DHR Administrator will retain a record of the Complaint, the written determination and any referrals made to another campus office.



Communicate with the intended referral office ahead of time



Gather information about when and how they intend to respond to the referral – document

Example: HR confirmed that upon receipt of the referral notification, the Employee Relations Manager will contact the complainant via email with 48 hours to set-up a meeting to further discuss their concerns



Provide a brief explanation in the notice of no investigate as to why the referral is appropriate

Example: While they do not fall within the scope of the Nondiscrimination Policy, it is appropriate that your concerns regarding your interactions with Dwight Schrute be reviewed by Human Resources as the office that addresses employee relations matters. Therefore, this office is referring your complaint to Human Resources for further review and assessment



Preferable to provide a name for the referral in the notice of no investigation rather than simply a department

Example: Toby Flenderson, Employee Relations Manager with Human Resources will be contacting you to set up a meeting to further discuss your concerns

The Successful Referral



Follow Up and Record Keeping

RECORD KEEPING

- Your efforts to contact the Complainant
- Notes from intake meeting, including points covered
- Supportive measures – decision and rationale pertaining to reasonableness
- Assessment as to pattern
- Decision to move forward or to not move forward – rationale – factors considered
- Decision-maker → Factors considered → Action → Communication
- If you win the lottery tomorrow, will your records tell the story without you?



Which Track?

1

If a Title IX complaint, start at Track 1 → Assess for proceeding under Track 1 or dismissal/referral

2

If not Track 1, consider Track 2

3

If not Track 2, consider Track 3



If not Track 3, consider other appropriate referral → HR, Faculty Affairs, Student Conduct, etc.

Scope of the Investigation

- Consider all possible policy violations
 - Including prohibited conduct from Track 1 and Track 2/3 in the Notice of Investigation
 - Helpful to inform both parties at the outset that if additional information is provided during the investigation, such information will be assessed to determine if additional forms of prohibited conduct should be investigated and that the parties will be notified via a revised NOI
- Pay equity discrimination allegations/Fair Pay Act
- Discrimination and Unprofessional Conduct – single investigation or separate?
- Additional considerations:
 - California Public Safety Officers Procedural Bill of Rights Act (POBR)
 - Disability accommodations – allegation of failure to accommodate



Hypothetical

Kelly, who is a woman, works in University Advancement as a Development Director. She has been in this role for four years. The four other Development Directors in Kelly's office and Kelly's supervisor, are all men. Kelly's colleagues like to engage in what they call "practical jokes" with each other. Kelly is but one target of these pranks. As one of these "jokes," they recently left a witch's hat on Kelly's desk in October (Kelly thinks it might have been on Halloween). They also have an on-going "joke," where they say, "Not again, Kelly," anytime Kelly speaks up during a meeting. Kelly's supervisor, Michael, joins in with this too.

Kelly also tells you that while she routinely receives "Meets Expectations" performance evaluations, she feels that the substantive content of her evaluations make light of her contributions and that this may have recently affected her unsuccessful application for the position of Associate Vice President for University Advancement. Kelly's colleague Jim was promoted instead, which Kelly attributes to Jim being "buddies" with Michael and because Jim is a man.

Kelly says that she wants to file a sexual harassment complaint against Michael and her four other co-workers – Jim, Oscar, Kevin, and Stanley.



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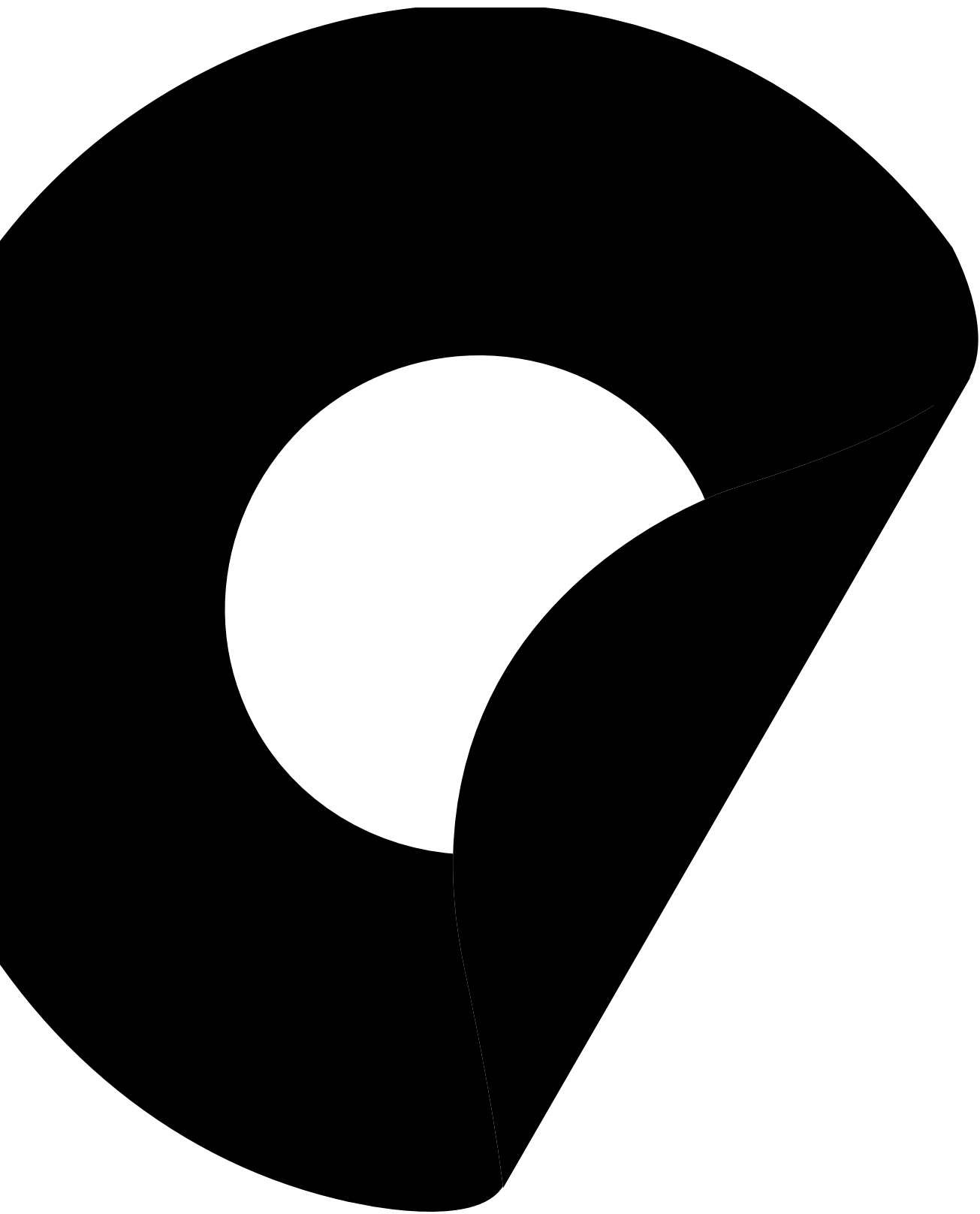
2023 TITLE IX & DHR ANNUAL CONFERENCE

ADVANCED DHR HARASSMENT INVESTIGATIONS

Jack Morse

Oppenheimer Investigations Group, LLP

2:30 p.m. – 3:30 p.m.



Investigator Training

For California State University

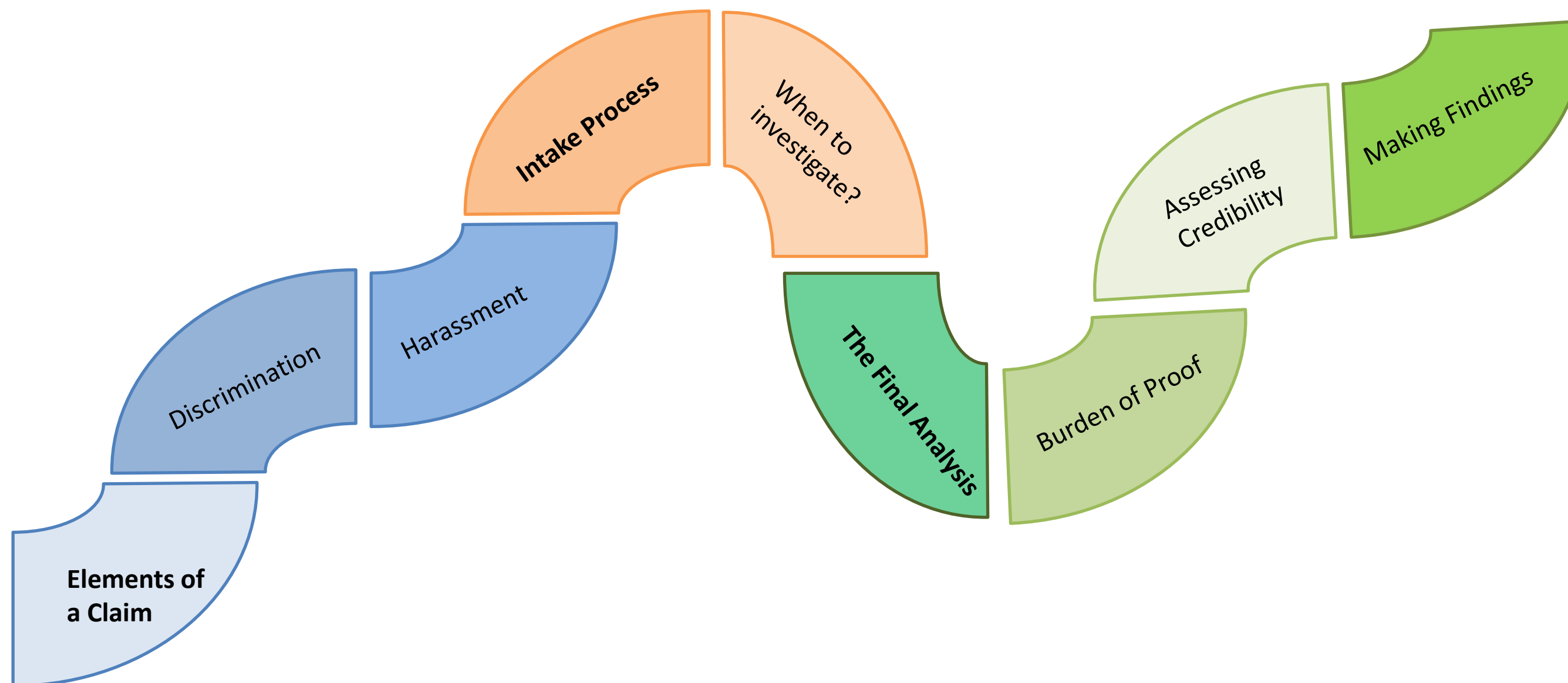
July 25, 2023

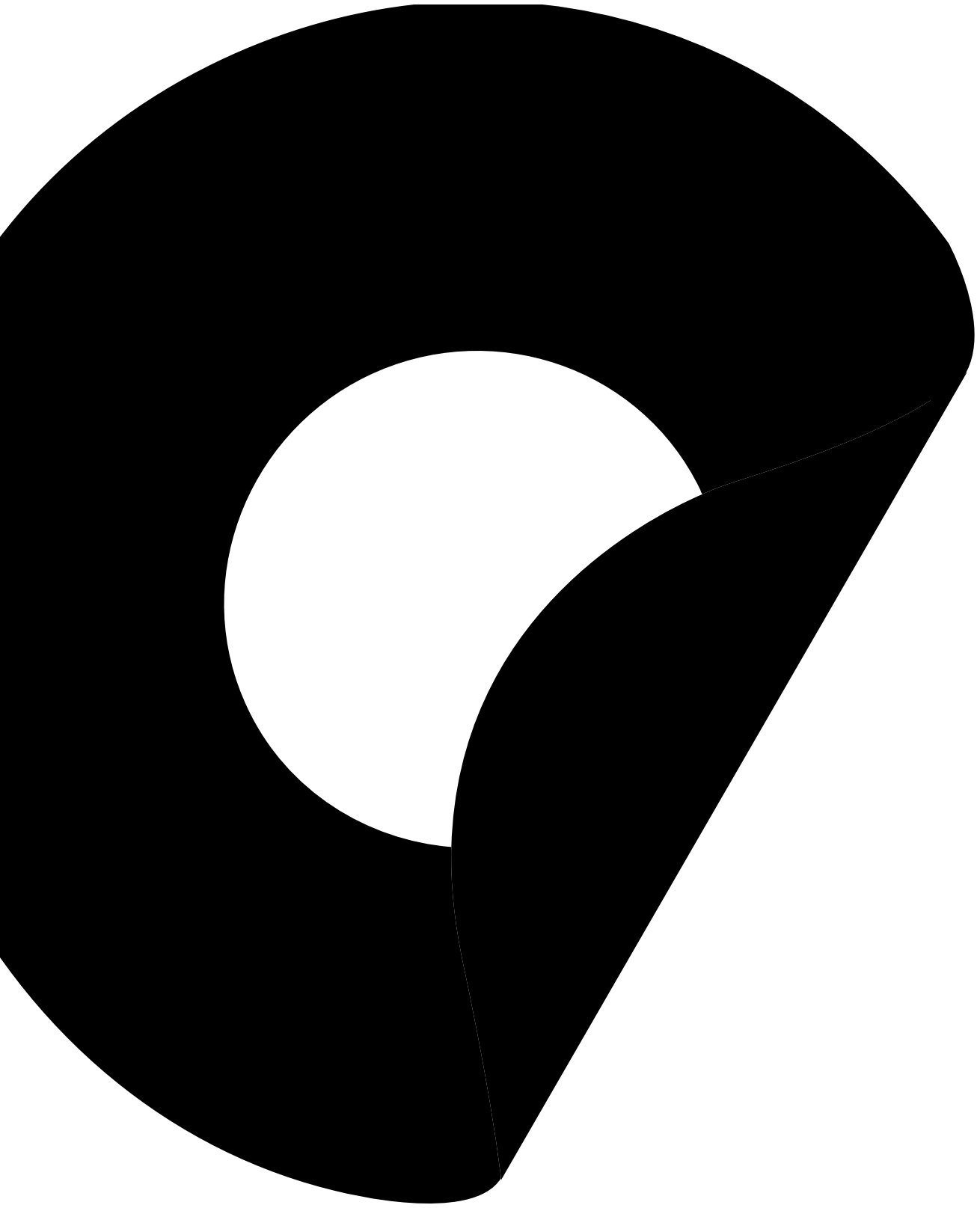
T. Jack Morse, Jr.

Oppenheimer Investigations Group | www.oigl.com



Agenda: A Roadmap





Elements of a Claim: Discrimination

Discrimination

What is Discrimination?

- An **adverse action**
- against a Complainant
- **because of their Protected Status**



Adverse Action

What is an Adverse Action?

- Action engaged in by the Respondent
- That has a substantial and material adverse effect
- On the Complainant's ability to participate in a CSU program, activity, or employment

Note:

- Minor or trivial actions or conduct not reasonably likely to do more than anger or upset the Complainant do not count

Examples Protected Status:

- Race/Ethnicity/Nationality
- Age
- Disability (physical and mental)
- Religion
- Gender
- Gender identity
- Sexual orientation



Gender-based harassment

Does NOT include sexual harassment

- Gender-based harassment involves behaving in an unwelcome manner toward someone because of their gender, gender identity, etc.
- Sexual harassment means sexually-based conduct, including:
 - Rape
 - Fondling
 - Dating violence and Domestic violence
 - Quid pro quo: Conditioning a CSU benefit or service on a person's participation in unwelcome sexual conduct
 - ❖ These cases are investigated differently!

Hypothetical

Complainant student is listed on the class roster as Mark, but on the first day of class Complainant told professor she identifies as female and prefers to be called Marsha. She states that afterward, Respondent professor never called on her during the entire class, but called on other students.

Discrimination?

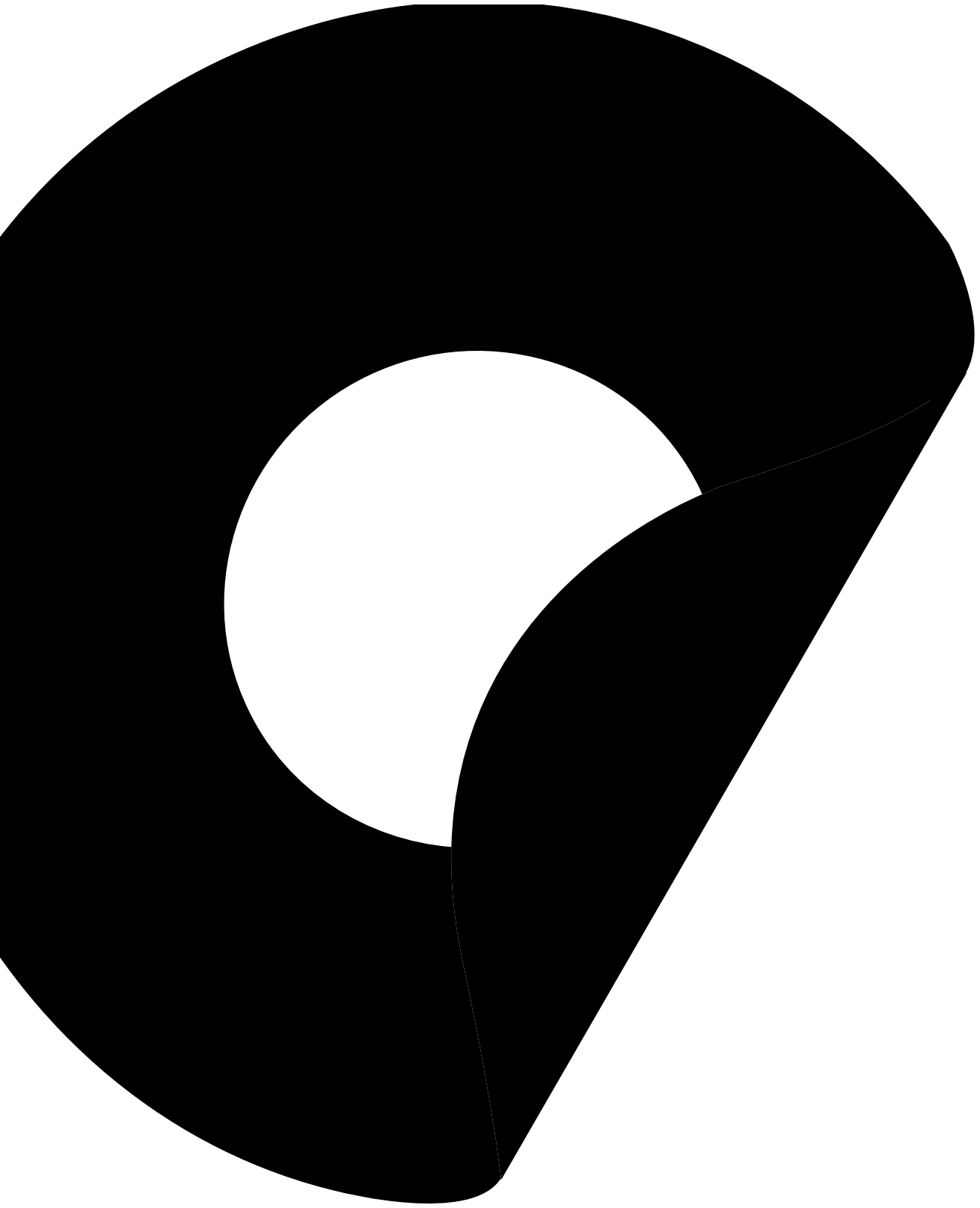
- Protected status?
- Was the professor's action due to the student's protected class?
- Adverse action against Complainant?

Hypothetical

Complainant student is listed on the class roster as Mark, but on the first day of class Complainant told professor she identifies as female and prefers to be called Marsha. She states that afterward, Respondent professor never called on her during the entire semester. Professor called on all other students, but not her.

Is this Discrimination?

- Adverse action against Complainant?
- Did it affect Complainant's ability to participate in a CSU educational program?



Elements of a Claim: Harassment

Harassment

What is Harassment?

- **Verbal, nonverbal, or physical** conduct
- That is **unwelcome**
- And engaged in because of a Complainant's **Protected Status**





Harassing Conduct

Verbal

- Slurs
- Epithets
- Derogatory comments

Non-Verbal

- Gestures
- Cartoons
- Drawings
- Symbols

Physical Conduct

- Blocking movement
- Battery
- Physical interference with work environment

Conditions When Harassment can Occur

A Complainant submitting to (or rejecting) the conduct is (explicitly or implicitly) a basis for:

- Decisions that adversely affect or threaten employment, or which are being presented as a term or condition of the Complainant's employment; or
- Decisions that affect or threaten the Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through CSU.

Hypothetical

Complainant, a female Muslim student, states that on the first day of class, the professor said that if she wanted a good grade, she should “stop wearing whatever she had on her head” (her hijab).

- Is this *conduct*?
- Is it *unwelcome*?
- Due to protected status?
- Is it *harassment*?

Another Condition When Harassment can Occur

- The conduct is so severe or pervasive
- that a reasonable person, under similar circumstances, with a similar identity,
- would believe the conduct created an intimidating, hostile or offensive work (or educational) environment
- that denies or substantially limits an individual's ability to participate in (or benefit from) CSU employment or educational services, activities, or privileges.
- Does not matter if Respondent intended to create such an environment.

Severe *or* Pervasive

- The conduct does not have to be both – can be one or the other

Pervasive:

- Spread throughout
- E.g., conduct repeated over the course of weeks or months

Severe:

- harsh; unnecessarily extreme
- *Can* be a single instance
- But note: Single, isolated incidents will typically be insufficient to rise to the level of harassment.

Reasonable Person Standard

Who is the Reasonable Person? Someone who:

- Is the same protected status as complainant (regarding religion, race/ethnicity, etc.)
- Is confronting similar circumstances (the conduct in question)
- Ask yourself: Would a *reasonable* person with the same protected status as the complainant find the conduct intimidating, hostile, or offensive?



Intimidating, Hostile, Offensive

Next step: Would a Reasonable Person consider the conduct to be:

- So intimidating, hostile or offensive
- that it creates a work (or educational) environment
- that denies or substantially limits an individual's ability to participate in (or benefit from) CSU employment or educational services, activities, or privileges.

Intimidating, Hostile, or Offensive conduct alone is not enough!

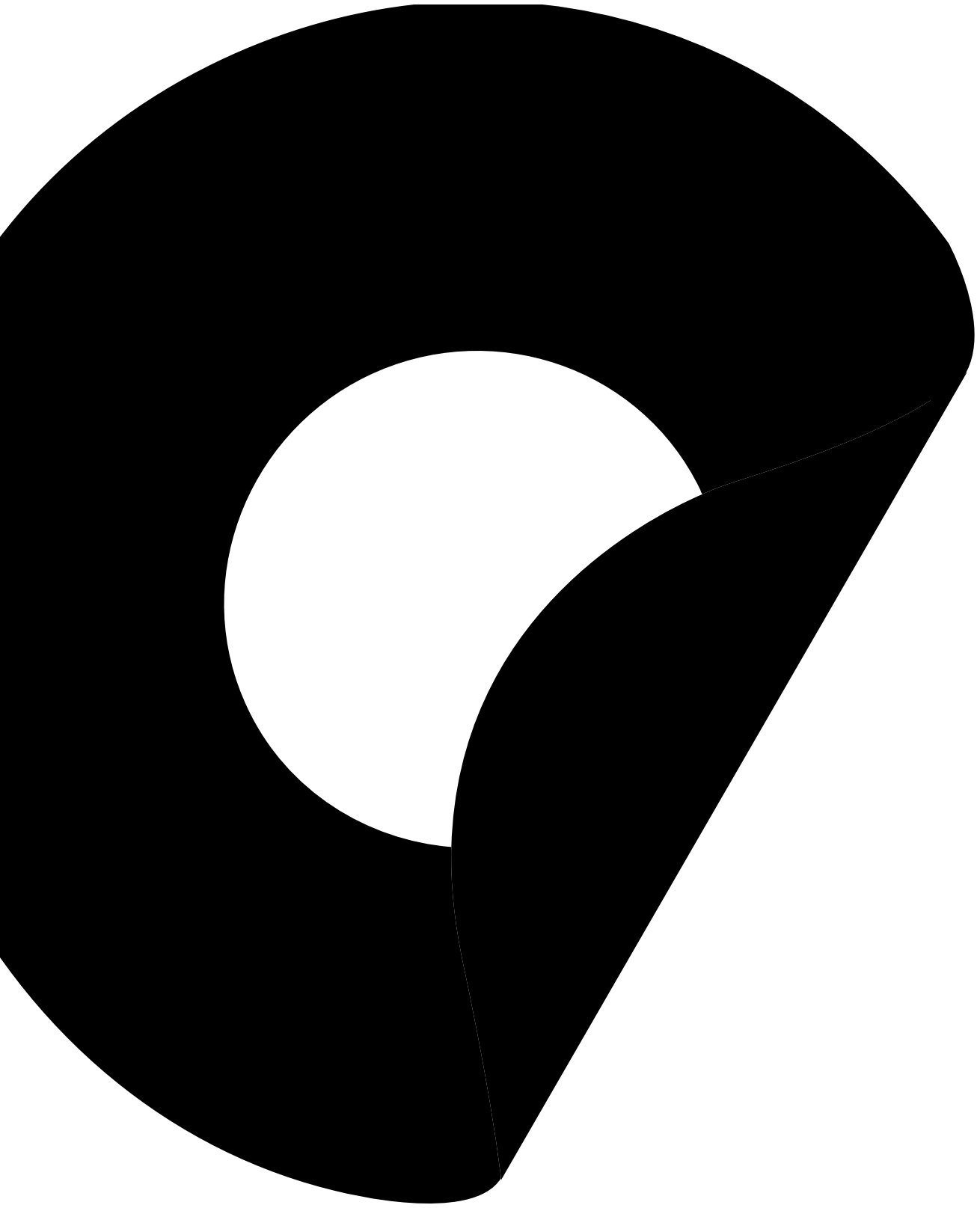
Hypothetical

Complainant is a paraplegic student who uses a wheelchair for mobility. She states that last Tuesday, when she was late for class, the Professor joked that she must have gotten a flat tire. Complainant found the comment to be so offensive that she has been unable to eat and is only sleeping a few hours a night. She has also been unable to concentrate, and so failed a test as a result.

Harassment?

Hypo continued

- Was the conduct severe or pervasive?
 - Only happened one time
 - But Complainant failed a test!
- Would a **reasonable person** believe the conduct created such an offensive environment that their ability to participate in CSU educational services was substantially limited?
 - Who is the reasonable person in this context?



The Intake Process: Triage

Intake

Not all complaints have to be investigated.

- Which ones should *not* be investigated?
- If, on its face, a complaint would not equate to a policy violation, then no need to investigate.
- Point the Complainant in another direction:
 - For students: refer to student conduct office or Dean of Students
 - For employees: refer to Human Resources/Faculty Affairs

Intake: Getting the Details

- Drill down and get the **details**:
 - Complainant may not initially provide enough information
 - Ask targeted questions that cover each element of the allegation
- **Quantify things**
 - What do you mean by “often”, “several” or “all the time?”

Hypothetical

Complainant is a Mexican student who states that last semester, the Professor made offensive, stereotypical, and deprecating statements and jokes about Hispanics. Professor also commented disparagingly about students who spoke Spanish during breaks.

Complainant found the comments to be offensive and insulting.

Do you investigate?

Hypo continued

- What is the potential policy violation?
 - Harassment or Discrimination?
- What is the protected class?
- Was the conduct severe or pervasive?
 - We don't know!
 - ASK:
 - WHAT was the disparaging comment?
 - HOW often did he say such things?
 - What effect or ramifications did the conduct have for the student?



Hypo continued again

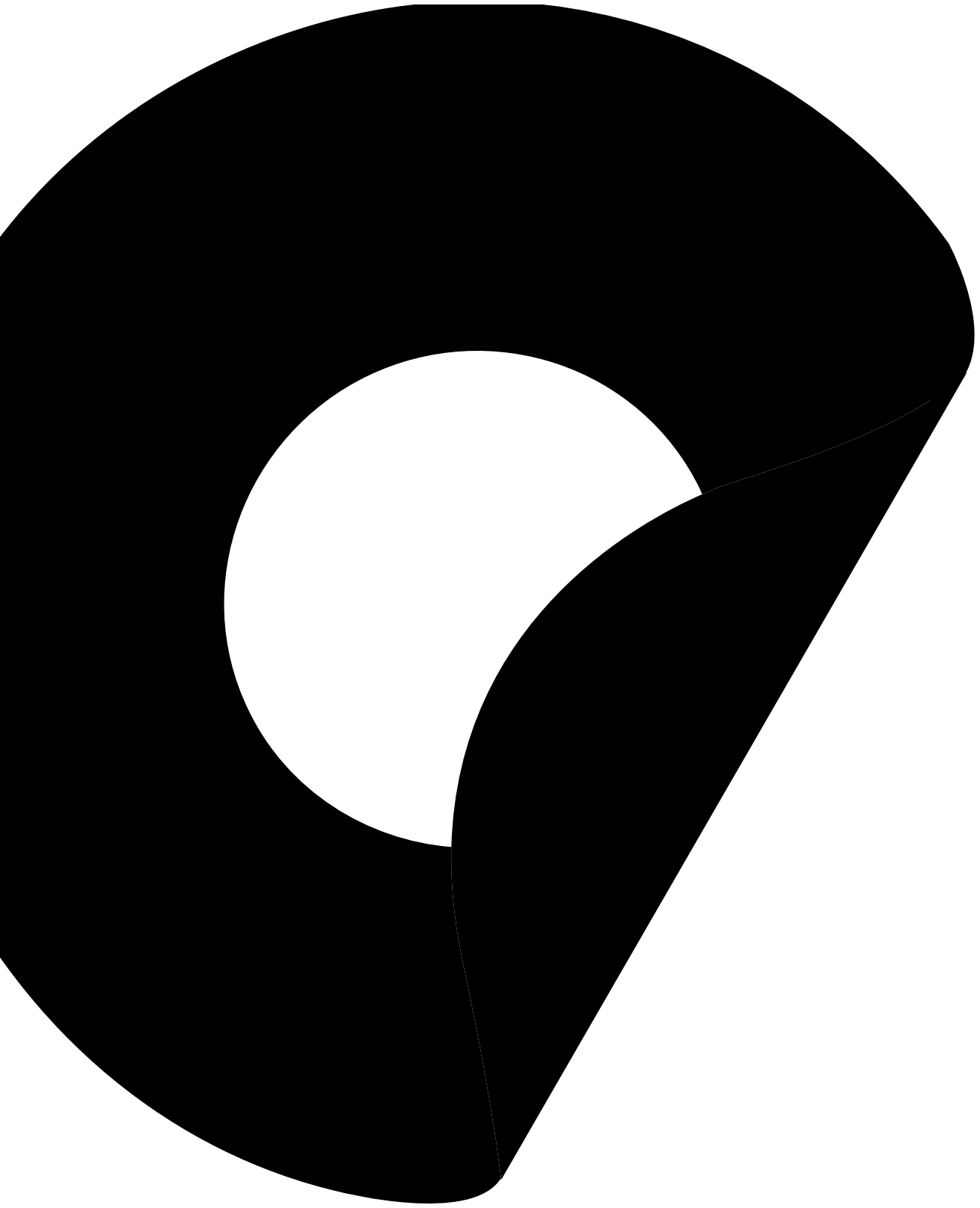
Q: What did the professor say?

- A: One time I was late to class, and the professor said I must be on “Mexican time”
- Q: What else did he say?
- A: “One time, he asked me how often I ate tacos.”
- Q: Anything else?
- A: “Not really. I can’t think of anything else.”
- Q: Your written complaint mentioned you speaking Spanish?
- A: “Oh yeah. My friend and I were speaking Spanish on a break and he told us to keep it down a little.”

Hypo Continued Yet Again

- Based on those answers, is the conduct severe?
- Pervasive?
- Would a reasonable person believe the conduct created such an offensive environment that their ability to participate in CSU educational services was substantially limited?

Do you investigate?



The Final Analysis



Burden of Proof

What is it?

- Preponderance of the Evidence
- “the greater weight of the evidence”
- “the evidence on one side outweighs, or is more than, the evidence on the other”
- Anything more than 50%



Applying the BOP

Weigh the Evidence

- Interview statements from witnesses (including complainant and respondent)
 - Interview anyone with relevant information that may affect the finding!
- Documents (emails, texts, other correspondence, photos)
- Video (cell phone, security footage)
- Ask yourself: Is there evidence to support a finding that this more likely than not occurred?
- NOTE: Finding may be based on circumstantial evidence!

Types of Findings

- Findings about **contested conduct** (e.g. harassment)
- Findings about **motive** when **conduct is uncontested** (e.g., Did Respondent decline to promote Complainant due to age?)
- Findings about **contested conduct *and* motive** (e.g. Did Respondent ignore Complainant and fail to call on Complainant in class? If so, was this due to Complainant's physical disability?)



Contested Conduct

Analyze the evidence using Credibility Factors:

- Witness corroboration (or lack of it)
- Consistent/inconsistent statements
- Opportunity or capacity to observe
- Past history and pattern of conduct
- Plausibility
- Motive to lie or fabricate



Credibility Factors

- **Corroboration/Lack of Corroboration:**
 - Is there witness testimony or physical evidence that corroborates the party's testimony?
 - Did a party or witness document the incident in writing?
- **Consistency/Lack of Consistency:** Has the witness been consistent over time?
 - Are witness statements internally consistent?
- **Capacity to Observe:** Did the witness observe the events firsthand?
 - How far away was she?
 - Did she hear about the event secondhand?

Credibility Factors

- **Past History and Pattern of Conduct:**
 - Has the Respondent engaged in similar actions previously?
 - (Helpful in he said / she said scenarios)
- **Inherent Plausibility:**
 - Is the statement believable on its face? Does it make sense?
 - Could it have occurred as reported?
- **Motive to Lie or Fabricate:**
 - Did the person have a reason to lie? (Respondents might always)
 - Does the person have a bias, interest, or other motive?

Credibility Factors: More to Consider

- The fact that witness provided a “specific and detailed account”
- The fact that a witness gave a balanced, even-handed account (i.e., not slanted towards complainant or respondent)
- The fact that respondent admitted something that would place them in a poor light

Uncontested Conduct

(e.g., claim of discrimination)

- Often this involves an employment decision rather than how a respondent behaved toward a complainant
- The question is what motivated the decision
 - For example, why did Complainant, who is homosexual, not get promoted?
- Facts not at issue, so Complainant credibility is not really at issue

Ask yourself: Is there evidence that the decision was more likely than not based upon a non-discriminatory reason? Look for:

- Documentation of performance issues
- Data

Hypothetical

Maria complains her co-worker (Fred), does not like her because she is Latina. She says that he does the following to harass her:

- Parks in her preferred parking space ALL THE TIME.
- Refers to her as “chica” in a sarcastic tone of voice.

Scenario #1

You interview Fred.

- Fred admits parking in the parking space but says he has nowhere else to park.
- Fred says he does refer to Maria as “chica” but he did not do so sarcastically. Instead, he was trying to be friendly and relate to her.

So...

- What are the factual disputes?
 - None!
- So, is a credibility determination helpful?
 - No, because they largely agree on the facts
 - The investigator needs to determine the reason why Fred parked in Maria's spot and called her "chica"
 - Factors such as opportunity to observe and consistent/inconsistent statements are unlikely to reveal motive

Scenario #2

You interview Fred and he says he does not park in Maria's space and never called her "chica." She must be mistaken.

- Would a credibility analysis help?
- YES
 - Witnesses may corroborate where Fred parked and what he said.
 - Was it plausible that he never parked there if parking was limited?

Making Findings: Writing the Analysis

- Explain why you are making your finding: **SHOW YOUR WORK!**
 - Do **NOT** just repeat facts!
 - Cite Witness statements, Documents, Data that support your conclusion
- Acknowledge contrary evidence, then refute it.
- E.g., “While respondent said he did not even know the Complainant, six witnesses said that he made racially offensive remarks about her.”

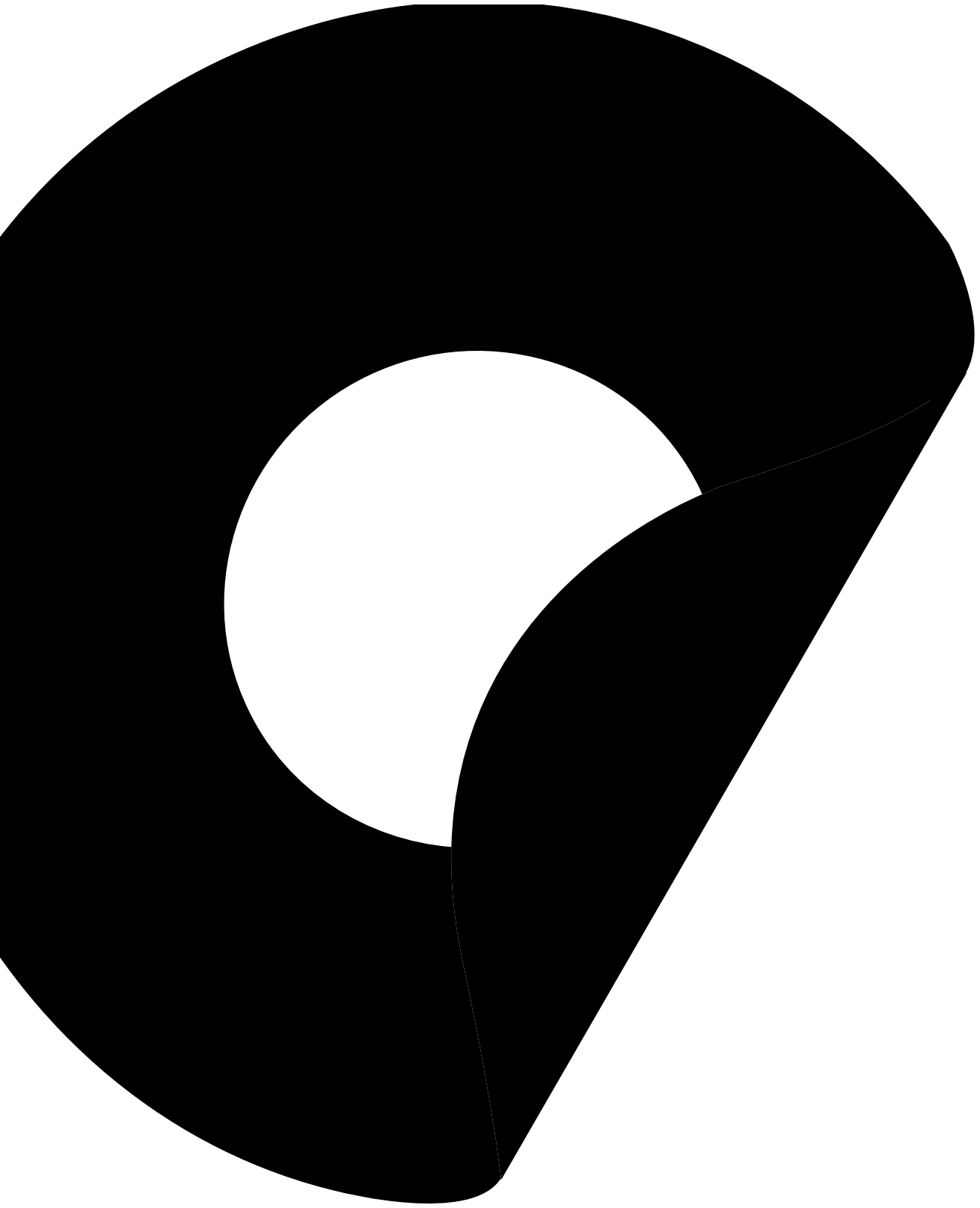


Structure of a Typical Finding

- Begin with a clear and unequivocal finding.
 - "SUSTAINED. A preponderance of the evidence supports a finding that Professor X discriminated against Student Y by
- 1-2 sentences summarizing what C alleged.
- 1-2 sentences summarizing R's response to the allegation.
- 1 paragraph of contrary facts you considered.
- 2 paragraphs of compelling facts that support your finding.
- 1 sentence to close the finding. ("Thus, a preponderance of the evidence supports a finding that")

Practice Tips: Findings

- Don't restate all the facts you gathered
 - Cite only the most compelling and relevant evidence.
- Do not cite information that does not add to your analysis.
 - E.g., don't mention witnesses who were not present or who did not recall the incident.
- Focus on the Preponderance of the Evidence:
 - You are deciding what "more likely than not" occurred
 - There can be some doubt – this is not a criminal trial!
- Make the hard calls—that is the investigator's job.
 - The finding is Sustained or Not Sustained – NEVER "inconclusive"



The Final Example

Finding

- Begin with a clear, unequivocal finding:

Sustained. A preponderance of the evidence supports a finding that Professor X harassed Student Y by repeatedly calling her the N-word during ten one-on-one meetings between the two.



Analysis

- Include evidence **contrary** to your finding:

Professor X denied Student Y's allegations and said he was the "least racist person you'll ever meet." In addition, there were no other witnesses with firsthand knowledge of the incidents. Further, three witnesses said Complainant had a tendency to lie about other matters.



More Analysis

- Cite compelling facts that **support** your finding:

Professor X's denials that he made racist remarks, while vehement, were insufficient to overcome contrary evidence. Of 10 witnesses, all of whom are Professor X's students, nine of them said that Professor X habitually made racist or discriminatory comments. The consistent narrative that these witnesses offered about Professor X's capacity and tendency to make racially-charged remarks lends plausibility to their assertions, and outweighs the perspective provided by student 10, the lone student who said she never heard Professor X say anything racist.

More Analysis

- Be sure to cover all the **elements** of the claim:

Evidence shows that Professor X's conduct was so pervasive and offensive that Student Y was reasonably and substantially limited in her ability to benefit from CSU educational services. Student Y stated that she was so offended by Professor X's comments that she had trouble sleeping at night, could not concentrate in class, and she eventually stopped showing up for the one-on-one meetings. Other students of Color reported similar reactions to other comments Professor X made, thus underscoring the reasonableness of Student Y's reaction.



Closing Sentence

- Restates the first:

Accordingly, a preponderance of the evidence supports a finding that Professor X harassed Student Y by repeatedly calling her the N-word during ten one-on-one meetings between the two.



OPPENHEIMER
INVESTIGATIONS
GROUP LLP

Questions?





OPPENHEIMER
INVESTIGATIONS
GROUP LLP

THANK YOU!
www.oiglaw.com

And by the way, this presentation has been designed using images from Vectorjuice and Freepik.com



INFORMAL RESOLUTION

Sarah Clegg

Interim Systemwide Title IX Assistant Director

Gloria Godinez

Interim Assistant VP of Equal Opportunity & Dispute Resolution | Chico State

3:45 p.m. – 4:45 p.m.

INFORMAL RESOLUTION

2023 ANNUAL TITLE IX & DHR CONFERENCE



SARAH CLEGG
INTERIM ASSISTANT DIRECTOR,
SYSTEMWIDE TITLE IX



GLORIA GODINEZ
INTERIM ASSISTANT VICE PRESIDENT OF
EQUAL OPPORTUNITY AND DISPUTE
RESOLUTION
CALIFORNIA STATE UNIVERSITY, CHICO



GOALS FOR TODAY'S PRESENTATION



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DEFINITIONS



DESCRIBE THE COMPONENTS
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PROCESS



DISCUSS HOW TO OVERSEE AN
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REVIEW ISSUES TO CONSIDER
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CASE STUDY EXERCISE

DEFINITIONS





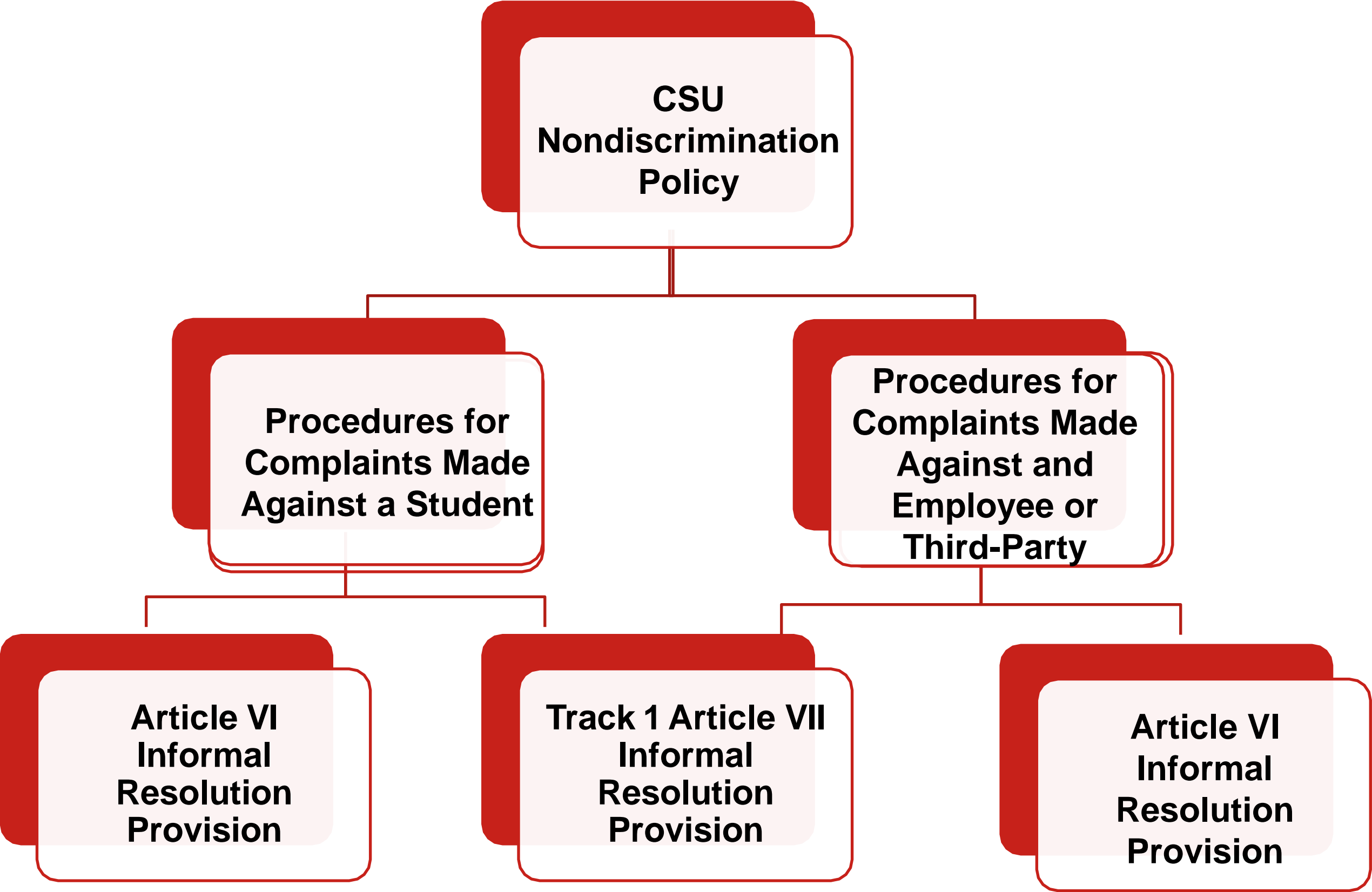
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- (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; See TX Transcript Notation and Information sharing Requirements
- (ii) (ii) Obtains the parties’ voluntary, written consent to the informal resolution process; and
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Article VI Informal Resolution

- Option is available any time before determination of responsibility
- Parties must receive written notice of agreement to engage in informal resolution
- Parties must give voluntary, written consent
- The Title IX Coordinator/DHR Administrator must approve the agreement
- Prior to signing any agreement, the Title IX/DHR Administrator must consult the student conduct administrator
- Any agreement must be in writing, signed by the Parties and the Title IX Coordinator/DHR Administrator
- Any agreed upon remedies or discipline have the same effect as remedies or discipline after hearing or investigation
- An agreement is not appealable



STEPS IN THE INFORMAL RESOLUTION PROCESS



Identification of applicable Track and applicable informal resolution provision



Provide notice to the parties



Secure signed consent to engage in informal resolution from each party.



Discussion of proposed resolution agreement terms



Review terms and consult with HR or Student Conduct



Secure agreement signatures



- Assess the nature and/or severity of allegations to determine if informal resolution is appropriate
- Continually assess the possibility of an informal resolution so that if there is no agreement, the formal process is not unduly delayed



ISSUES TO CONSIDER

When should informal resolution be available? Think about these questions when determining whether to allow for informal resolution:

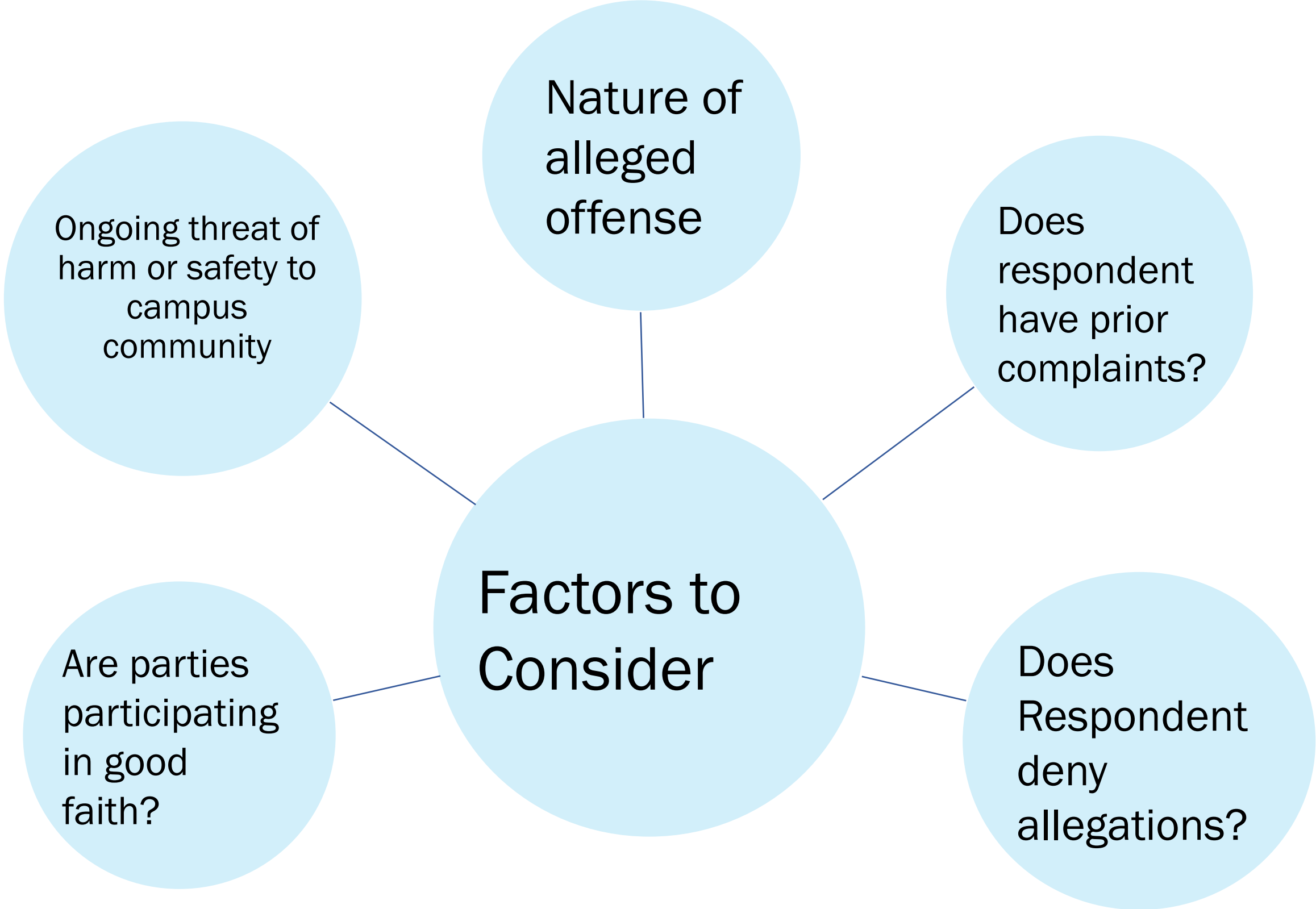
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- What is the risk if there is a failure to comply with a no- contact directive?

Hypothetical



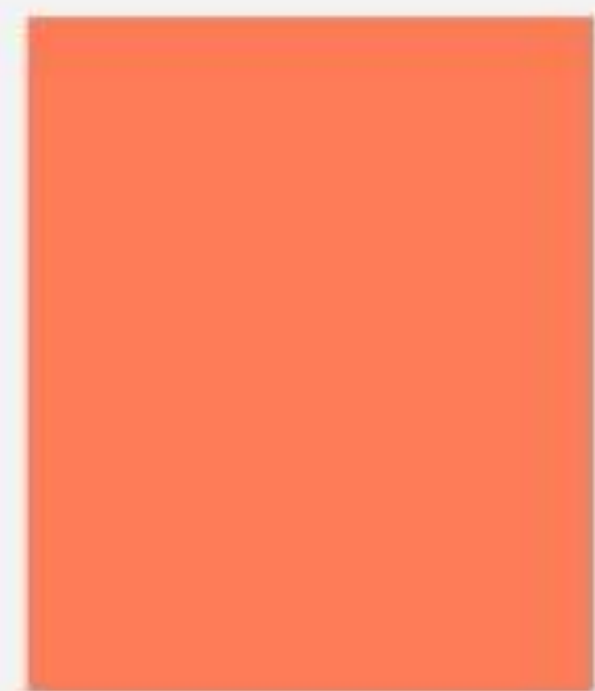
- Complainant (student) files formal complaint alleging sexual harassment and gender discrimination.
- Complainant and Respondent are in the same Business Marketing class. She is the only female student in the small working group she shares with Respondent.
- She alleges that Respondent (student) is condescending and belittling, often excludes her from group texts and emails. She alleges that he refers to her as “sweetheart” and “honey” both in private and in front of the group. He has also allegedly made comments such as “Women don’t typically have the aptitude for business. Traditionally, women do much better in roles like teacher and nurse.”
- Complainant further alleges that Respondent has sent private messages to her in which he makes comments about her appearance (“lookin’ hot today mama...”) (If that shirt was cut any lower we’d all get quite a show ;)”
- Complainant states that Respondent’s behavior has made her feel unsafe. She is unable to focus on her work and has skipped several classes to avoid him. She does not want an investigation because she doesn’t want him “to get into trouble” but would like to explore an informal resolution
- Respondent is notified of complaint. He meets with Title IX Coordinator, who shares Complainant’s wish to attempt an informal resolution. Respondent denies all of the allegations but states that he will engage in the IR process “to get it over with.”

INFORMAL RESOLUTION IS NOT FOR ALL SITUATIONS





CASE STUDY



Informal Resolution-Restorative Justice Case:

- Employee reported to TIX that Student-Complainant shared she was “taken advantage of” by another student.
- Complainant asks to meet with TIX in response to outreach/resource letter sent to her.
- Initial meeting with Complainant reveals:
 - o Complainant needs help connecting with counseling.
 - o Complainant is a student athlete.
 - o Respondent is a student athlete.
 - o The student athlete group socializes frequently.
 - o Six months earlier, on Complainant’s birthday, she went out with friends, and, according to her, she was “incredibly drunk” and blacked out.
 - o Complainant recalls only walking to a friend’s home with Respondent and two others; after arriving, she and Respondent took off their clothes and Respondent said, “I want to fuck you.” She recalls thinking “I don’t want to have sex with him,” but does not recall responding or anything else.
 - o The following morning, Complainant woke on the couch, wearing only her shirt, covered by a blanket. Respondent left the friend’s home around 3:00 a.m., per a friend.
 - o Sometime later, Complainant sees Respondent making out with a drunk female at another athletic group party.
 - o Later still, Complainant was intoxicated at another party and asked Respondent about the night of her birthday, and he responds, “We didn’t talk before, why would we talk now?”
 - o Complainant is unsure if she wants an investigation.
- About a month later, Complainant states she wants to file a complaint. Determined to be a Track 2 matter.
- Because the parties are in the same athletic group, Complainant is offered a no contact directive, at which point she states she does not need one and would not be opposed to having a conversation with Respondent if he approached her.
- Notice of Investigation issued to both parties.
- Respondent is interviewed and interested in informal resolution.
- Complainant is contacted and is interested in informal.
- Non-investigator contacts both parties separately to explain informal resolution process in detail.
- o Complainant expresses desire for Respondent to hear what he has to say and indicates it would perhaps help her to hear what he has to say since she does not remember what happened that night.
- o Respondent and Complainant are informed about restorative justice practices, including face to face process to address the harm.
- Both parties sign agreement to engage in informal resolution.

- o Several preparatory meetings held with both parties (two in person and one phone call with Respondent; two with Complainant), including an intake/assessment to gauge their readiness to engage in a restorative meeting (in-person or shuttle), identify support systems, the harms caused and needs of Complainant, brainstorm potential ways to address the harms and needs.
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QUESTIONS



THANK YOU!

SARAH CLEGG –

SCLEGG@CALSTATE.EDU

GLORIA GODINEZ

GGODINEZ5@CSUCHICO.EDU

The background of the slide is a scenic photograph of a waterfront. In the foreground, there are large, dark grey rocks forming a breakwater in the water. A paved walkway runs along the water's edge, with a few people walking. In the background, there are several palm trees and a multi-story building with a red roof. The sky is clear and blue.

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The California State University
OFFICE OF THE CHANCELLOR

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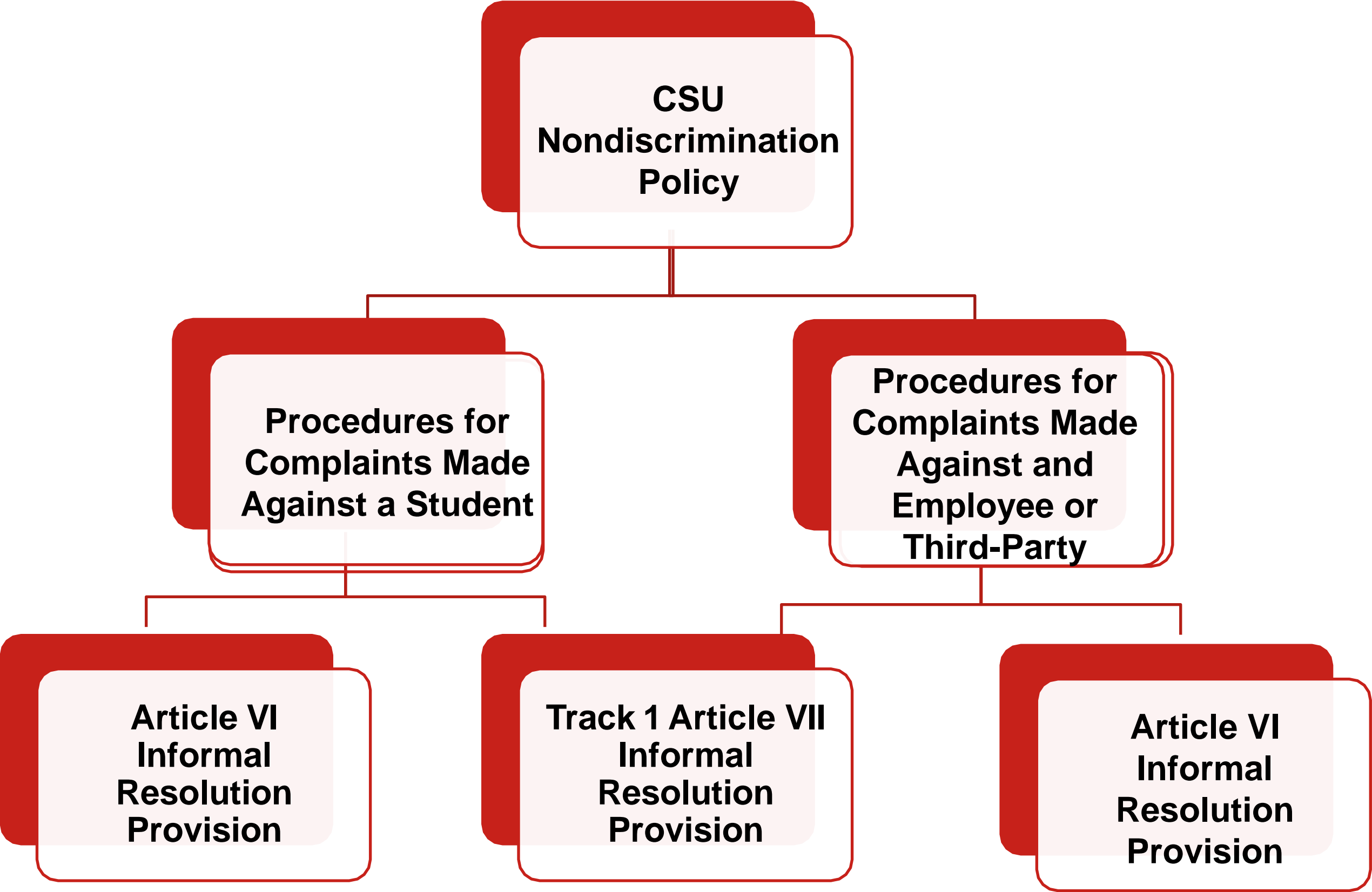
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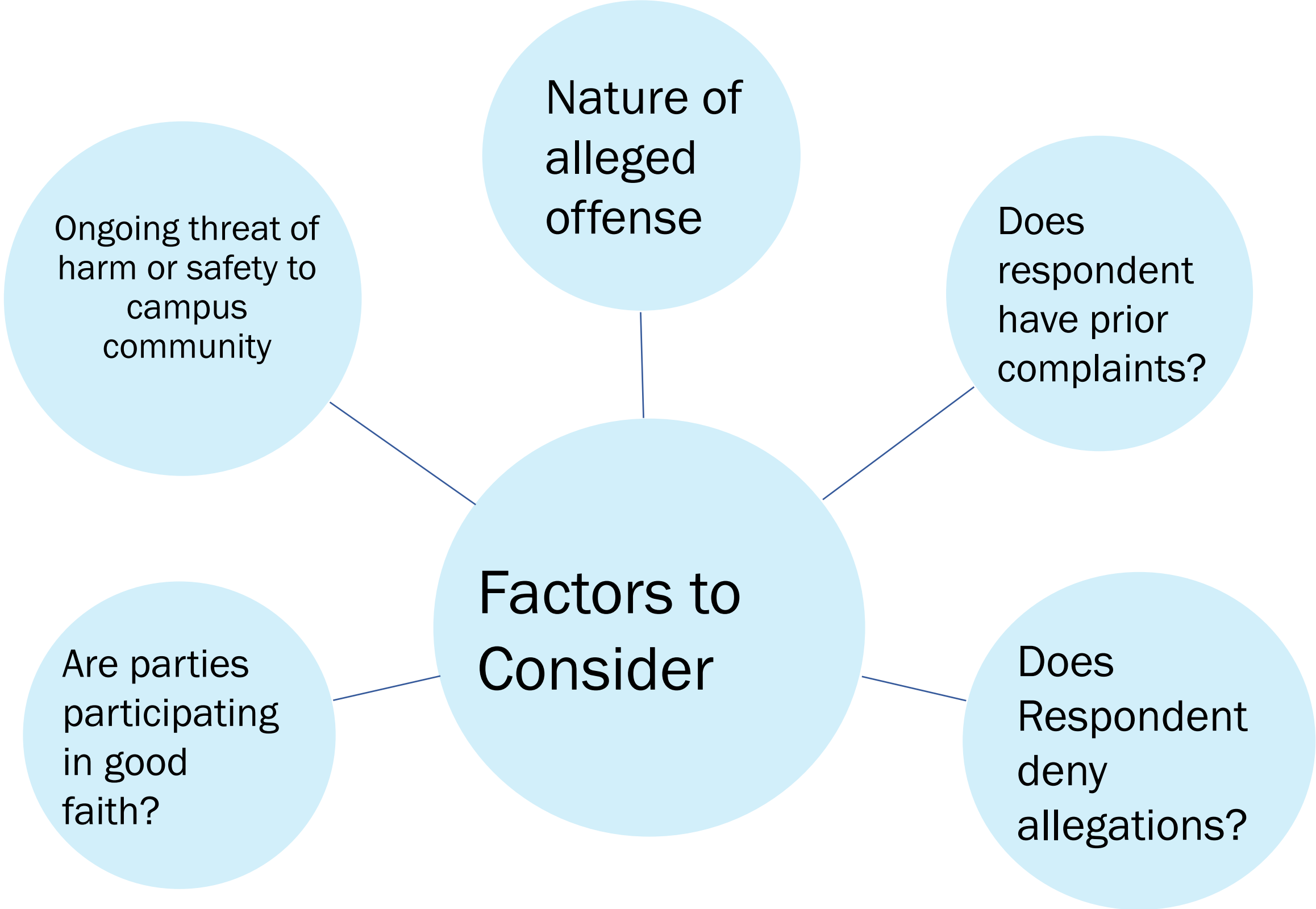
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QUESTIONS



CSU

The California State University

OFFICE OF THE CHANCELLOR

WELCOME!

**2023 TITLE IX & DHR
ANNUAL CONFERENCE**

DAY 2 - JULY 26, 2023





AGENDA

2023 TITLE IX & DHR ANNUAL CONFERENCE

DAY 2 - JULY 26, 2023

DAY 2: WEDNESDAY, JULY 26 | 7:45 A.M. TO 4:15 P.M. | DUMKE CONFERENCE CENTER (UNLESS NOTED)

7:30 a.m. BREAKFAST

8:30 a.m. WELCOME TO DAY TWO

Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
Sue McCarthy, Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services

8:45 a.m. INTERSECTION OF ADA AND TITLE IX/DHR

Mary Lee Vance, Director, Services for Students w/Disabilities & Testing Center | Sacramento State

9:45 a.m. BREAK

SESSIONS	GROUP 1: FOUNDATIONAL	GROUP 2: ADVANCED Title IX Coordinators and DHR Administrators	GROUP 3: ADVANCED Experienced Investigators
10:00 a.m.	<p>PREPARING FOR AN INVESTIGATION <i>ANACAPA CONFERENCE ROOM</i></p> <p>Natasha Baker, Managing Attorney Novus Law Firm, Inc.</p>	<p>CONSOLIDATION & NOTICES OF INVESTIGATION <i>DUMKE CONFERENCE CENTER</i></p> <p>Ruth Jones, University Counsel - Civil Rights Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services</p>	<p>EFFECTIVE COMMUNICATION WITH PARTIES AND WITNESSES <i>WALLACE CONFERENCE ROOM</i></p> <p>Kristen Entringer, Assistant Director and Investigator, Cal State Fullerton Dawnita Franklin, Asst VP, Office of Equity and Compliance Cal Poly Pomona Britnie Hopkins, Senior Investigator Sacramento State</p>
11:00 a.m.	<p>CONDUCTING EFFECTIVE INTERVIEWS <i>ANACAPA CONFERENCE ROOM</i></p> <p>Natasha Baker, Managing Attorney Novus Law Firm, Inc.</p>	<p>SUPERVISING INVESTIGATIONS PANEL <i>DUMKE CONFERENCE CENTER</i></p> <p>Maren Hufton, Associate VP, Civil Rights & Compliance Cal Poly San Luis Obispo Sarah Bauer, Title IX Coordinator Cal State Fullerton Skip Bishop, Executive Director for Equal Opportunity Sacramento State Larisa Hamada, AVP, Equity & Diversity/Title IX Coordinator Cal State Long Beach</p>	<p>CREDIBILITY ANALYSIS & FACTUAL FINDINGS <i>WALLACE CONFERENCE ROOM</i></p> <p>Sue Westover, Asst VC & Chief Counsel - Litigation</p>



AGENDA

CONT...

2023 TITLE IX & DHR ANNUAL CONFERENCE

DAY 2 - JULY 26, 2023

DAY 2: WEDNESDAY, JULY 26 | 7:45 A.M. TO 4:15 P.M. | DUMKE CONFERENCE CENTER (UNLESS NOTED)

12:00 p.m. LUNCH

SESSIONS

GROUP 1:
FOUNDATIONAL

GROUP 2: ADVANCED
Title IX Coordinators and
DHR Administrators

GROUP 3: ADVANCED
Experienced Investigators

1:00 p.m.

EVIDENTIARY ANALYSIS
AND REPORT WRITING
ANACAPA CONFERENCE ROOM

Natasha Baker, Managing
Attorney | Novus Law Firm, Inc.

EMPOWERING
MANAGERS TO BOOST
STAFF MORALE
DUMKE CONFERENCE CENTER

Cindy Sayani, Associate Marriage
and Family Therapist | LifeMatters

WHAT ARE THE
ELEMENTS? APPLICATION
OF FACTUAL FINDINGS
TO POLICY
WALLACE CONFERENCE ROOM

Elisabeth Walter, University
Counsel | Sonoma State

Sarah Clegg, Interim Systemwide
Title IX Assistant Director

2:00 p.m. BREAK

2:15 p.m.

PAY EQUITY AND DISCRIMINATION

Marc Mootchnik, Assistant Vice Chancellor & Chief Counsel, Human Resources
Lety Hernandez, Sr. Director Systemwide General Employment Services and Policy Administration

3:15 p.m.

PREVENTION AND EDUCATION RESOURCE FAIR

WALLACE CONFERENCE ROOM

Campuses are invited to bring your forward-thinking ideas (in a poster/brochure format) to share!

4:00 p.m.

CLOSE FOR THE DAY

6:00 p.m.

RECEPTION

You're invited for an evening social hour. Appetizers will be provided and a cash bar.
Hilton Hotel in Long Beach
701 West Ocean Boulevard, Long Beach 90831 | 562.983.3400



WELCOME TO DAY TWO

Laura Anson

Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services

Sue McCarthy

Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services

8:30 a.m – 8:45 a.m.



INTERSECTION OF ADA & TITLE IX/DHR

Mary Lee Vance

Director, Services for Students w/Disabilities & Testing Center | Sacramento State

8:45 a.m – 9:45 a.m.

Annual CSU System Title IX/DHR Conference
July 26, 2023

Intersection of Title IX and the ADA

Mary Lee Vance, Ph.D.
CSU Sacramento
Director, Disability Access Center
marylee.vance@csus.edu

Caveat

The presenter of this PowerPoint deck assumes no responsibility for reliance on the information set forth in this presentations.

This presentation is provided for informational purposes only and is not to be construed as legal advice. You should seek the advice of house or contract counsel in order to resolve any legal issues that you are responsible for addressing.

Given the purpose of this presentation, it may omit discussion of relevant information that may affect its utility in any legal or professional situation. Moreover, due to the rapidly changing nature of the law and agency guidance, information presented today may become quickly outdated.

Attendance at this presentation or discussion included in this presentation does not create an attorney-client relationship between the presenter and any audience member or other person. Further, this presentation has not been written to recommend any particular transaction, such as those between OCR and a complainant or a recipient.

Presentation Outline

- Intro
- Intersection of Federal Laws
- DHR/Title IX and ADA Cases
- Accommodations and Support Measures
- DS and Title IX/DHR Coordination
- Q/A

Intersection of
Title IX, ADA, 504

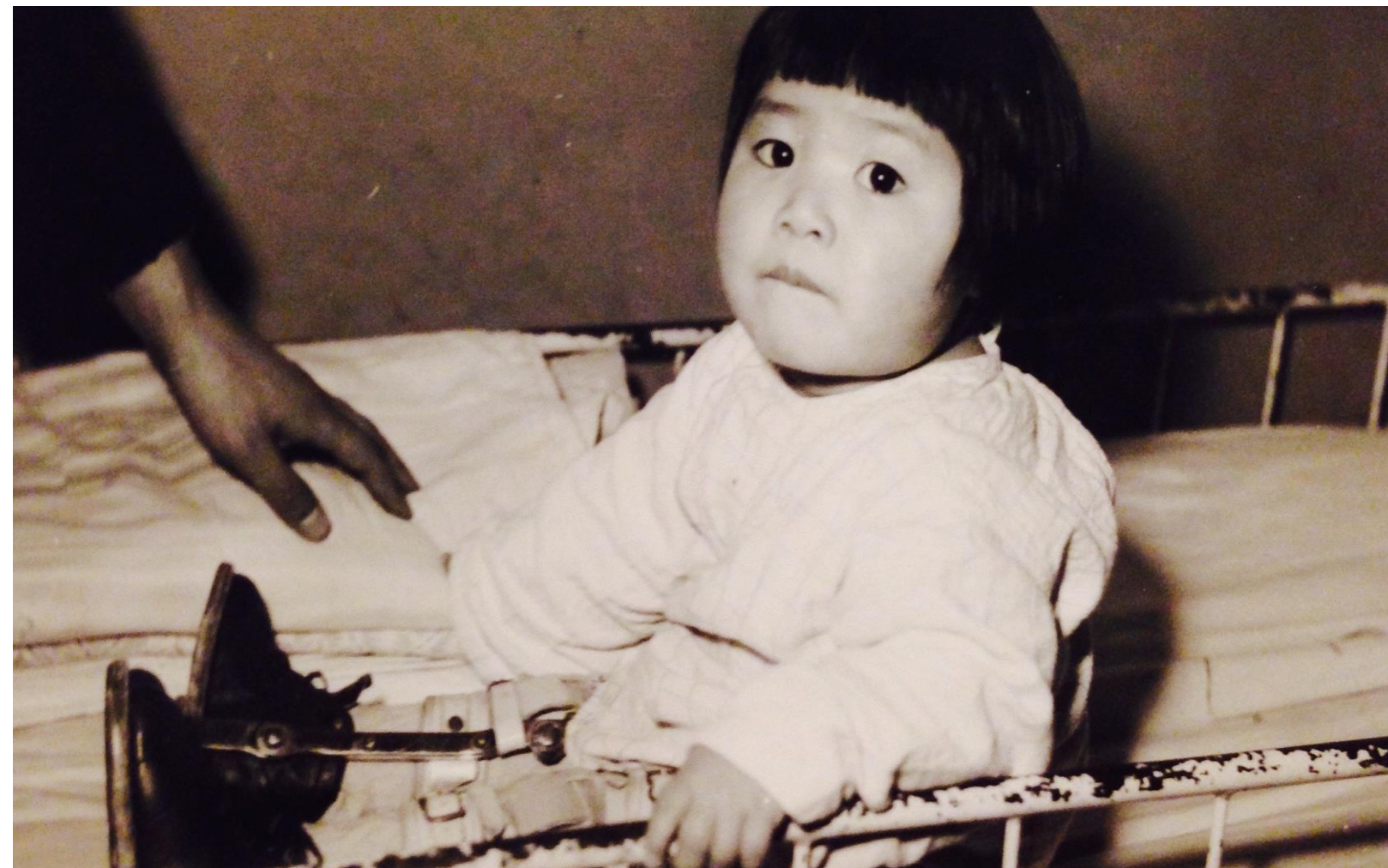
**And the Civil Rights Act:
Why Disability Rights are Civil Rights**

Intersection Example:
I am an Immigrant.
I am a Disabled Female
Korean American Adoptee.



2 Pictures:

- 1) Passport photo of young female Asian child with solemn expression
- 2) Picture of same child sitting in a hospital bed with full leg braces



Intersections Are Important: Especially to Me
(Disability/Race)

I have a disability (actually 2)
But they are not disabling
Unless I have been disabled
By poor planning

Mary Lee Vance, Ph.D.

Disability Rights are Civil Rights

- Photo of Rosa Parks sitting in the front of the bus
- Photo of wheelchair and scooter users chained to front of Greyhound bus



Civil Rights and Title IX

- **1964 Civil Rights Act**

- Outlawed discrimination based on race, color, religion, sex, and national origin.
- It prohibited unequal application of voter registration requirements, racial segregation in schools, public accommodations, and employment discrimination.

- **Title IX of the Education Amendments of 1972**

- Prohibits sex (including pregnancy, sexual orientation, and gender identity) discrimination in any education program or activity receiving federal financial assistance.
- Prohibits sex-based harassment, including sexual harassment, when such harassment is sufficiently serious as to limit the ability to participate in and benefit from a program or activity.

Section 504

- **Section 504, 34 C.F.R. § 104.43(a)**
 - Provides that a qualified person with a disability (**QID**) may not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any postsecondary aids, benefits, or services on the basis of disability.
 - Requires a post-secondary institution to **modify** its academic requirements as necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of disability against a qualified
- **1990 ADA**
 - Disability rights are civil rights.
 - Prohibits discrimination against people with disabilities in several areas, including employment, transportation, public accommodations, communications and access to state and local government' programs and services.



Who is a QSD?

- The definition of a QSD found at 34 C.F.R. sec. 104.3(l)(3) [504]
 - A student with a disability
 - Who can meet the academic and technical standards of the college
- The definition of a QSD found at 28 C.F.R. sec. 35.104 [Title II], is more complete and accurate:
 - An individual/student with a disability who,
 - [W]ith or without reasonable modifications to rules, policies or practices
 - [Or] the removal of architectural, communication, or transportation barriers,
 - [O]r the provision of auxiliary aids and services,
 - [M]eets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity

Definition of a QID: 504 and ADA

- An individual with
 - A physical or mental impairment
 - That substantially limits
 - One or more major life activities
 - Or an individual with a record of such an impairment
 - Or an individual who is regarded as having such an impairment
 - <http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>

Title II: Reasonable Modification Requirement

- 28 CFR section 35.130(b)(7)(i)
 - (7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Meaning of “Reasonable”

- **Academic adjustments** include things like extra time on exams or exams in a low distraction environment, lower distraction environment for exams etc.
- **Auxiliary aids** and services are primarily for persons with sensory impairments: Deaf/HH; Blind LV like captioning and sign language interpreting
- Though stated more generally, equivalent requirements exist under the ADA, for example:
 - Under Title II, a public university may not afford a qualified individual with a disability opportunities that are not equal to those afforded others
28 C.F.R. § 35.130(b)(1)(ii) and (iii)
 - Under Title II, a public university must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on the basis of disability
28 C.F.R. § 35.130(b)(7)(i)

“Reasonable” in Academia

- In academia, “reasonable” does not mean reasonable in the eyes of the average faculty member or what seems fair to students
- Faculty may have legitimate insights into fundamental alteration and undue burden :
 - A fundamental alteration or lowering of academic standards;
 - An undue burden, particularly with regard to administrative burden rather than cost;
 - A “personal service” is being requested by the student; or,
 - The student represents a direct threat to the health and safety of others, including faculty

Title IX and the ADA

Title IX Regulations

- Discrimination and Exclusion.
 - Schools must not discriminate against any student or exclude any student from their education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. 34 C.F.R. § 106.40(b)(1). A school also must not discriminate against or exclude from employment any employee or employment applicant on these bases. 34 C.F.R. § 106.57(b).
- Medical and other services.
 - Schools must treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom the same as any other temporary disability with respect to any hospital or medical benefit, service, plan, or policy for students. 34 C.F.R. § 106.40(b)(4). For employees, schools must treat pregnancy and the same related conditions, including termination of pregnancy, as well as any temporary disability resulting therefrom, as any other **temporary disability** for all job-related purposes, including employment-based medical, hospital, and other benefits. 34 C.F.R. § 106.57(c).

Sexual Assault: ADA and Title IX Intersection

- Sexual violence can have psychological, emotional, and physical effects on a survivor. These effects aren't always easy to deal with, but with the right help and support they can be managed. Learning more can help you find the best form of care to begin the healing process.
- There are many emotional and psychological reactions that victims of rape and sexual assault can experience. One of the most common of these is depression
- During a flashback, memories of past traumas feel as if they are taking place in the current moment.
- It's normal for survivors of sexual violence to experience feelings of anxiety, stress, or fear. If these feelings become severe, last more than a few weeks, or interrupt your day-to-day life, it might be a condition known as post-traumatic stress disorder (PTSD).

Title IX and Disability

- When we see sexual violence and sexual assault through a disability lens, we understand that the victims of sexual assault tend to be disproportionately women and disproportionately women with disabilities.
- Students with disabilities are almost three times more likely to be sexually assaulted than their peers. That's a sobering statistic when you think about how often sexual violence occurs overall.
- For example, in college, one in three disabled women is sexually assaulted compared to one in five women without disabilities.

Shank v Carleton College

United States District Court, D. Minnesota. --- F.Supp.3d
2017 WL 80249 (January 9, 2017)

- Shank was twice the victim of rape: under-aged and intoxicated, by alcohol provided by an upperclassman
- Under Title IX, she sought to hold Carleton responsible being “deliberately indifferent to” wide-spread under-aged drinking, in effect, knowing of this wide-spread practice, condoning it or doing nothing to prevent it, or the foreseeable increase risk of sexual assault
- Shank alleged that as a result of being raped she is an individual with PTSD (QID), as evidenced by the fact that she went from being a stellar student to one who often had to drop classes

Shank's Claims

- Shank alleged that Carleton failed to “accommodate” her by:
 - Refusing to suspend or expel the students who assaulted her
 - Failing to remove notations from her academic record that she had dropped several classes
- Failure to provide academic accommodations, such as:
 - Permitting her to attend classes remotely
 - Allowing her to take only those classes held in sections of the campus where her assailants were unlikely to appear
- Failure to provide academic accommodations, such as:
 - Failing to honor her requests not to have to meet with her assailant in a one-to-one meeting if she wanted to know the College’s disposition of the matter
 - She complained the College was intentionally inflicting emotional distress and that its actions (or omissions), thus sought punitive damages

U.S. District Court - Title IX, ADA, Rehabilitation Act

- The U.S. District Court granted summary judgment to the university on claims that it mishandled sexual misconduct disciplinary process and was deliberately indifferent is affirmed.
- Under claim of violation of Title IX, the university's requirement to have Shank meet one-on-one with the abuser, failing to remove posters of the abuser on campus, and not promptly finding new accommodations did not amount to deliberate indifference that was so severe, pervasive and objectively offensive that it deprived her of the educational opportunities or benefits to which she was entitled.
- Under the ADA and Rehabilitation Act, Shanks failed to show the university failed to provide reasonable accommodation.

SLCC Pregnant Student: No. 08-22-2021

- Student enrolled in 4 classes, and then dropped one
- Classes were all in person with attendance policy with 3 tardies equal to one absence
- During the course of the semester, student:
 - Learned she was pregnant
 - Experienced morning sickness and was late or missed classes
 - Informed Professor and requested academic adjustments to allow for more absences, late assignments and live streaming
- Professor told her to take responsibility and advised her to drop
- Complainant went to DS but was told pregnancy fell under Title IX

Title IX

- Title IX Coordinator determined complainant requested academic accommodations constituted fundamental alteration of the program
- Title IX did not create an investigation file or obtain statements
- Title IX rejected accommodation requests - “fundamental alteration”
 - Did not respond to faculty allegation of discrimination
 - Did not consult with faculty/dept
 - Did not consider academic alternatives
- Title IX and DS did not communicate with each other

OCR Said ...

- College violated Section 504 when, after the Complainant reported the effects of her pregnancy to the DRC, and the College did not consider whether her pregnancy had caused a temporary disability or engage in the interactive process with her to determine whether she required academic adjustments pursuant to Section 504.
- The DRC, did not consider whether the Complainant suffered from a temporary disability, but rather only referred her to the Title IX Coordinator
- Title IX Coordinator did not provide student with academic adjustments to accommodate her conditions caused by her pregnancy.
- OCR concluded that the College violated the Section 504 regulation at 34 C.F.R. § 104.44(a), when it did not engage the Complainant in an interactive and informed process with respect to the provision of modifications to its Program.

Troy University OCR Complaint # 04-21-2060

- Troy University student filed a complaint with the Office for Civil Rights (OCR) after the institution failed to provide proper accommodations for her pregnancy.
- Complainant requested a table for her class from the Title IX Coordinator because, due to her pregnancy, she could not fit into the smaller desks in the classroom.
- She was penalized in a class for poor attendance and received a failing grade in another class because she was denied the ability to make up work
- During his interview with OCR, the Title IX Coordinator said he was unaware of any written University policy that prohibited discrimination against pregnant students or that outlined the process for addressing requests from pregnant students.
- (At no time was the DS office involved in this case)

Troy University OCR Findings

- OCR determined that the student notified the university of the accommodations needed—a classroom desk to fit her growing body and never received it
- The evidence to date suggested that the University did not engage in an interactive process with the Complainant or otherwise attempt to determine what adjustments would be appropriate for each of her courses based on the information she provided about her pregnancy.
- The absence of available information about how to obtain pregnancy-related adjustments contributed to the university's uncoordinated response left the student to make multiple requests through both the university's Title IX coordinator and individual professors.
- DS was not involved in providing temporary accommodations

Sample Syllabi Statement

Sacramento State is committed to ensuring an accessible learning environment where course or instructional content are usable by all students and faculty. If you believe that you require disability-related academic adjustments for this class ***(including pregnancy-related disabilities)***, please immediately contact Services for Students with Disabilities (SSWD) to discuss eligibility. A current accommodation letter from SSWD is required before any modifications, above and beyond what is otherwise available for all other students in this class will be provided. Please be advised that disability-related academic adjustments are not retroactive. SSWD is located on the first floor of Lassen Hall 1008. Phone is 916-278-6955 and e-mail is sswd@csus.edu. For a complete listing of services and current business hours visit <https://www.csus.edu/student-affairs/centers-programs/servicesstudents-disabilities/>

Discrimination, Harassment and Retaliation (DHR) and the ADA

OCR Case No. 09-22-2176

- Student
 - Transferred from community college to a 4-year, and requested as accommodation Power Point slides in advance of class, claiming she had been provided these at her previous institution
 - Submitted documentation from medical provider identifying moderate severity with ADD, anxiety and PTSD. However, diagnosis was from 14 years previous.
 - Was informed by DS to submit more current documentation and informed by DS that this accommodation may not be always available but was approved for the slides in advance “if available.” Also was approved for Extra time with tests/ quizzes, distraction reduced environments, seating next to doors in classes, slides provided prior to class for printing note taking needs, Audio note taker (Sonocent) technology, Kurzweil reading to me programs.
 - Student insisted on PP in advance of classes, complained she was being discriminated against based on disability, that faculty were not providing the slides etc - and was referred by the DS to the DHR

DHR: Disability Discrimination Complaint

- DHR met with the student and then contacted DS to learn more about what had been communicated
- DS assured DHR that they were continuing to work with the student with accommodations even though:
 - Documentation was dated
 - Insufficient information to demonstrate direct nexus between requested accommodation and documentation
 - Ability to guarantee PP in advance of classes was not possible
 - In addition, DS provided additionally free Adobe Creative Cloud and Adobe Acrobat software for converting slides into text for study purposes
- DHR determined there had been no discrimination
- Student complained to VP of SA and referred back to DS re: accommodations
- Student filed a complaint with OCR
- Meanwhile, DS continued the interactive process, open to reviewing any new documentation

OCR

- Acknowledged
 - DS agreed to slides in advance “if” available
 - Medical documentation did not support request for slides in advance
 - Student informed multiple times that slides in advance had not been approved
 - Student had been requested multiple times to bring in additional documentation to support necessity for accommodation
 - While accommodations were not the students’ preferred accommodations, evidence did not support that the University failed to adhere to a process consistent with Title II and Section 504
 - Responses from DS had been prompt and reasonable

“On Time” Graduation Plan Thwarted

- Pregnant student enrolled in grad courses Fall 2021 delivered baby in October
- Courses were online, so student just stopped going to classes after the delivery
- In January, student informed ADA Coordinator in HR of baby
- ADA Coordinator did not share info with DS until February, when student wanted accommodations for spring semester
- Student met with DS and was upset because she was being denied ability to complete her internship in Spring, and as a result, her graduation in May was in jeopardy. Wanted retroactive accommodations.
- DS contacted academic program, who then said student had not completed coursework in Fall that was prerequisite for Spring internship – discussed technical standards etc.
- Student complained claimed discrimination based on pregnancy
- DS referred student to Title IX/DHR re: allegation

Ghost Whisperer

- Student in her 40's first became known to DS due to wanting to live on campus but have single room with private kitchen and bathroom because she "can't live with anyone"
- Disabilities included ADHD, LD and undiagnosed psych conditions
- Student informed to provide more medical information to support required need for single room
- Refused to use laptop and cell, as they were "haunted" and had other departments contact DS for accommodations and requests – Helpdesk super frustrated with her and DS informed student to go through them and not go to Helpdesk
- Initially wanted to bring 3 ESA's – no documentation
- Filed complaint of disability discrimination through Maxient re: housing, academic program and counseling
- DS continued to work with Helpdesk, DHR and other departments as well as Student (interactive process kept alive from DS and DHR)
- Was dismissed but wanted to continue to use laptop and other services

Faculty with Incomplete WPAF

- Faculty on probation alleged discrimination based on disability (physical and mental health - anxiety and depression), and as a result was unable to complete the Working Personnel Action File (WPAF) on time and submitted an incomplete file, Requested an investigation.
- Dept chair had communicated to faculty retention, tenure and probation updates, including a soft deadline for probationary faculty to submit WPAF's for review
- Although not approved for FML medical leave by HR, HR sent multiple communications to faculty regarding necessary paperwork required and need for interactive process related to disability accommodations
- Despite no approval from HR, the Dean provided faculty member an extension
- Faculty member did not request probation period extension, and was not approved for workplace accommodations, yet certified that WPAF was satisfactorily completed and ready for review.
- Provost acknowledged WPAF described health challenges, but nothing indicated workplace accommodations had been approved
- DHR determined that the facts, taken as true, did not establish a violation of CSU interim DHR policy, and that the dept would not conduct an investigation

Accommodations and Support Measures

Examples: Accommodations/Supportive Measures

Accommodations

- Attendance Leniency
- Assignment Extensions
- Bathroom Breaks
- Extended Time (Exams/Quizzes)
- Furniture
- Note Taking/Audio Recording
- Program Extensions
- Remote/Online
- Technology

Supportive Measures

- Confidential Advocate
- Discipline
- Sanctions
- TRO/No Contact
- Transfer
- Lactation Stations

Accommodations

- Accommodate the process NOT excuse the behavior
- Using the term “accommodations” to describe supportive measures implemented elsewhere in the Title IX process may confuse parties.
- The term “accommodations” should be used for actions taken to address disability-related needs.
- Using the term “accommodation” to describe supportive measures implemented elsewhere in the Title IX process may confuse parties and their advisors. It should be rephrased.
(United Educators)

Possible Accommodations for Disabled Complainants and/or Respondents

- Consult w/DS – Send info on how to request accommodations w/DS
- Extra time to review and respond to documents
- Direct and detailed instructional e-mails into smaller bits (scaffold):
Step by Step, Visual diagrams
- Clear communication rules: contact, point, etc. – repeat as needed
- Auxiliary aids or assistive devices including an interpreter, note-taker, recording device, or copies of documents, Kurzweil/Freeware for Speech to Text and Text to Speech, Support person (distinguishing between that role and advisor, as allowed in your Title IX process).
- Precise language used during the Title IX process
- (In person) Comfortable furniture, adjustable lighting etc.)

Monk, Sheldon and Other “Autistics”

- May Think Differently: “strong interests” in things others may not understand or care about; attention to details; routines; when overwhelmed may lose control over body
- May Process Senses Differently: sensitive to bright lights; loud sounds; repetitive motions “stimming” to self-regulate
- May Communicate Differently: repeating; may need alternative communication (non-verbal); voice volume etc.
- May Socialize Differently: following rules; eye contact uncomfortable; unable to guess how people feel

Zoom, a Few UD Tips

- Mute all participants
- Turn on subtitles, use full text captioning, and spotlight speaker/ASL
- Designate someone to read aloud chat and Q/A comments and request it is used sparingly, as it distracts screen readers from hearing presentations
- Ensure speakers have cameras on and are well lit
- Ensure speakers use microphones and/or speak clearly
- Have each speaker identify themselves when talking
- If using breakouts, make sure ASL interpreter/captioner is with participant needing the service
- Longer or more frequent breaks during interviews and/or hearings

Most Important Message:
DS and Title IX Coordination
(It Takes a Campus)

Recommendations for DS and Title IX

- Helpful to build DS/Title IX relationship early on
 - Pregnant/New Parent Process
- Include DS with Title IX advisory
 - Such as the Cozen O'Connor systemwide Title IX and DHR
- Understand concretely what are the differences between DS reasonable accommodations and support measures under Title IX
- Discuss
 - How can DS be a resource for Title IX and add strength, be more inclusive, be more accessible etc.
 - What happens when during Title IX process, a students' mental health condition (previously unknown) is triggered?
 - Check website, processes etc for inclusivity/accessibility language

Title IX and DS: Must Develop Smooth Coordination

- Academic affairs/Faculty should be included in conversations that may pose fundamental alterations since faculty members will be responsible for implementing approved accommodations
- Colleges and universities must create a streamlined and uniform “pipeline” process for students requesting accommodations;
 - Pregnant and Parenting (Resources) SUCH as lactation rooms, gender neutral restrooms (compliance v functionality)
 - DS
 - CARES
 - Academic Advising
 - Counseling
 - Title IX
 - Veterans

Are We "There" Yet?



- Image of a person in a wheelchair about to be hit on the head by a police officer with a raised baton

Shameless Plug #1: DS Processes for Accommodations

Laws, Policies, and Processes: Tools for Postsecondary Student Accommodation

This book is a Swiss Army Knife for disability professionals, including disability rights history, basic to advanced legal principles, direct advice to disability professionals, an eloquent presentation of the student perspective by Haben Girma, and tips for building a more inclusive academic environment. After years of presenting their highly popular and well-attended disability law trainings, Jamie Axelrod and Paul Grossman have put their legal guidance into writing, thoroughly covering legal concepts such as who is a "qualified student with a disability," when a reasonable accommodation is "necessary," and determining whether a requested or proposed accommodation is "reasonable" on its face. This is followed by a discussion of the "affirmative defenses," including fundamental alteration, undue burden, and direct threat to health and safety, and when it is appropriate to assert these. This book is a must for college administrators, disability office professionals, ADA Coordinators, faculty, and anyone else who works with students with disabilities in higher education.

"This book is written in a comprehensive way, enabling a broad range of people with responsibility for ensuring that disabled people are able to successfully complete their higher education, and will empower disability resource staff, administrators, faculty, and others to think more clearly about what their responsibilities are while at the same time providing critical information to enable people to understand the intent of laws, policies, and the processes."
--Judith E. Heumann, *International Disability Rights Advocate*

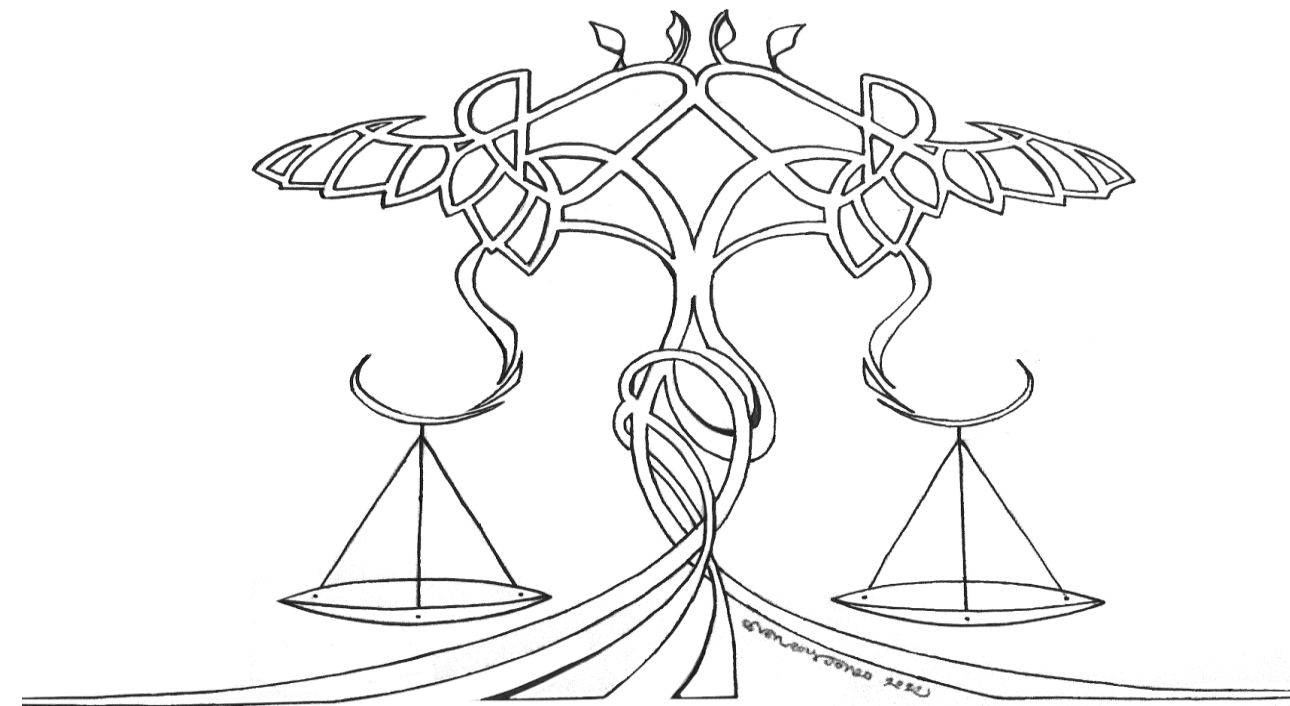
"Built on the principles of Universal Design, this book provides a pathway beyond racism and ableism where inclusion really means inclusion of all."
--Robert S. Nelsen, *President, California State University, Sacramento*

"As a university president, I have great appreciation for the high level of expertise of the authors, and perhaps most importantly, their ability to continually refine and update best practices in full alignment with recent findings in disability law, pedagogy, universal design, and student success."
--Richard Yao, *Ph.D., President, California State University, Channel Islands*

"Restoring the promise of higher education requires the critical historical assessment, policies, perspectives, and practices featured in this book."
--Dhanfu E. Elston, *Ph.D., Senior Vice President for Strategy & Chief of Staff, Complete College America*

Laws, Policies, and Processes: Tools for Postsecondary Student Accommodation

Laws, Policies, and Processes: Tools for Postsecondary Student Accommodation



Edited by Mary Lee Vance and Tom L. Thompson

AHEAD Association on
Higher Education
And Disability®

Shameless Plug #2: Disabled Employees (DHR)

DISABLED Faculty & Staff: Intersecting Identities in Higher Education

In this second volume of *DISABLED*, coeditors Mary Lee Vance, PhD and Elizabeth G. Harrison, PhD have curated a collection of writings by 28 contributing authors who have provided personal narratives of what it is like to “work while disabled” in higher education. The authors, who represent an array of disabilities, identities, and nationalities, shine a light on the current state of accessibility and support for disabled faculty and staff in postsecondary careers. They establish their positionality by identifying their disability and other identities, illustrate how they’ve experienced the intersectionality or entangling of these identities in the context of work and daily life in higher education, and offer constructive suggestions and recommendations for how to make everyday life at their institution more equitable, inclusive, and accessible. The authors’ experiences clearly show that institutions must learn not only to identify, but also to oppose, ableism. The book also provides recommendations for how to use the contributors’ experiences to initiate campus conversations and classroom discussions toward building an anti-ableist environment, leveraging universal design, and the recognition that there is no diversity without disability.

“This book elevates the power of the counternarrative, centering the lived experiences of persons with a spectrum of disabilities. It is instructive to those who are seeking disability justice to consider replicating the good and disrupting the bad and not-so-good experiences of persons with disabilities living, working, and being within an ableist society. A must-read book for all higher education institutions on a journey to creating inclusion as a foundation for equal access!”

Mia Settles-Tidwell, EdD, Vice President for Inclusive Excellence and University Diversity Officer, California State University–Sacramento

“The unique combination of lived experience, keen legal insights, and a career at the intersection of higher education and disability provides Mary Lee Vance an invaluable perspective. Through these firsthand accounts of those with similar experiences, she brings us closer to understanding ableism as it plays out on campuses throughout the country and offers us tools to help us overcome it.”

Stuart Seaborn, Managing Director of Litigation, Disability Rights Advocates

“Belonging and mattering start with who can participate. Disabled staff and faculty need access to participate for the opportunity to thrive, so disabled students can thrive. Intersectionality is important because no one has one identity, and the intersection of identities reveals how people are treated within the campus community. Campus leadership needs to diversify, and that includes disabled people.”

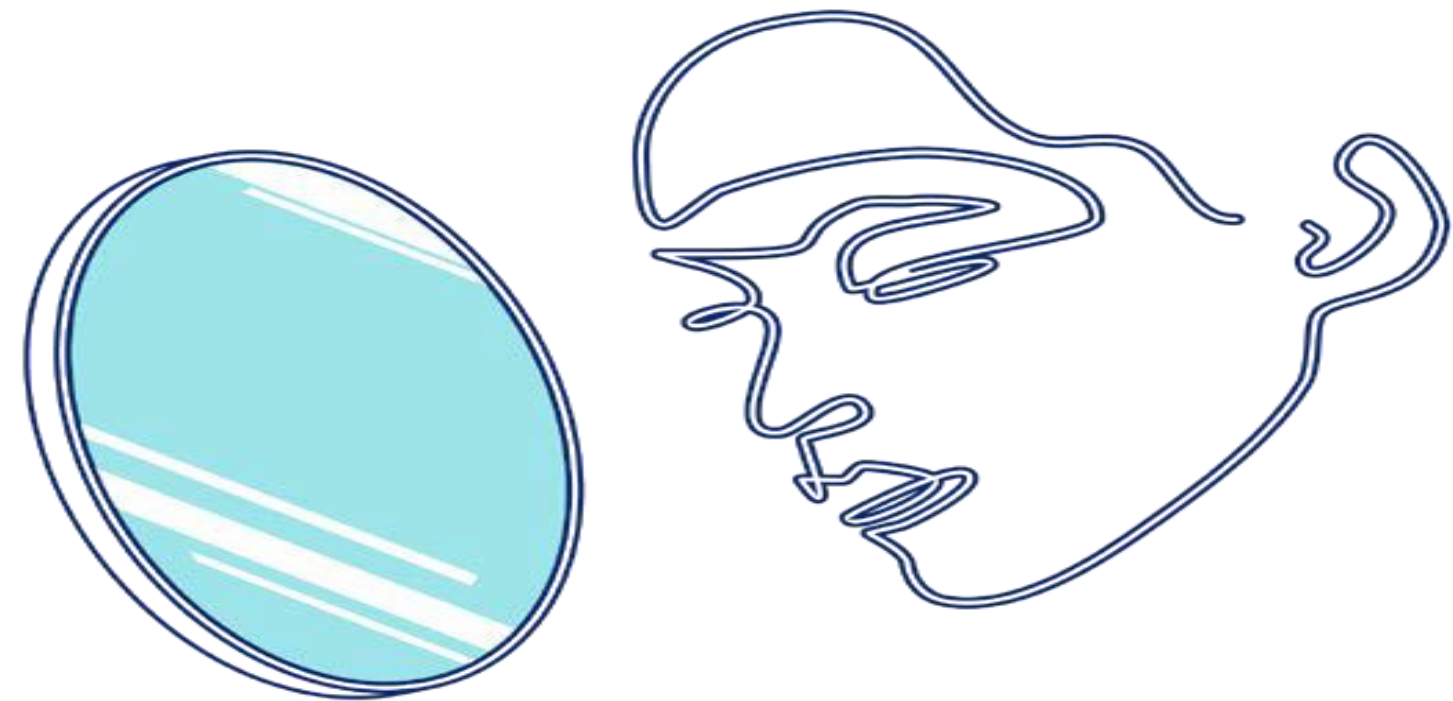
Zebadiah Hall, Vice President, Office of Diversity, Equity, and Inclusion, University of Wyoming

978-0-9996089-5-1

Staff
DSABHD
Faculty &

DISABLED Faculty & Staff: Intersecting Identities in Higher Education (Volume 2)

*Edited by Mary Lee Vance, PhD & Elizabeth G. Harrison, PhD
Foreword by Haben Girma*



Vance & Harrison (Eds.) 2023

AHEAD Association on
Higher Education
And Disability®

If you remember nothing else from today:

- Not all who claim to have disabilities are QID
- If they are QID, they have a responsibility to register with DS and/or HR
- Not all accommodation/adjustments/modifications are “reasonable”
- Do not use “accommodations” when referring to support measures or remedies
- Never say never – keep interactive door open
- Build strong relationships with your DS department - proactive v reactive
- With rare exceptions, accommodations are not retroactive
- Disability Rights are Civil Rights

The background of the slide is a photograph of a waterfront area. In the foreground, there are large, grey, jagged rocks forming a breakwater in the water. To the right, a paved walkway runs along the water's edge, with a few people walking. In the background, there are several buildings, including a tall, modern one and a shorter one with a red roof. Palm trees are scattered throughout the scene under a clear blue sky.

CSU

The California State University
OFFICE OF THE CHANCELLOR

2023 TITLE IX & DHR ANNUAL CONFERENCE

PREPARING FOR AN INVESTIGATION

Natasha Baker
Novus Law Firm, Inc.

10:00 a.m. – 11:00 a.m.



California State
University:
DHR Investigations
Training

July 26, 2023



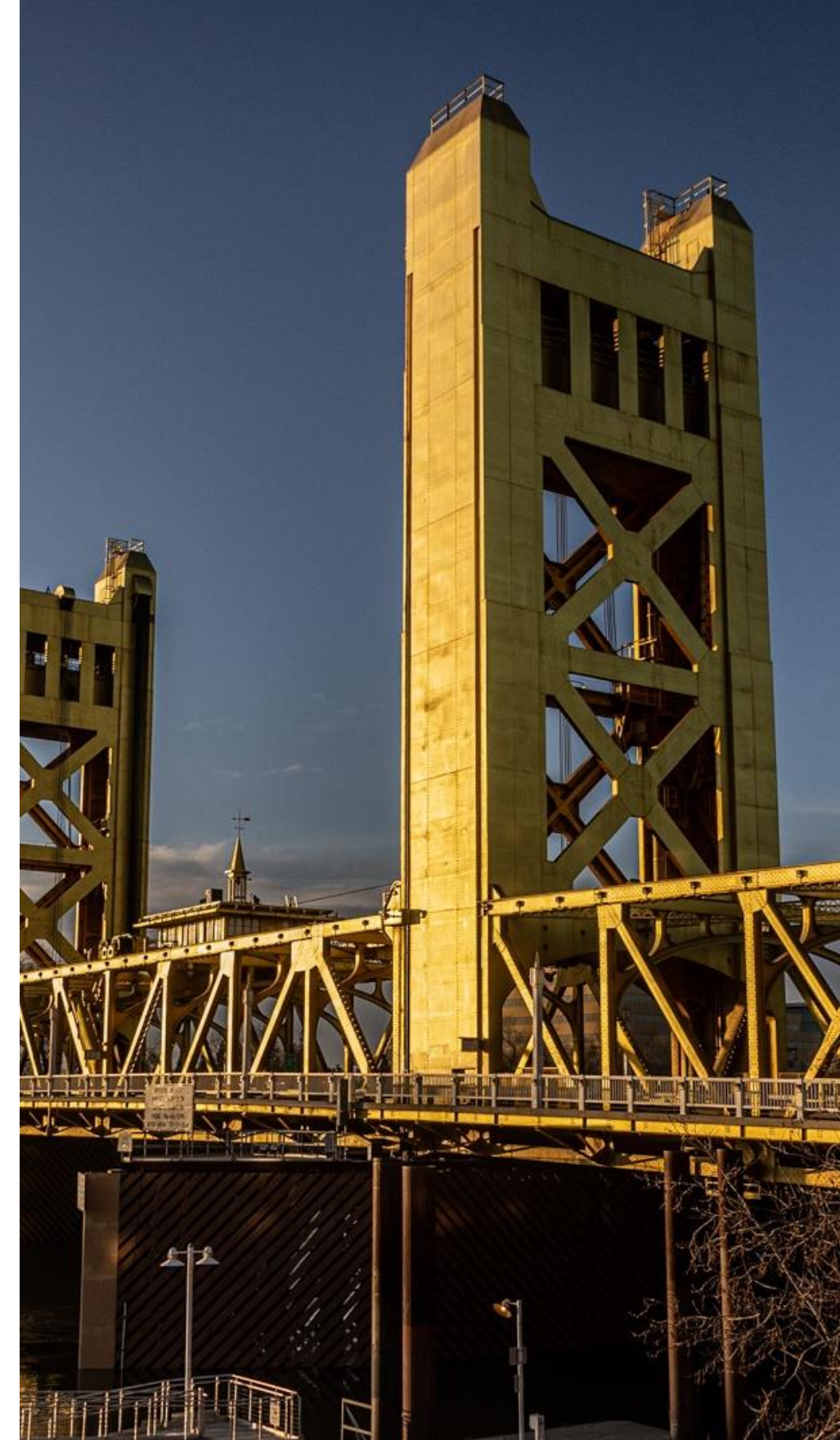


Natasha Baker

Managing Attorney
Novus Law Firm, Inc.

Agenda & Logistics

- Session One: Preparing for an Investigation (10:00 a.m. – 11:00 a.m.)
- Session Two: Conducting Effective Interviews (11:00 a.m. – 12:00 p.m.)
- Session Three: Evidentiary Analysis and Report-Writing (1:00 p.m. – 2:00 p.m.)



Session One: Preparing for an Investigation



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 to take care of yourself.

Qualities of a Good Investigator



Session One: Preparing for an Investigation

01

Understand how and why an investigation is scoped and what to do if the scope should be modified

02

Formulate an investigation plan based on the scope and the applicable policy, including the timelines for review and drafting

03

Determine a strategy for ordering witnesses and gathering evidence

04

Identify strategies to use when supervising a third-party investigator

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



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*

Article VI. Applicable Complaint Procedures (cont.)

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.

Article VI. Applicable Complaint Procedures (cont.)

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.

Article VI. Applicable Complaint Procedures (cont.)

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

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.

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 Nondiscrimination 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.

Article VI. Applicable Complaint Procedures (cont.)

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

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 Nondiscrimination 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.



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.



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 absent in this situation because they are having a prohibited relationship with a current student.



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?



Formulating an Investigation Plan

Importance of
having a plan

Elements of
a plan

Using the plan

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)

Example of Professor C

Procedures, deadlines and proposed timeline:

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

Example of Professor C

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



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)

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 to corroborate Professor C's report of the meetings.

Example of Professor C



Procedural requirements?



Preferred order? Why?



Strategic considerations?

Supervising a Third-Party Investigator

Scope

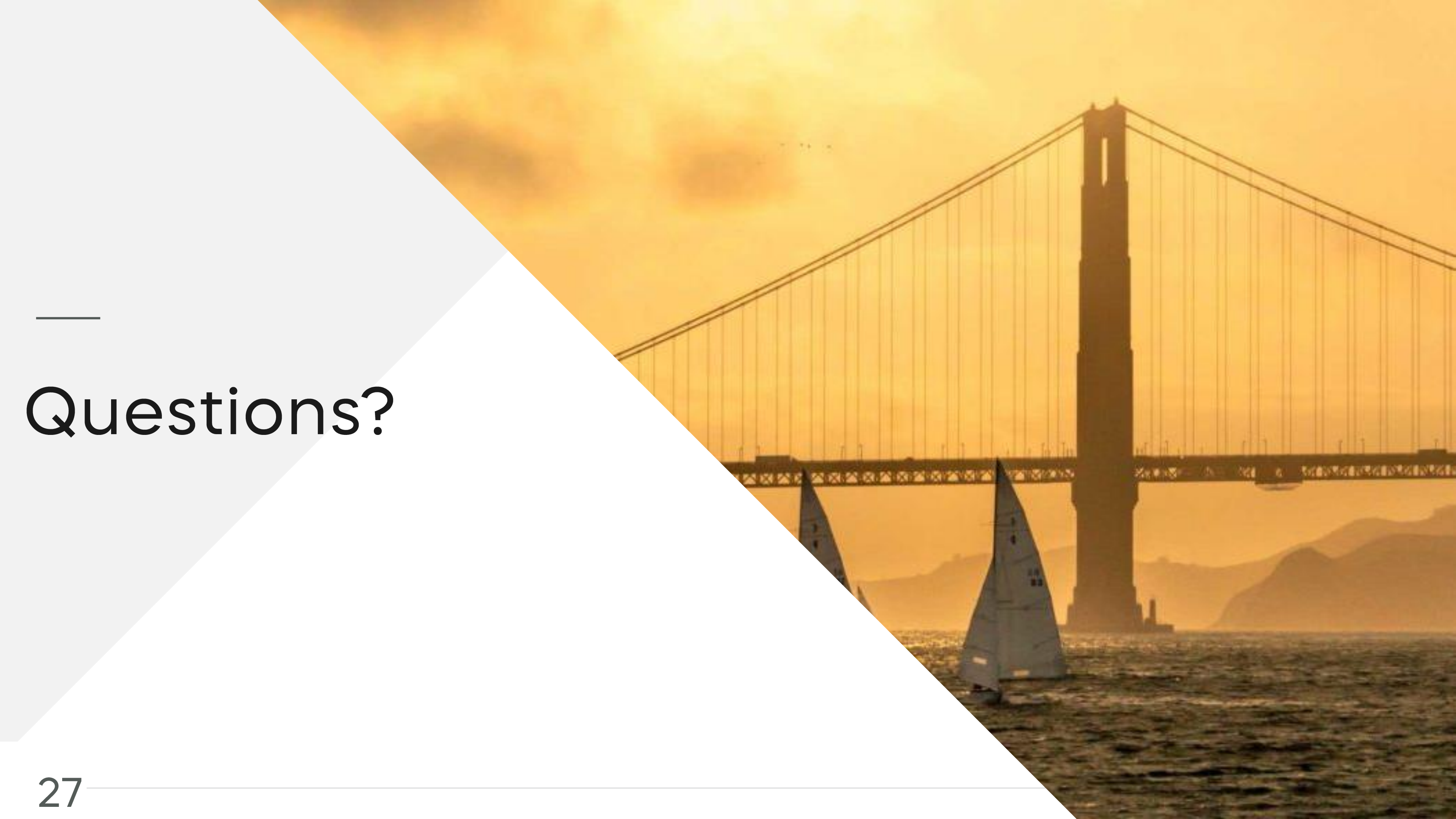
Timing and
deadlines

Communication and
expectations

Input on strategy
without affecting
neutrality

Reviewing a draft
report appropriately

- missing data/gaps in
analysis/procedural
errors



Questions?



CONDUCTING EFFECTIVE INTERVIEWS

Natasha Baker
Novus Law Firm, Inc.

11:00 a.m. – 12:00 p.m.



California State University: DHR Investigations Training

July 26, 2023



Session Two: Conducting Effective Interviews

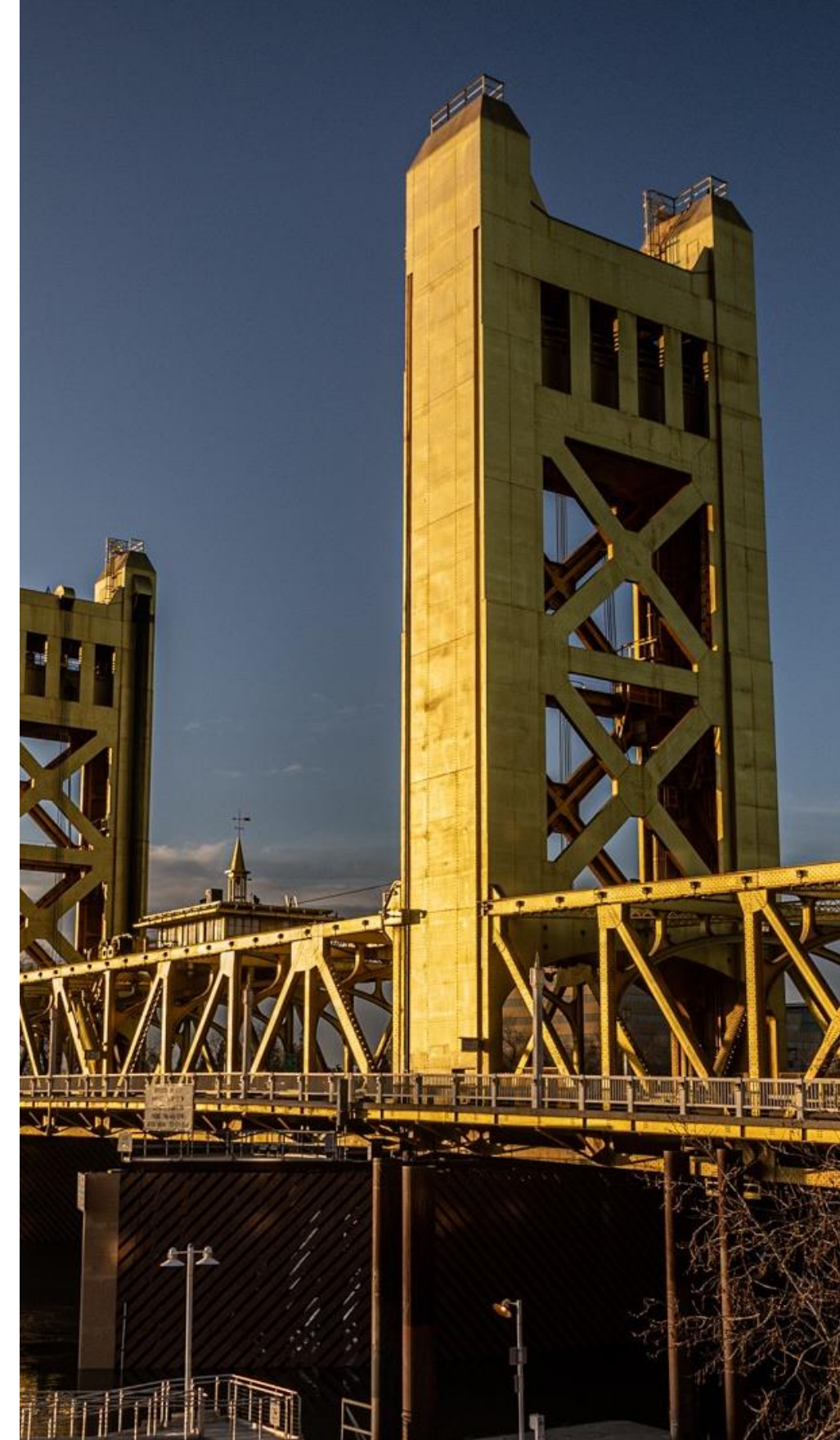


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Session Two: Conducting Effective Interviews

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.

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

Initial Meeting – Purpose/Objective



INSTILLING CONFIDENCE
IN THE SYSTEM AND YOU



GATHERING FACTS



IDENTIFYING ISSUES

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?

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



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**

Asking Effective Questions

- GO BACK TO WHO, WHAT, WHEN, WHERE...(caution on WHY)
- Broad to narrow questions
- Caution: Leading questions
- Prepare: Tough questions



Asking Effective 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)



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.

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?



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.

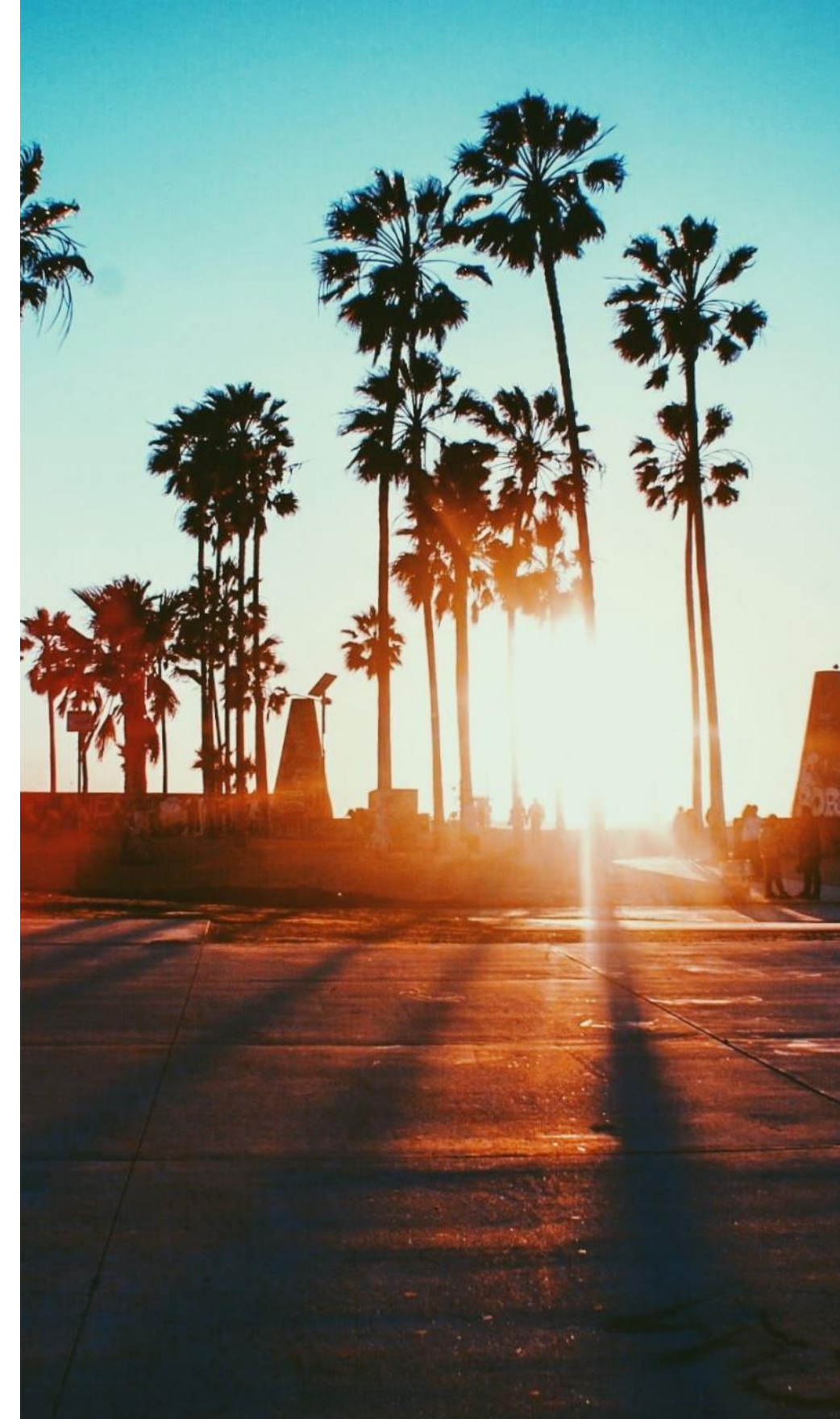


Note-taking/ data gathering

- 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

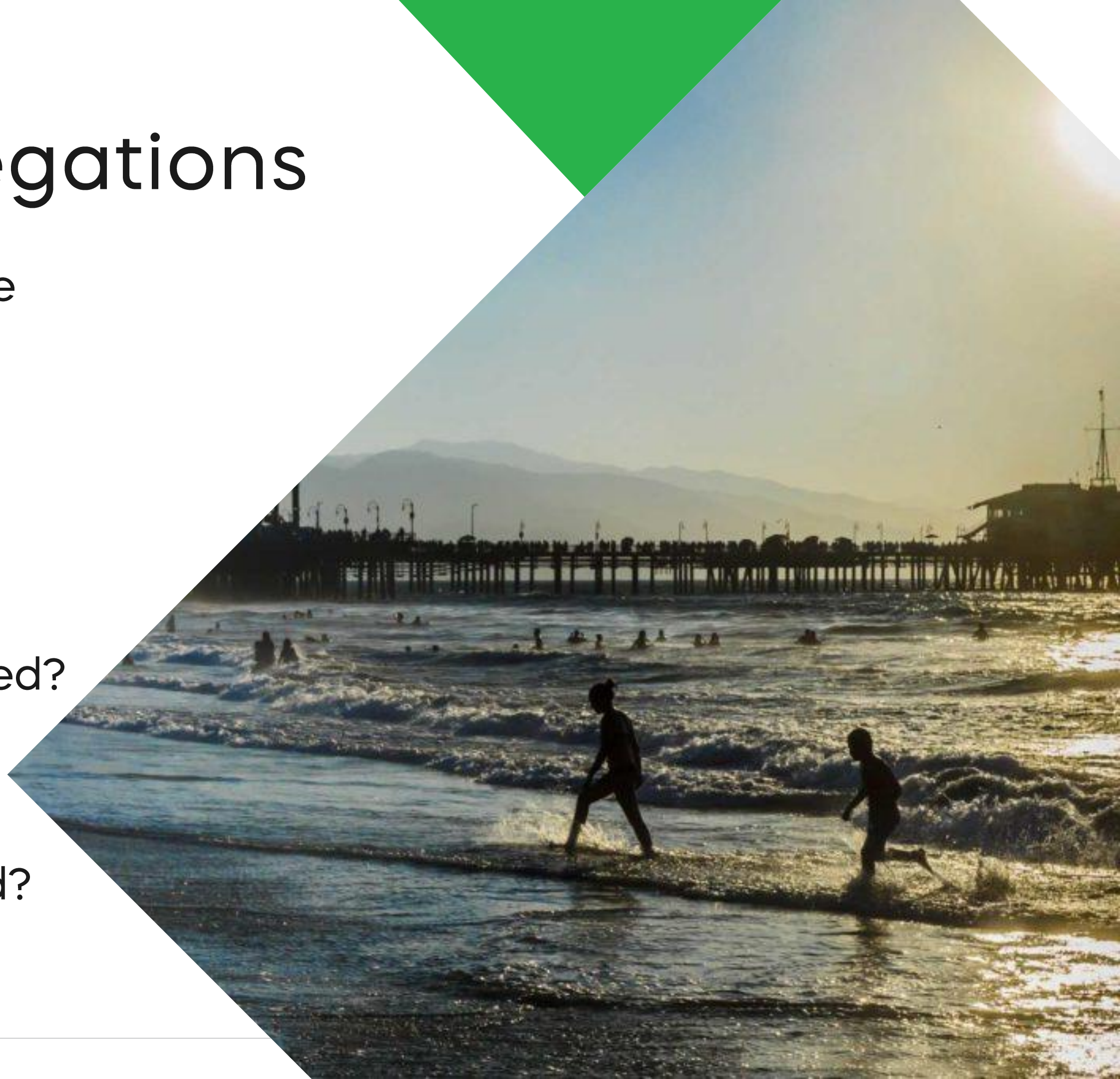
When Do You Have Enough?

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



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?



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.

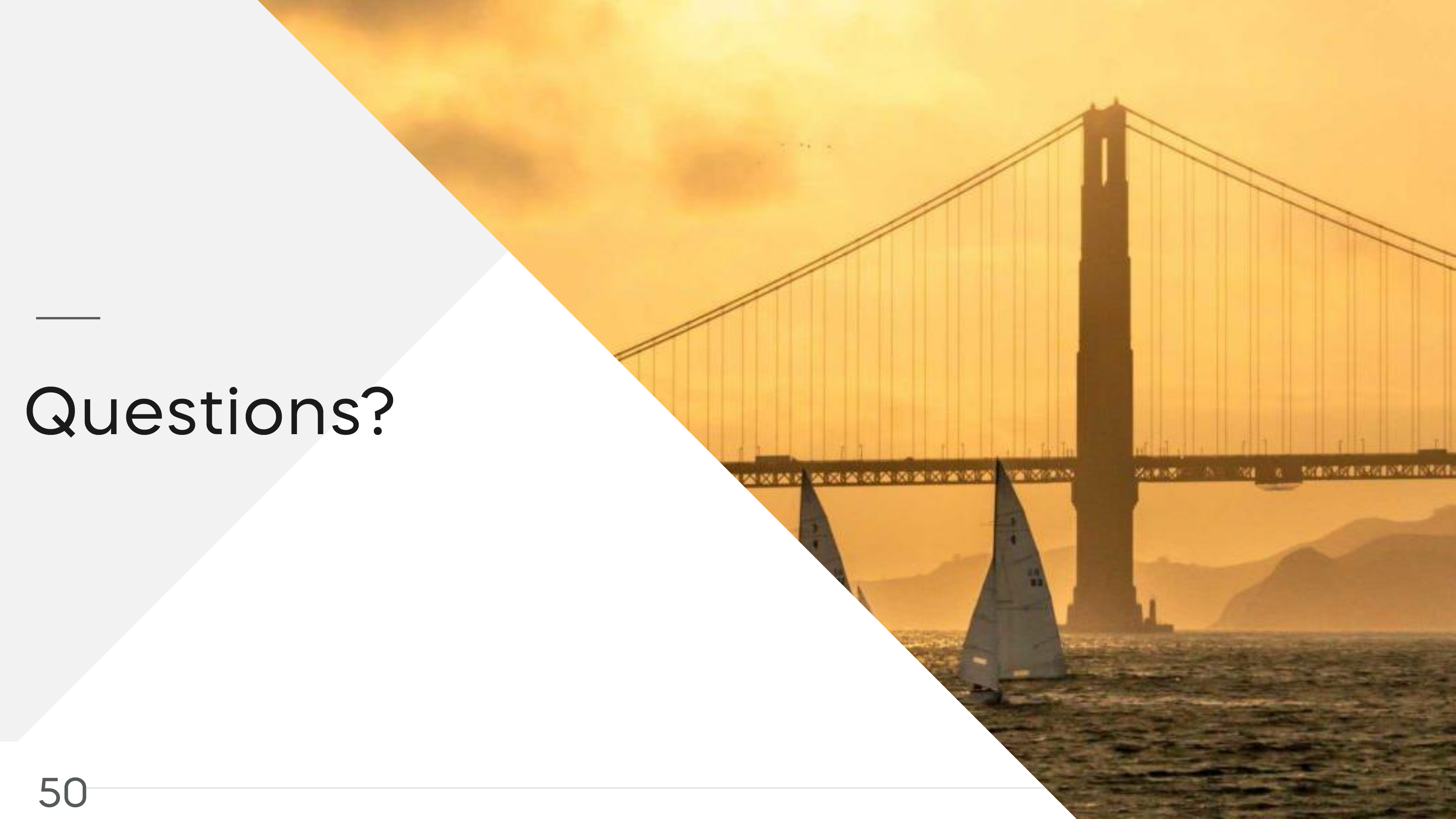
Professor C reported that several faculty members (Professors Goodbye and Goodluck) left the department as a result of this toxic environment. When interviewed, they confirmed that they left due to racial tensions.

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.



Questions?

The background of the slide is a photograph of a waterfront area. In the foreground, there is a rocky shoreline with large, grey and brown rocks. The water is a clear, light blue. In the middle ground, there is a paved walkway with a few people walking. To the right, there are palm trees and a building with a red roof. In the background, there are more buildings and a clear blue sky.

CSU

The California State University
OFFICE OF THE CHANCELLOR

2023 TITLE IX & DHR ANNUAL CONFERENCE

EVIDENTIARY ANALYSIS AND REPORT WRITING

Natasha Baker

Novus Law Firm, Inc.

1:00 P.m. – 2:00 p.m.



California State University: DHR Investigations Training

July 26, 2023



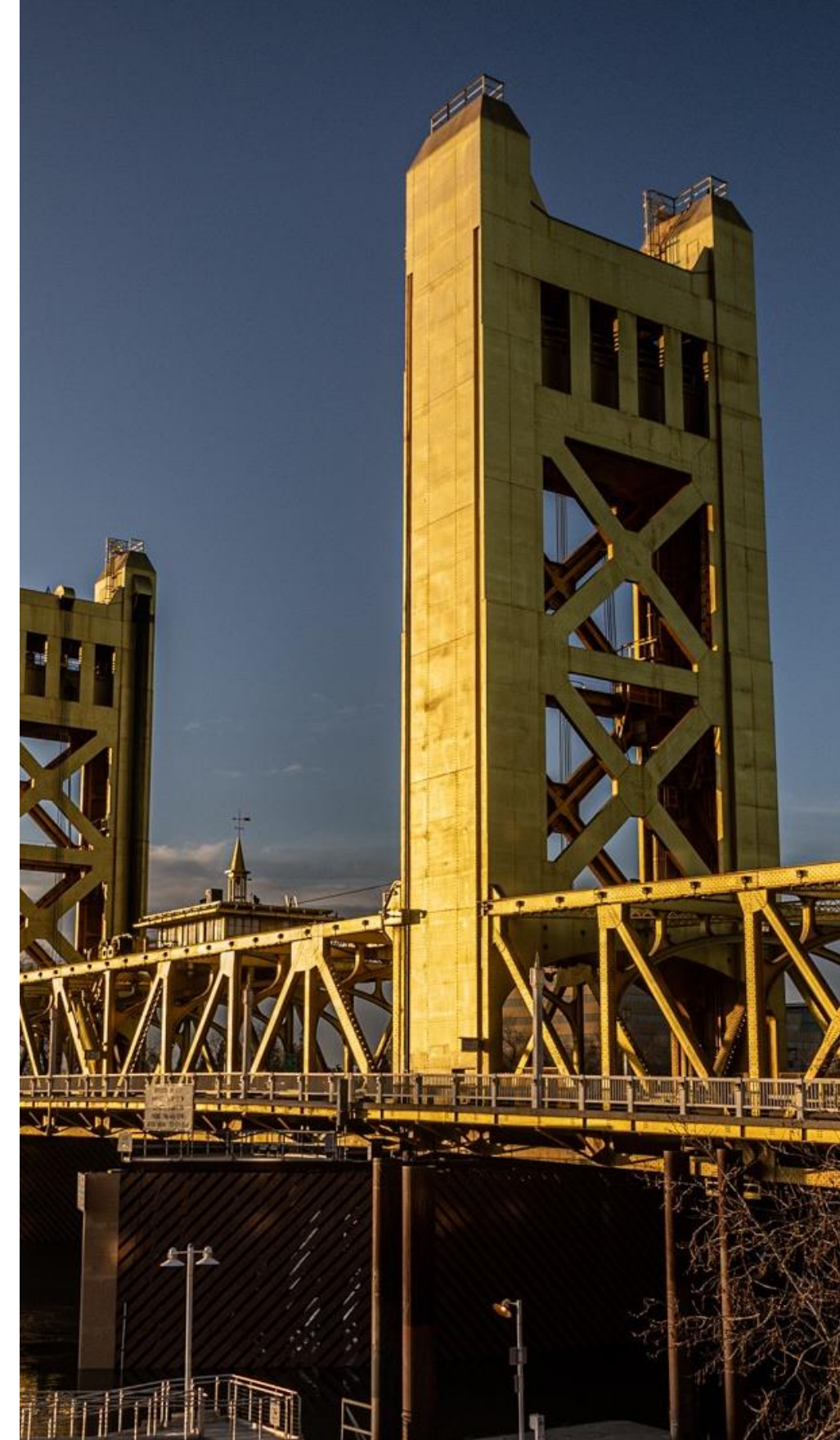


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Session Three: Evidentiary Analysis and Report Writing



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Session Three: Evidentiary Analysis and Report Writing



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.



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

Summary of the Allegations



Precision



Check notices and amended notices



Quote the policy – the exact definitions of prohibited misconduct

Investigation Process



Audience



Tone



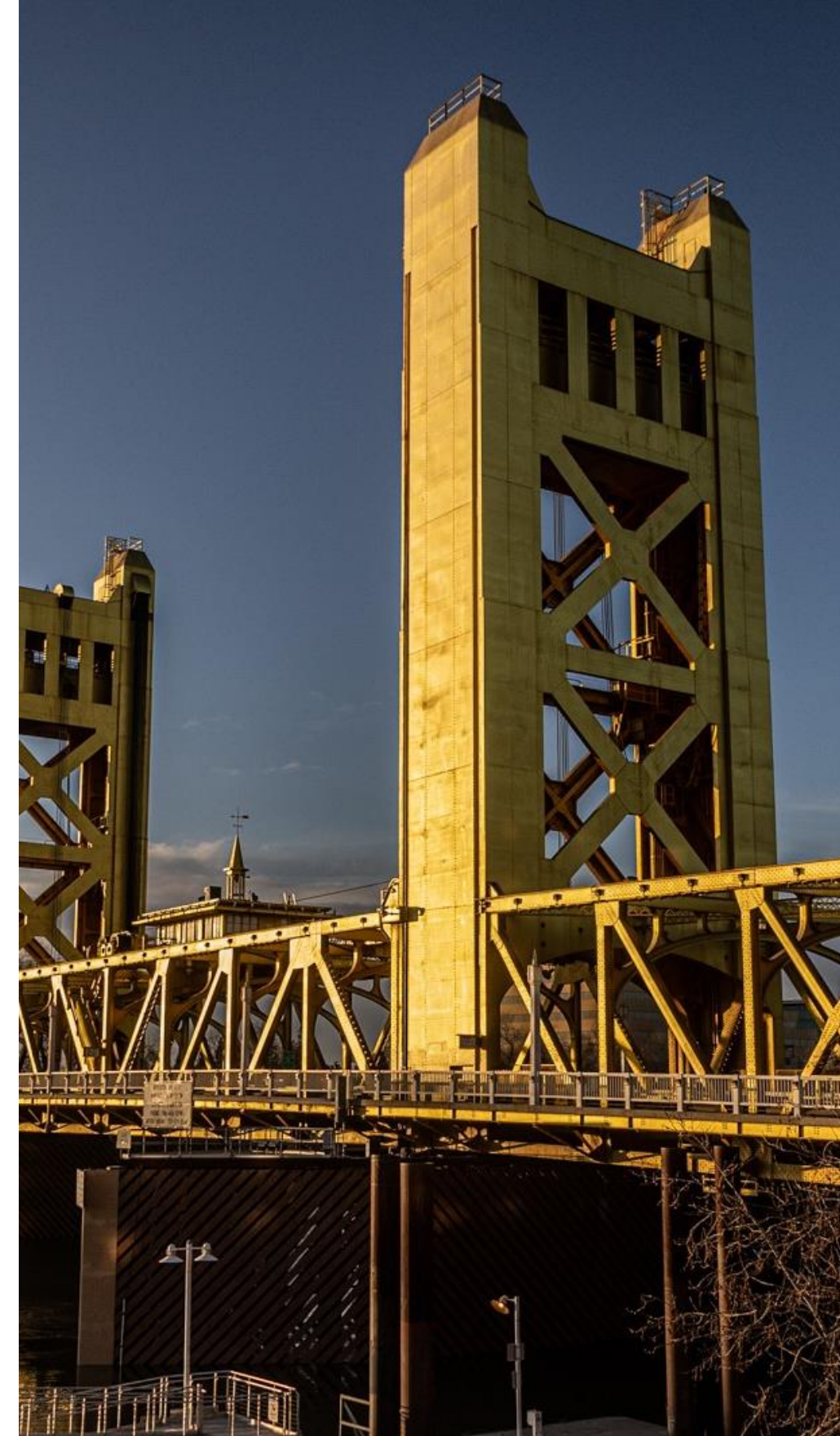
Strategy



Include minor procedural details that you will not remember

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.



Analysis, Credibility Resolutions, Findings

This is AFTER
the summary
of evidence.

This is
analysis of
the evidence.

Only analyze
what you
need to.

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?

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



Analysis Tips

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

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, 2022 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.*



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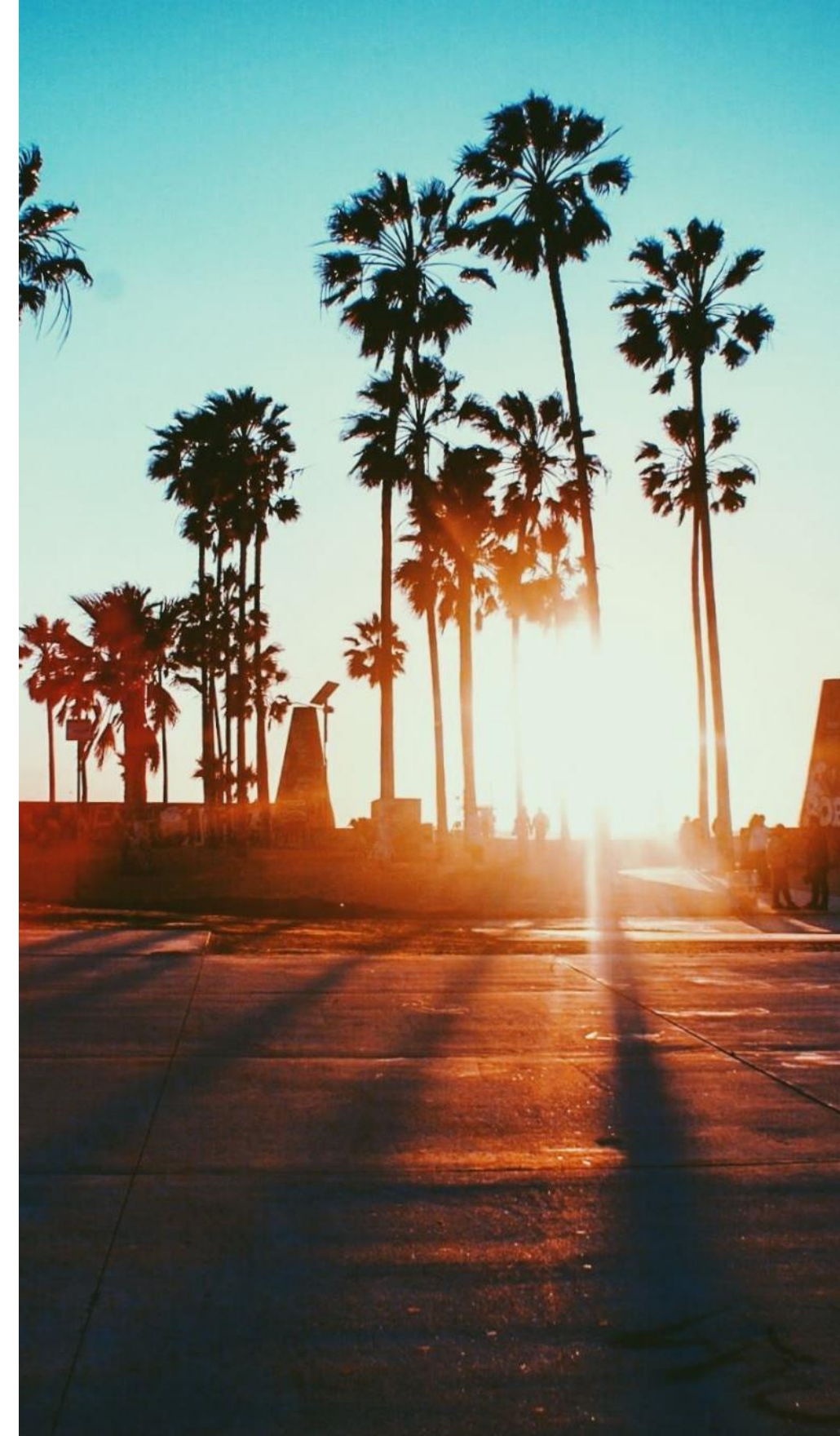
Professor R. denied discussing Professor C. with Professors Aider and Abettor. When confronted with the Zoom chat, Professor R's position was that the chat had been altered. When reviewing the draft evidence, Professor R's response to Professor Aider's confirmation of the chat was that Professor R's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

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.

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





Questions?





Natasha Baker

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



THANK
YOU







CONSOLIDATION & NOTICES OF INVESTIGATION

Ruth Jones
University Counsel

Laura Anson

Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services

10:00 a.m – 11:00 a.m.

Consolidation and Notice Issues

Presented by:

Ruth Jones

University Counsel, Civil Rights
CSU Office of General Counsel



Laura Anson

Sr. Systemwide Director for
DHR/Whistleblower/Equal
Opportunity Compliance Services





Potential Consolidation Situations

- One (1) Complainant vs. Multiple Respondents
- Multiple Complainants vs. One (1) Respondent
- Cross-Complaints against the Parties

Policy Language



General Principles

Where Parties assert Complaints against each other, and they arise out of the same events or circumstances, the Title IX Coordinator/DHR Administrator may consolidate the Complaints into one.

CSU Nondiscrimination Policy Article VII. A. ix.

Policy Language



Track 2

Where there is more than one Respondent or Complainant in connection with a single occurrence or related multiple occurrences, the hearing officer and the Parties may agree to a single hearing. A Party may request consolidation with other cases, or the Title IX Coordinator may initiate the consolidation. (Subject to FERPA and other applicable privacy laws)

CSU Nondiscrimination Policy Article VIII. B. 2.

Consolidation

When might the issue of consolidation arise:

- Notice of allegation
- Preliminary Investigation Report
- Final Investigation Report
- Hearing



What are the Interests at Stake When Considering Consolidation?

- Efficiency
- Undue Prejudice
- The Facts of the Specific Case



Efficiency

Streamlining the process to avoid required participation by witnesses and parties in multiple investigations.



Possible Undue Prejudice

- Protecting the privacy interests of the Parties.
- Ensuring that there is an assessment of individual culpability.



Analyzing Consolidation

Factors to be considered:

- Are the factual allegations closely related?
- Would a combined investigation involve most or many of the same witnesses and/or parties?
- Would a combined investigation include many or most of the same factual allegations, the same instances, or alleged conduct?



Analyzing Consolidation

cont.

- Might consolidation unnecessarily share information beyond those who “need to know”?
- Would a combined investigation result in parties learning substantial information about another party that is unrelated to their investigation?
- Would consolidation make assessment of individual culpability more challenging?



Alternatives to Consolidation of the Entire Process

- One investigation with multiple reports.
- One report with redactions?

Hypothetical: Consolidation

Tom, Dick and Harry are students in Professor Smith's math class. Professor Smith likes to go off on tangents during his lectures and talk about non-math related subjects. In particular, Professor Smith enjoys talking about the history of race and U.S. slavery. During one such off-topic lecture, Professor Smith used the N-word several times. Tom, Dick and Harry were offended and filed a complaint against Professor Smith with the DHR Administrator. A couple of days after Tom, Dick and Harry filed their complaint, another student, Sue, filed a complaint against Professor Smith after he allegedly used a racial epithet toward her during his office hours.

Can all of these complaints be consolidated? Discuss.

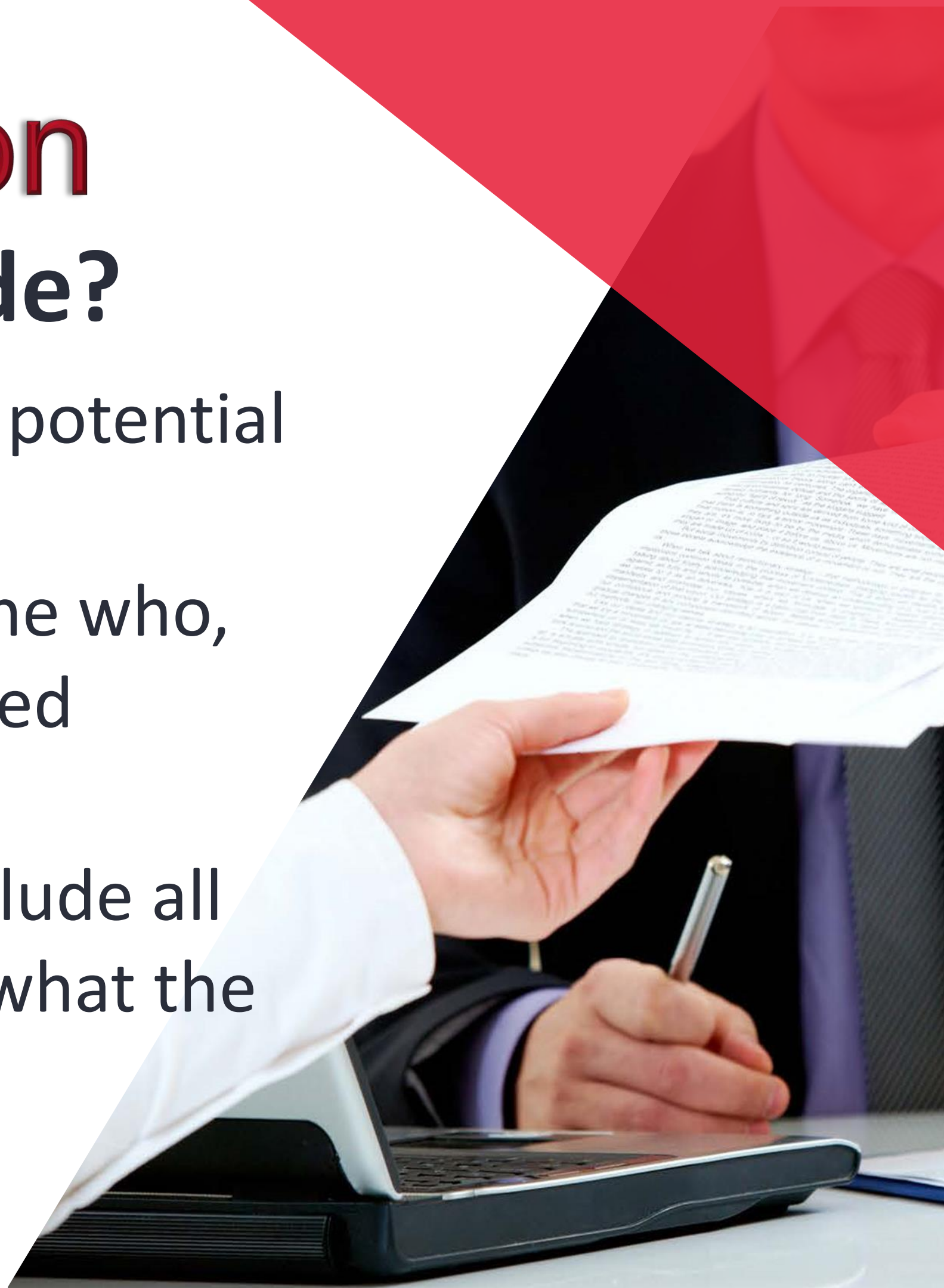
Notices of Investigation



Notice of Investigation

What should the notice include?

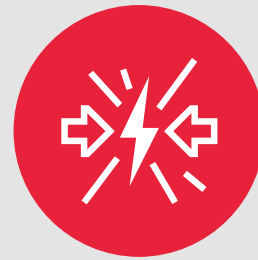
- Includes the factual allegations and potential policy violations.
- Factual allegations should include the who, what, where, and when of the alleged conduct.
- Possible policy violations should include all possible policy violations - not just what the Complainant might identify.



Special Notice Issues



Including Both Track 1,
Track 2/Track 3 Prohibited
Conduct



Retaliation

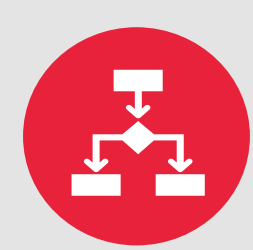


Including Other
Information

Including Track 1 and Track 2/3

Definitions

- CSU policy implements both federal regulations and state law.
- The definitions of prohibited conduct under Track 1 and Track 2/3 are not the same (E.g., sexual harassment).
- There are some offenses under Track 2/3 that are not offenses under Track 1.



Sexual Harassment Definitions (Hostile Environment)

Track 1

- Unwelcome conduct determined based on the reasonable person standard to be so severe, pervasive, **AND** objectively offensive that it effectively denies a person of equal access to an Education Program or Activity.

Track 2/3

- The conduct is sufficiently severe, persistent, **or** pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of Complainant, and is in fact considered by Complainant, as creating an intimidating, hostile, or offensive environment.



Which Conduct Definitions Should be Included in the Notice of Investigations?

- Does the complaint meet the elements of Track 1? Formal complaint with allegations of Track 1 prohibited conduct.
- Are there potential Track 2/Track 3 policy violations? a colorable claim of Sexual Harassment under Track 1, the Notice of Investigation should include the definition of Sexual Harassment under Tracks 1, 2 and 3.
- Are there factual findings relevant to other policy violations? (E.g., professional misconduct)

Notice of Investigation: Retaliation

- Retaliation complaints pertain to Protected Activity and not Protected Statuses
- Notices should specifically refer to protected activity. Protected activity means that Complainant did one or more of the following:
 - a. Exercised their rights under the Nondiscrimination Policy.
 - b. Reported or opposed conducted reasonably believed to violate the Nondiscrimination Policy.
 - c. Assisted or participated in a proceeding/investigation under the Nondiscrimination Policy.
 - d. Assisted someone in reporting or opposing a violation of the Nondiscrimination Policy.





Retaliation

Example:

An NOI in a Retaliation case should **NOT** say: Complaint alleges that Respondent retaliated against him **based on his race** by failing to promote him.

- This allegation focuses on a Protected Status and not a Protected Activity.



Including Other Information

Background or other information to put the allegations in context:

- Relationship between the parties e.g., student-teacher, supervisor, faculty member-department chair.
- On-campus or off-campus.
- Relevant location or work unit (e.g., lab, the dorm).

Hypothetical: Retaliation^t

Sam is an African American accountant in the Finance & Administration Department on his campus. His boss, Jack, has used offensive racial epithets towards him and other African American employees in the department. One day, after Jack made a multitude of racial slurs, Sam was fed up and couldn't take it anymore, and filed a complaint with the campus DHR Administrator. When Jack was notified that he was a Respondent in a DHR investigation, his attitude toward Sam changed, and not for the better. Jack started giving Sam less desirable work assignments, a negative performance evaluation, and told Sam he was not selected for a promotion he had applied for. Sam talked to the DHR Administrator and decided to add a Retaliation allegation to his complaint.

If you were the DHR Administrator, how would you draft the Notice of Investigation pertaining to the retaliation allegation?

QUESTIONS?



The background of the slide is a scenic photograph of a waterfront. In the foreground, there are large, grey, jagged rocks forming a breakwater in the water. A paved walkway runs along the water's edge, with a few people walking. In the background, there are palm trees, a modern building with a red roof, and a clear blue sky.

CSU

The California State University
OFFICE OF THE CHANCELLOR

2023 TITLE IX & DHR ANNUAL CONFERENCE

EMPOWERING MANAGERS TO BOOST STAFF MORALE

Cindy Sayani

Associate Marriage and Family Therapist | LifeMatters

1:00 p.m – 2:00 p.m.

15 TIPS TO BOOST MORALE

Presented by:

LifeMatters®

mylifematters.com



TODAY

- Signs, costs and causes of low morale
- Tips for improving morale
- Action plan

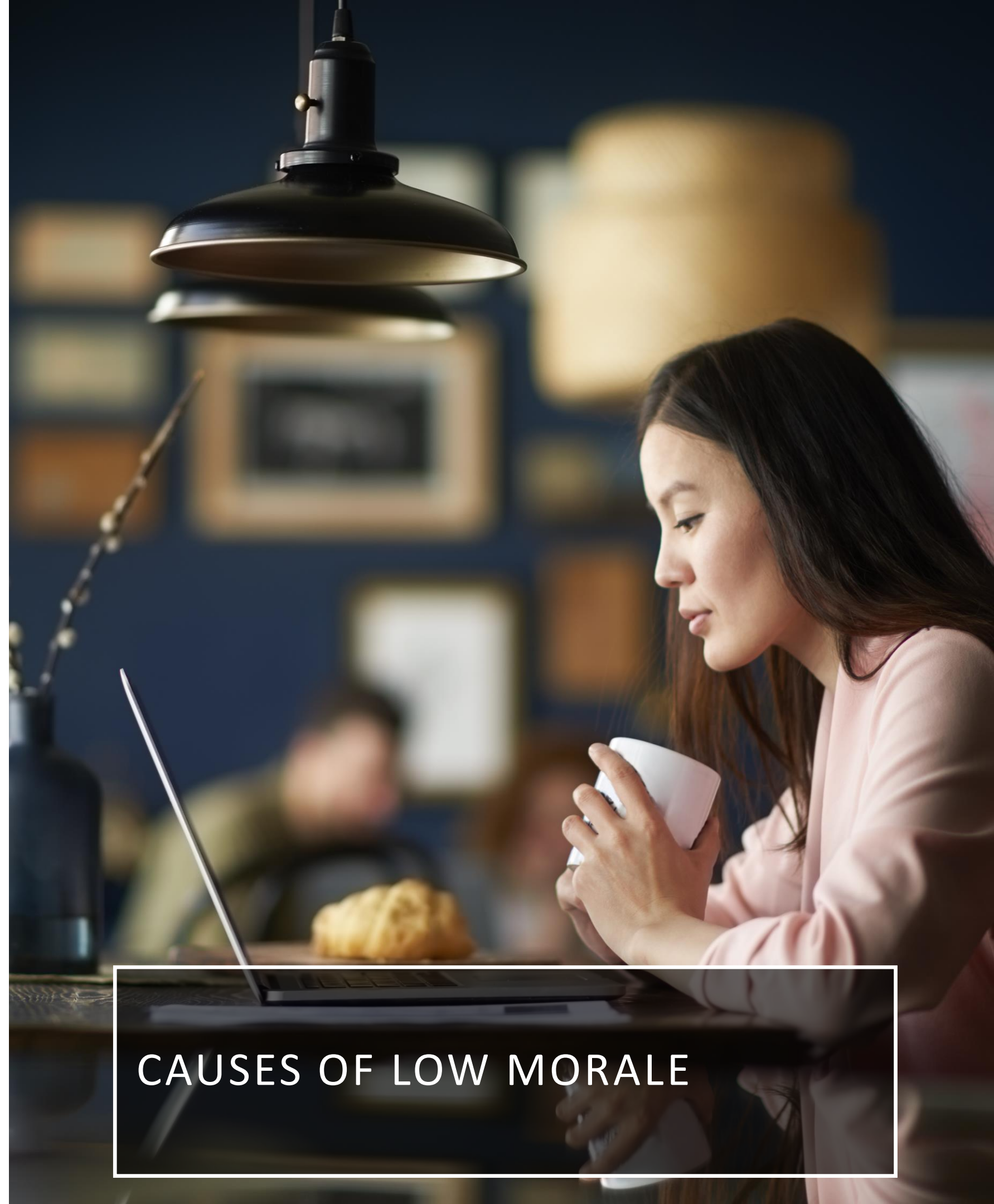


THE COST OF LOW MORALE

- Decreased productivity
- Unresolved conflict
- Employee turnover
- Tainted reputation
- Unpleasant environment

SIGNS OF LOW MORALE

- Tardiness
- Absenteeism
- Apathy
- Moping
- Backstabbing
- Increased turnover
- Decreased quality
- Decreased productivity
- Increased accidents/injuries



CAUSES OF LOW MORALE

- Think about a time when you've experienced low morale.
- What were the conditions that contributed to it?

CAUSES OF LOW MORALE

Excessive workload

Concerns regarding leadership

Anxiety about the future

Lack of challenge in work

Insufficient recognition

- Source: Towers Perrin and researchers Gang & Gang

“Lightening Round”

- Break into small groups
- Quickly generate/record ideas
- When time is called, move to next station

A large teal circle with a white border, containing the text 'TIPS FOR IMPROVING MORALE'.

TIPS FOR
IMPROVING
MORALE



TIP #1

Manage your own morale first

- Take responsibility for your happiness
- Look for the best in people and life
- Take on an attitude of self-confidence
- Treat everyone like a VIP

TIP #2

Talk and listen to employees

- Ask what is causing poor morale
- Ask for ideas to improve morale
- Really listen to responses
- Implement viable ideas

TIP #3

Express appreciation

- **Timely**
- **Specific**
- **Sincere**

Expect good things

- The “self-fulfilling prophecy”
- People and teams do as well as you think they will



TIP #4



TIP #5

Brag about employees

- Newsletters
- Trade magazines
- Local press
- Bulletin board
- Meetings
- E-mail

TIP #6


Create goals

- What skills do I need?
- What info do I need?
- What help do I need?
- What resources do I need?
- What barriers do I need to overcome?
- Is there a better way of doing things?

TIP #7

Encourage involvement

- Setting goals
- Create team tasks
- Stay open to opportunities

A woman with dark, curly hair is shown from the chest up, wearing a light blue blazer over a white top. She has her eyes closed and a slight smile, looking upwards. The background is a blurred city street scene. The text is overlaid on the left side of the image.

TIP #8

Respect opinions

- Value differences
- Invite opinions
- Listen

TIP #9

Celebrate success

- Take time before next project
- Include support staff
- Pizza party
- Off-site lunch



TIP #10

Provide feedback

- Be proactive
- Be specific
- Develop a plan
- Link performance to organizational goals



TIP #11

Connect with community

- Get involved in the community
- Make donations to local organizations
- Offer student internships

Be honest

- Notify people of changes
- Talk about how the changes will effect them

TIP #12



TIP #13

Show concern

- Use the person's name
- Be there for your employees
- Offer resources
- Ensure safety
- Supply necessary tools

TIP #14

Evaluate workload

- List work and tasks
- Are there tasks that no longer need to be done?
- Should tasks be delegated?
- Is there a more efficient way to do the task?

Earn trust

- Back them up
- Treat like customers
- Delegate authority
- Understand mistakes happen

TIP #15



TIP #15 (CONTINUED)

Earn trust

- Be fair
- Be respectful
- Communicate openly
- Trust employees



GOING
FORWARD

As a result of today's session, I will do the following to help improve the morale of my workgroup...

FINAL THOUGHT

“When you wholeheartedly adopt a ‘with all your heart’ attitude and go out with the positive principle, you can do incredible things.”

-Norman Vincent Peale, Author

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CREDIBILITY ANALYSIS & FACTUAL FINDINGS

Sue Westover

Asst VC & Chief Counsel - Litigation

11:00 a.m. – 12:00 p.m.



The California State University

OFFICE OF THE CHANCELLOR

Truth, Fiction, or Something Else? Assessing Credibility of Parties/Witnesses and Making Factual Findings

Presented by:

**Susan Westover, Asst. Vice Chancellor & Chief Counsel – Litigation
Office of General Counsel**

Divining the Difference Between Truth, Fiction (Lies), and Mistakes

- **Burdens of Proof**
 - **Preponderance of the Evidence = More Likely Than Not**
 - **Clear and Convincing Evidence = Highly Probable**
 - **Beyond a Reasonable Doubt = *for criminal cases only***
- **Some cases truly are 50/50, where findings cannot be sustained**
- **Both direct and indirect (circumstantial) evidence are probative**
- **Most cases hinge on credibility, and you're the judge and jury – at least in the university setting**

Guiding Principles

- **No magic formula; it's truly a case-by-case analysis**
- **All testimony must be weighed**
 - **Some witnesses tell lies**
 - **Some witnesses tell the truth**
 - **Most witnesses make mistakes – neither absolute truth nor lie – but you must assess their ability to be accurate**
 - **Differences in recall do not necessarily amount to lies**
- **Keep in mind that in most CSU proceedings, witnesses are not placed under oath (so potential perjury charges are not available)**

Factors in Evaluating Credibility

- **Initial level of cooperation or hesitancy**
- **Ability to see or hear the events in question (vs. hearsay)**
- **Capacity to perceive, recollect, retell (including incapacitation)**
- **Motive to lie or existence of bias**
- **Withheld evidence**
- **Plausibility of the story**
- **Admissions of untruthfulness**
- **Consistency vs. inconsistency**
- **Actively omitted, concealed or destroyed evidence**

Factors in Evaluating Credibility (cont.)

- **Demeanor while testifying (baseline vs. the harder questions)**
- **Eye contact**
- **Nonverbal responses**
- **Inadequate verbal responses**
- **Timing of answers**
- **Nonverbal clues to dishonesty (stress reactions)**
- **If someone lies once, chances are it's not just once**

Drafting your Credibility Findings

- First lay out all the largely undisputed factual findings
- Then list all the facts for which you must make credibility determinations
- For contested evidence, perform a credibility determination
- Do's and Don'ts:
 - Don't call someone a liar or dishonest unless it was blatant; instead, write that a person was:
 - Less credible
 - Less persuasive
 - More inconsistent
 - Less believable
 - Unconvincing
 - Contradictory

Drafting your Credibility Findings (cont.)

- **Explain in detail the specific reasons for your findings:**
 - **In word-versus-word situations, explain why you found one more persuasive**
 - **Verbal or non-verbal clues that you found significant**
 - **Level of accuracy of testimony, compared to others**
 - **Plausibility of their story, in view of the totality of the circumstances**
 - **Capacity to perceive or retell**
 - **Consistencies vs. inconsistencies**
 - **Bias or hostility**
 - **Motive to lie**
 - **Dishonesty, concealment, or destruction of evidence**
- **Example from State Personnel Board case**
 - **Recite the conflict**
 - **Recite the factors to be taken into account (the legal list)**
 - **Describe witness demeanor and other factors that came into play, including plausibility (“Appellant’s explanation made little sense”)**
 - **Decide which testimony to believe**

Questions?





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2023 TITLE IX & DHR ANNUAL CONFERENCE

**WHAT ARE THE ELEMENTS? APPLICATION OF
FACTUAL FINDINGS TO POLICY**

Elisabeth Walter

University Counsel, Sonoma State

Sarah Clegg

Interim Systemwide Title IX Assistant Director

1:00 p.m. – 2:00 p.m.

WHAT ARE THE ELEMENTS?

APPLYING FACTUAL FINDINGS TO POLICY ANALYSIS





SARAH CLEGG

Interim Assistant Director, Systemwide
Title IX Compliance



ELISABETH WALTER

Office of General Counsel
University Counsel,
Sonoma State University

GOALS FOR TODAY'S PRESENTATION



QUERY – BIGGEST
CHALLENGES?



DEFINING THE
ELEMENTS/PRONGS



DETAILS OF THE
ELEMENTS/PRONGS



IDEAS TO CONSIDER

SCOPE vs **ELEMENTS**

Scope is the universe of the investigation.

Elements/prongs are questions that you need to answer to reach your findings.





WHAT ARE ELEMENTS/PRONGS?

- They are derived from the standards and definitions in the policy.
- They become the headers and questions for your analysis.
- They should be set out in advance.
- Don't analyze prongs in the same order as the policy language.
- A 'yes' or 'no' answer to some of the prongs may end the analysis.

CSU policy:

Discrimination is (an) Adverse Action(s) against a Complainant because of their Protected Status.

- Adverse Action means an action engaged in by the Respondent that has a **substantial and material adverse effect** on the Complainant's ability to participate in a university program, activity, or employment. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action.

An adverse employment action is any conduct or employment action that is reasonably likely to impair an employee's job performance or prospects for advancement or promotion.

- If Adverse Action is taken because of a Complainant's Protected Status, that means that the Complainant's Protected Status is a substantial motivating reason (but not necessarily the only reason) for the Adverse Action.

Discrimination based on
Protected Status



For conduct occurring on or
after January 1, 2022

ANALYSIS USING ELEMENTS OF DISCRIMINATION BASED ON PROTECTED STATUS



1. What Adverse Action(s) does Complainant allege by Respondent? (e.g. failure to promote, unfounded criticism, denied opportunity)
2. Was Respondent's conduct minor or trivial in nature such that the conduct was not *reasonably likely* to do more than anger or upset a complainant? (e.g. comments, facial expressions, jokes)
 - If yes: No policy violation. Refer to appropriate department for further action as needed.
 - If no: move to next question.
3. Did Respondent's conduct have a **substantial and*** material adverse effect on the Complainant's ability to participate in a university program, activity, or employment? (e.g. reasonably likely to impair Complainant's job performance or prospects for advancement or promotion.)
 - If no: No policy violation. Refer to appropriate department for further action as needed.
 - If yes: move to next question.

ANALYSIS USING ELEMENTS OF DISCRIMINATION BASED ON PROTECTED STATUS



4. Is Complainant in a qualifying Protected Status?

Age, Disability (physical and mental), Medical Condition, Gender (or sex, including sex stereotyping), Gender Identity (including transgender), Gender Expression, Genetic Information, Marital Status, Nationality, Race or Ethnicity (including color, caste, or ancestry), Religion (or religious creed), Sexual Orientation (a person's identity in relation to the gender or genders to which they are sexually or romantically attracted and includes but is not limited to heterosexuality, gay, lesbian, bisexuality, and queer, Veteran or Military Status.

- If no: No policy violation (unless perceived status is an issue). Move to next question or refer to appropriate department for further action as needed.
- If yes: move to next question.

5. Was a substantial motivating reason (but not necessarily the only reason) Respondent engaged in the conduct based on Complainant's Protected Status? (Consider if Respondent was aware of or indicated any disapproval of Complainant's protected status (or perceived status)).

- If no: A finding of policy violation by Respondent is unlikely.
- If yes: A policy violation finding is reasonable.



Remember, these analysis questions are not absolutes.

They must be tailored to each case.

They are a guide.

Harassment Based on Protected Status:

For conduct occurring on or after January 1, 2022

CSU Policy states:

Harassment means unwelcome verbal, nonverbal or physical conduct engaged in because of an individual Complainant's Protected Status. If a Complainant is harassed because of their Protected Status, that means that the Complainant's Protected Status is a substantial motivating reason (but not necessarily the only reason) for the conduct.

Harassment may occur when: Submitting to, or rejecting, the verbal, nonverbal or physical conduct is explicitly or implicitly a basis for:

Decisions that adversely affect or threaten employment, or which are being presented as a term or condition of the Complainant's employment; or
Decisions that affect or threaten the Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university.

OR

The conduct is sufficiently severe or pervasive so that its effect, whether intended or not, could be considered by a reasonable person under similar circumstances and with similar identities, and is in fact considered by the Complainant as creating an intimidating, hostile or offensive work or educational environment that denies or substantially limits an individual's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU. ...

Single, isolated incidents will typically be insufficient to rise to the level of harassment.

HARASSMENT BASED ON PROTECTED STATUS: ANALYSIS

1. Is Complainant in a qualifying Protected Status?

- If no: A policy violation finding is unlikely (unless perceived status is an issue). Move to the next question.
- If yes: Move to the next question.

2. What misconduct does Complainant allege by Respondent?

(e.g. comments, facial expressions, jokes)

3. Was that conduct taken by Respondent *against* Complainant?

- If no: consider if there is a different complainant and/or whether the environment became hostile for Complainant nonetheless. Move to the next question.
- If yes: Move on to the next question.

4. Was a substantial motivating reason (but not necessarily the only reason) Respondent engaged in the conduct based on Complainant's Protected Status? (Consider if Respondent was aware of or indicated any disapproval of C's protected status.)

- If no: A policy violation finding is less likely, unless the harassment was significant (*next slide).
- If yes: Move to the next question.

5. Was the conduct unwelcome by Complainant?

- If no: A policy violation finding is unlikely unless the harassment later became unwelcome or the harassment was significant (*next slide). Move to the next question.
- If yes: Move to the next question.

6. Was the conduct a single, isolated incident unlikely to adversely affect or threaten Complainant's employment, academic status, progress, or access to benefits and services, honors, programs, or activities available at or through the university?

- If yes: A policy violation finding is less likely, unless the conduct was significant (*next slide).
- If no: Move to the next question.

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS
CONTINUED**



7. a) Did Respondent indicate, explicitly or implicitly, that Complainant's submission to, or rejection of Respondent's conduct would be used as the basis for any decision affecting or threatening a term or condition of the Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university? (Quid pro quo/retaliation)

OR

b) Did Respondent's conduct adversely affect or threaten Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university?

OR

c) Was Respondent's conduct sufficiently severe or pervasive*: (cont.)

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS,
CONTINUED**



7.c) Was Respondent's conduct sufficiently severe or pervasive:

- Using the lens of a reasonable person under similar circumstances and with similar identities, would the effect of the conduct, (even if unintended by Respondent), create a work or educational environment that is intimidating, hostile or offensive, such that it denies or substantially limits an individual's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU?

AND

- **If yes to the above**, did Complainant *in fact* consider Respondent's conduct, (even if unintended by Respondent) to create an intimidating, hostile or offensive work or educational environment that denied or substantially limit Complainant's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU?

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS,
CONTINUED**



If NO to 7 a, b and c:

A policy violation finding is unlikely.

If YES to 7 a, b or c:

A policy violation finding against Respondent is reasonable.

Remember, these analysis questions are not absolutes.

They must be tailored to each case.

They are a guide.

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS,
CONTINUED**



Sexual Harassment

For conduct occurring on or after January 1, 2022

CSU Policy states:

- **Sexual Harassment** means unwelcome verbal, nonverbal or physical conduct of a sexual nature that includes, but is not limited to, sexual advances, requests for sexual favors, offering employment benefits or giving preferential treatment in exchange for sexual favors, or indecent exposure, and any other conduct of a sexual nature where:
 - A.Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for any decision affecting a Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university; or
 - B.Submission to, or rejection of, the conduct by the Complainant is explicitly or implicitly used as the basis for any decision affecting a term or condition of the Complainant's employment, or an employment decision; or
 - C.The conduct is sufficiently severe, persistent, or pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of the Complainant, and is in fact considered by the Complainant, as limiting their ability to participate in or benefit from the services, activities or opportunities offered by the university;
- (e.g. Sexual Harassment could include being forced to engage in unwanted sexual contact as a condition of membership in a student organization or in exchange for a raise or promotion; being subjected to video exploitation or a campaign of sexually explicit graffiti; or frequently being exposed to unwanted images of a sexual nature in a work environment, or in a classroom where the images are unrelated to the coursework.

SEXUAL HARASSMENT: ANALYSIS



1. What verbal, nonverbal or physical misconduct does Complainant allege by Respondent?

2. Is the conduct Complainant is alleging by Respondent sexual in nature? (e.g., sexual advances, requests for sexual favors, offering employment benefits or giving preferential treatment in exchange for sexual favors, or indecent exposure)

- If no: No finding of Sexual Harassment but consider other forms of harassment and/or refer to appropriate department for further action as needed.
- If yes: move to the next question.

3. Did Respondent indicate, explicitly or implicitly, that Complainant's submission to, or rejection of Respondent's conduct would be used as the basis for any decision affecting or threatening a term or condition of the Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university? (Quid pro quo/retaliation)

OR

4. Was the conduct sufficiently severe, persistent, or pervasive?

a) Did Respondent's conduct adversely affect or threaten Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university?

OR (cont.)

SEXUAL HARASSMENT: ANALYSIS

(cont.)

OR

b) Using the lens of a *reasonable* person in the shoes of Complainant, could the effect of the conduct, (even if unintended by Respondent), be considered as limiting their ability to participate in or benefit from the services, activities or opportunities offered by the university?

- If no: A policy violation finding is unlikely.
- If yes: move to the next question.

c) Did Complainant *in fact* consider Respondent's conduct, even if unintended by Respondent, as substantially limiting their ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU?

- If no: No policy violation finding.
- If yes to 4a or 4b&c: A policy violation finding against Respondent is reasonable.



Retaliation

For conduct occurring on or after
January 1, 2022

CSU Policy states:

Retaliation means that a substantial motivating reason an Adverse Action was taken was because the person has or is believed to have:

Exercised their rights under this Nondiscrimination Policy,

Reported or opposed conduct which was reasonably and in good faith believed to be in violation of this Policy,

Assisted or participated in an investigation/proceeding under this Policy, regardless of whether the Complaint was substantiated,

Assisted someone in reporting or opposing a violation of this Nondiscrimination Policy or assisted someone in reporting or opposing Retaliation under this Policy.

Adverse Action means an action engaged in by the Respondent that has a **substantial and** material adverse effect on the Complainant's ability to participate in a university program, activity, or employment. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action. Retaliation may occur whether or not there is a power or authority differential between the individuals involved.

RETALIATION

1. What misconduct does Complainant allege by Respondent?

(e.g., failure to promote, unfounded criticism, denied opportunity)

2. Was Respondent's conduct taken against Complaint?

- If no: is there is a different complainant and/or refer to appropriate department for action.
- If yes: move to the next question.

3. Was Respondent's conduct minor or trivial in nature such that the conduct was not *reasonably likely* to do more than anger or upset *a complainant*? (e.g. comments, facial expressions, jokes)

- If yes: No policy violation finding. Refer to appropriate department for further action.
- If no: move to the next question.

RETALIATION: ANALYSIS

Retaliation may occur whether or not there is a power or authority differential between the individuals involved.



4. Did Respondent's conduct have a **substantial and** material adverse effect on the Complainant's ability to participate in a university program, activity, or employment? (e.g., reasonably likely to impair Complainant's job performance or prospects for advancement or promotion.)

- If no: No policy violation finding. Refer to appropriate department for further action.
- If yes: move to next question.

5. Was Respondent's adverse action substantially motivated because Complainant has or is believed to have done any of the following:

Exercised their rights under this Nondiscrimination Policy, or Reported or opposed conduct which was reasonably and in good faith believed to be in violation of this Policy or Assisted or participated in an investigation/proceeding under this Policy, regardless of whether the Complaint was substantiated, or Assisted someone in reporting or opposing a violation of this Policy or assisted someone in reporting or opposing Retaliation under this Policy.

If yes, a policy violation finding is likely.

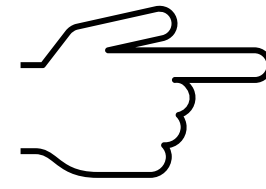
further If no: A policy violation finding is unlikely. Refer to appropriate department for action as needed.

RETALIATION: ANALYSIS

Retaliation may occur whether or not there is a power or authority differential between the individuals involved.

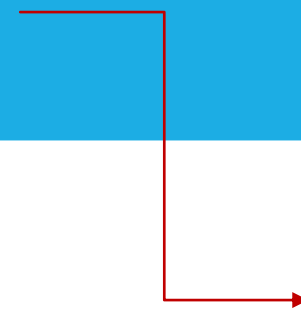


Close Call/tough
Decisions: there isn't
always a *right* answer but
there is always a
reasonable answer based
on the facts available.

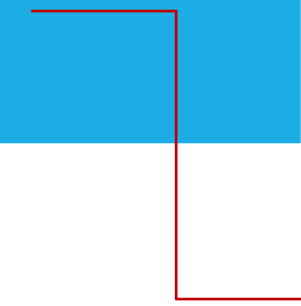


Remember,
preponderance is the
standard, not beyond a
reasonable doubt.

Create a timeline based
on the facts



Brain dump: jot down
every thought you have
and then sort, organize &
find gaps



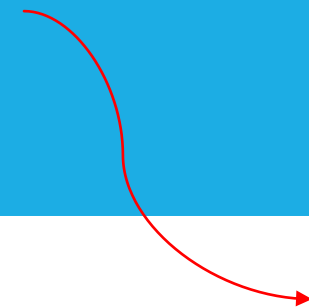
Tie fact findings to
elements (don't restate
facts not needed to
explain your rationale)

Explain your logic/
rationale

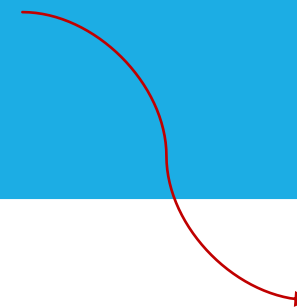


Have a conversation
with yourself on paper

Ping pong between
sides/views/arguments



Explain why a different
conclusion doesn't
make sense



Force yourself to write
about the opposite
perspective on every
element

If credibility is an issue:

- explain why each person is credible AND why they are NOT
- plausibility of the statements, (does it make sense?)
- does their story fit the timeline of events
- corroboration of statement through other statements and/or physical evidence
- motives to falsify or withhold relevant information/motive to lie
- motive to tell the truth
- bias or prejudice
- demeanor of the party/witness * * * * Be careful using demeanor to judge a person's veracity. Unless you know the person well it's hard to gauge their demeanor under stress. We all have quirks, behaviors, mannerisms.



QUESTIONS



The background of the slide is a scenic photograph of a waterfront. In the foreground, there are large, dark grey rocks forming a breakwater in the water. A paved walkway runs along the water's edge, with a few people walking. In the background, there are palm trees, a modern building with a red roof, and a clear blue sky.

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2023 TITLE IX & DHR ANNUAL CONFERENCE

PAY EQUITY & DISCRIMINATION

Marc Mootchnik

Assistant Vice Chancellor & Chief Counsel

Lety Hernandez

Sr. Director Systemwide General Employment Services and Policy Administration

2:15 p.m – 3:15 p.m.

The California Fair Pay Act

Marc Mootchnik

Ass't Vice Chancellor & Chief Counsel for HR

Lety Hernandez

*Senior Director, Systemwide General Employment
Services & Policy Administration*



CFPA: In General

- Prohibits paying employees of different gender, race, or ethnicity less for “substantially similar work”
- Prohibits retaliation against employees for complaining or assisting in complaints based on CFPA
- Statute of limitations
 - Two years
 - Three years if willful
 - CFPA Retaliation claims - one year statute of limitations



Nondiscrimination Procedure

- Follow Non-Discrim Policy
 - Intake
 - NOI
- Is claim based on gender vs. race or ethnicity?
 - DHR Administrator or TIX Coordinator responsible for investigation
- Notify campus counsel

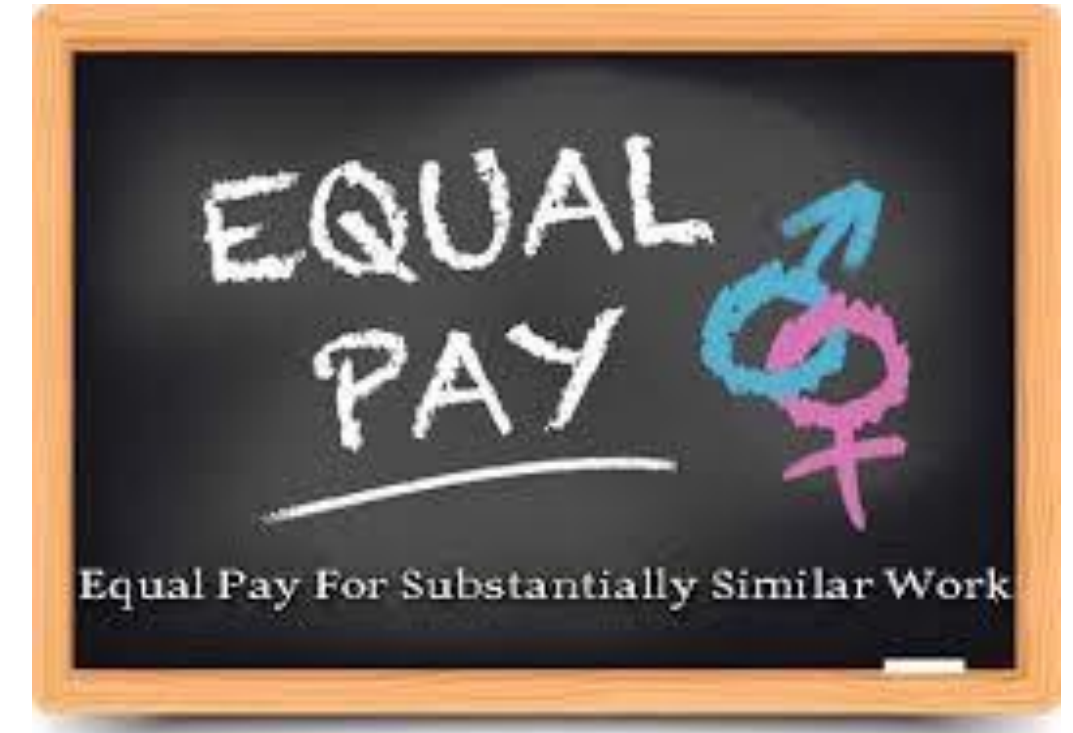


Triggers

- Internal Complaint Under Non-Discrim Policy
- Grievance
- External Complaints
- May be subset of other claims
 - Or may include DHR/TIX allegations beyond comp analysis
- Hiring, IRPs and Other Internal Triggers



Determine Comparables



- Work performed under similar working conditions
- Substantially comparable taking all necessary skills, effort and responsibilities into account
- Analysis based on *actual* duties and requirements of position

“Substantially Similar Work” Key Concepts

- Skills
 - Includes experience, training, education, ability
 - Must relate to core function of the job
 - Performance
- Effort
 - Physical or mental exertion to perform core functions
- Responsibility
 - Operate independently or under supervision
 - Extent supervises others
 - Impact on operations and mission of CSU
- Working Conditions
 - Amenities, environment, noise level, safety or hazard issues



Other Factors

- Job Descriptions
 - Instructive but not determinative
 - Keep current, descriptive, and accurate
- Titles are important! (Lindsley case)
- Extra assignments
- “Common core of tasks” (Univ. of Oregon case)
- Discuss with manager



Determine Comparable Group

- Complaint
 - Strong consideration to persons ID'd by complainant
- ID persons in substantially similar positions on campus
 - Unit? Department? College? Campus-wide?
 - Broad enough comparable pool?
- Do we need to look systemwide or multi-campus?
 - Requires cooperation and coordination
- Local job market (?)
- Consult with systemwide office
 - Sr. Dir, Systemwide General Employment & Policy Admin
 - Sr. Systemwide Dir, Academic & Staff Human Resources

The Comp Analysis

- Involve the Comp Manager
- Snapshot vs. salary history
- But not prior employment history
- Market surveys (?)
- Look at reasons for salary changes



But Disparity Okay If....

- Seniority system
- Merit system
- Quantity or quality of work
- Other “bona fide” factor
 - Examples: education, training or experience
 - Job related
 - Consistent with “business necessity”
 - Includes: cost of living, cost of labor, geographic differences, differences in disciplines or fields of study



Seniority, Merit and Incentive Systems

- Cannot be adopted with discriminatory intent
- Established, Pre-determined criteria
- Communicated to employees



Example: Faculty rank and promotion systems

Additional Considerations

- Justifications must be applied consistently and reasonably
- Justifications must account for entire wage differential
- Considering job market at time of hire carries risks
- Consider all forms of compensation:
 - Overtime, pay differentials, stipends, supplemental pay, allowances, quantifiable benefits

Pay Attention To....

- Supplemental Comp
 - All funding sources
- Retention Raises
- Neutral Comp Practice – Disparate Impact
- Leapfrogging
- Outliers
- Coaches

Some Nuts and Bolts

- Work with comp manager for analysis.
- Document each step of analysis
- Incorporate into Investigation report
 - ID all relevant factors
 - State reasons
- Remedy
- Communication to Management



Prior Salary Cannot Be Considered

- Since 2017, prior salary cannot, by itself, justify any disparity
- Labor Code 432.3
 - Prohibits asking applicants for salary history information
 - Must provide pay scale on reasonable request
 - Can ask for salary expectations
 - Candidate can voluntarily, without prompting, disclose prior salary
 - Statute does not apply to publicly available info
 - Can support a pay equity claim

Questions



CSU

The California State University

OFFICE OF THE CHANCELLOR

WELCOME!

**2023 TITLE IX & DHR
ANNUAL CONFERENCE**

DAY 3 - JULY 27, 2023





The California State University

OFFICE OF THE CHANCELLOR

AGENDA

2023 TITLE IX & DHR ANNUAL CONFERENCE

DAY 3 - JULY 27, 2023

DAY 3: THURSDAY, JULY 27 | 8:00 A.M. TO 3:15 P.M. | DUMKE CONFERENCE CENTER

- 8:00 a.m. BREAKFAST
- 9:00 a.m. WELCOME, UPDATES AND HOUSEKEEPING
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
- 9:15 a.m. NON-DISCRIMINATION POLICY - ACADEMIC FREEDOM - FREE SPEECH RIGHTS
Robin Webb, University Counsel
- 10:15 a.m. BREAK
- 10:30 a.m. ADDRESSING OTHER CONDUCT OF CONCERN
Gina Maisto-Smith, Chair, Institutional Response Group | Cozen O'Connor
Leslie Gomez, Vice Chair, Institutional Response Group | Cozen O'Connor
- 12:00 p.m. LUNCH
- 1:00 p.m. UNCONSCIOUS BIAS
Christina J. Ro-Connolly, Partner | Oppenheimer Investigations Group LLP
- 2:00 p.m. BREAK
- 2:15 p.m. HIGHLIGHTS AND CLOSING THOUGHTS
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
Sue McCarthy, Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services



WELCOME & UPDATES & HOUSEKEEPING

Laura Anson

**Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity
Compliance Services**

9:00 a.m – 9:15 a.m.



**NON-DISCRIMINATION POLICY – ACADEMIC
FREEDOM – FREE SPEECH RIGHTS**

Robin Webb
University Counsel

9:15 a.m – 10:15 a.m.

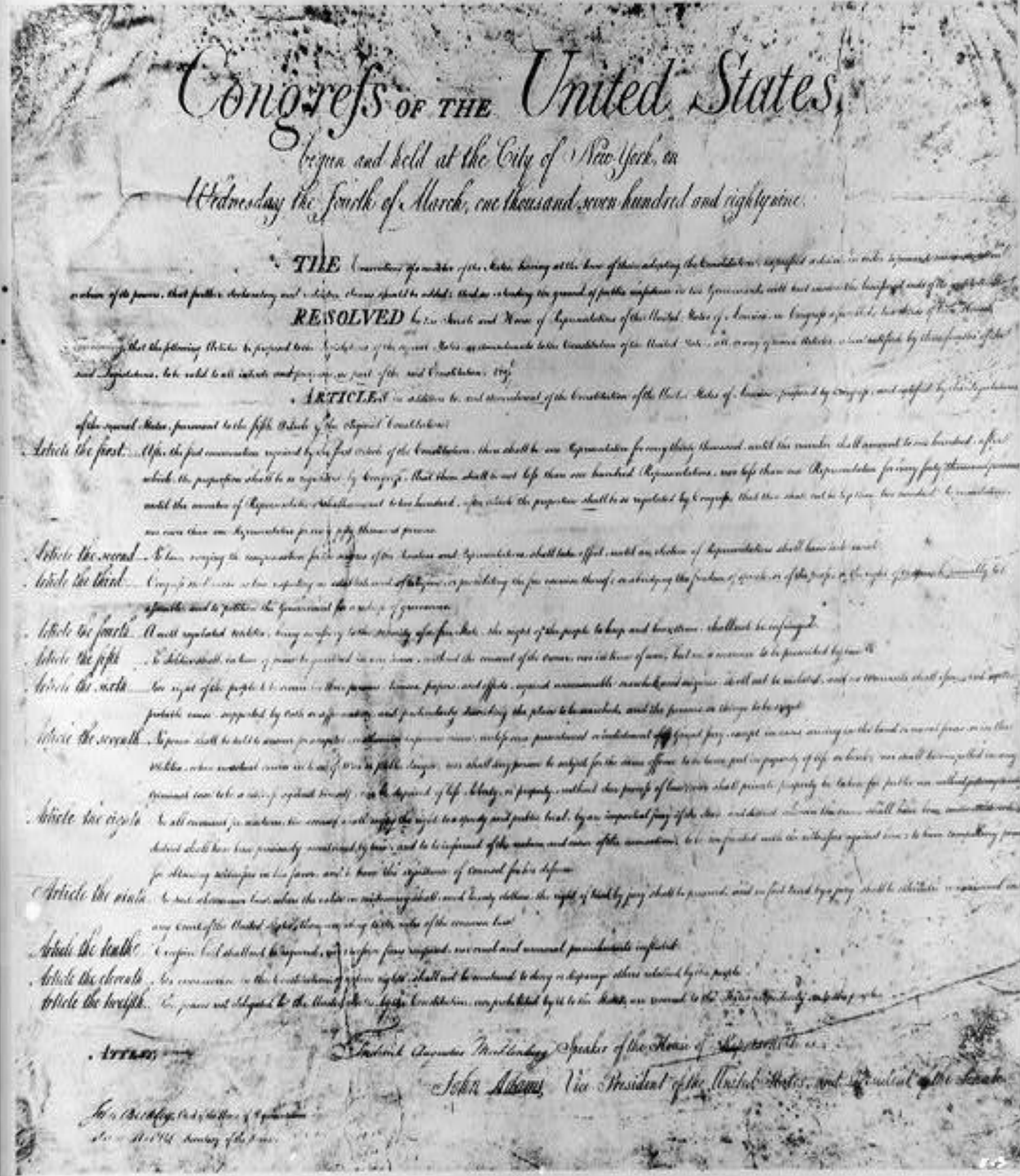
Freedom of Speech and DHR/Title IX Issues

Office of General Counsel 2023



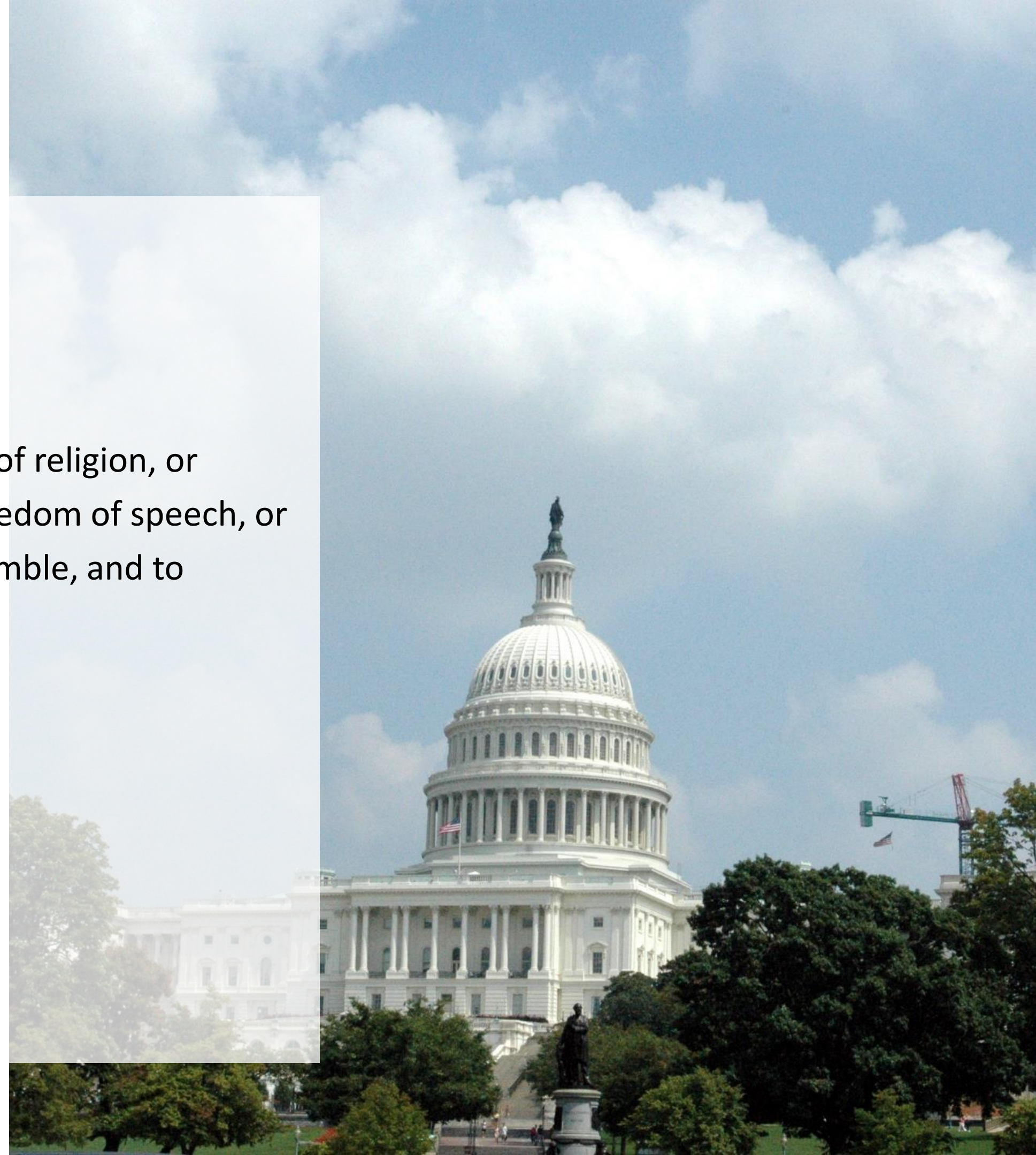
Topics

- What is “freedom of speech?”
- Why is speech protected?
- What speech is protected?
- Who is protected?
- When does speech become actionable under DHR/Title IX policies?



First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances



California Constitution

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press



What Does This Mean?

The government,
including the CSU,
may not restrict speech,
except in limited circumstances



Why Does Speech Receive Protection?

Encourages dialogue

Allows us to see other points of view

Fosters new ideas

Provides progression in society

Prevents authoritarianism



What Speech Is Protected?

- Written words
- Spoken words
- Expressive conduct
 - Art
 - Clothing
 - Gestures
 - Symbolic behavior



Speech Is Generally Protected Except:

- Speech that incites actual violence or harm
- Fighting words
- True threats
- Defamation
- Obscenity/child pornography
- Severe harassment
- False advertising
- The use of public resources for partisan politics

CSU generally cannot punish or prevent speech unless it falls into a non-protected category

(CSU can regulate employee speech in certain circumstances, such as when the employee is speaking on behalf of the university)



Incitement of Violence or Harm:

Speech is not protected when it is “directed to inciting or producing *imminent* lawless action” and is “*likely* to incite or produce such action”

General advocacy for violence in the future will not lose First Amendment protection

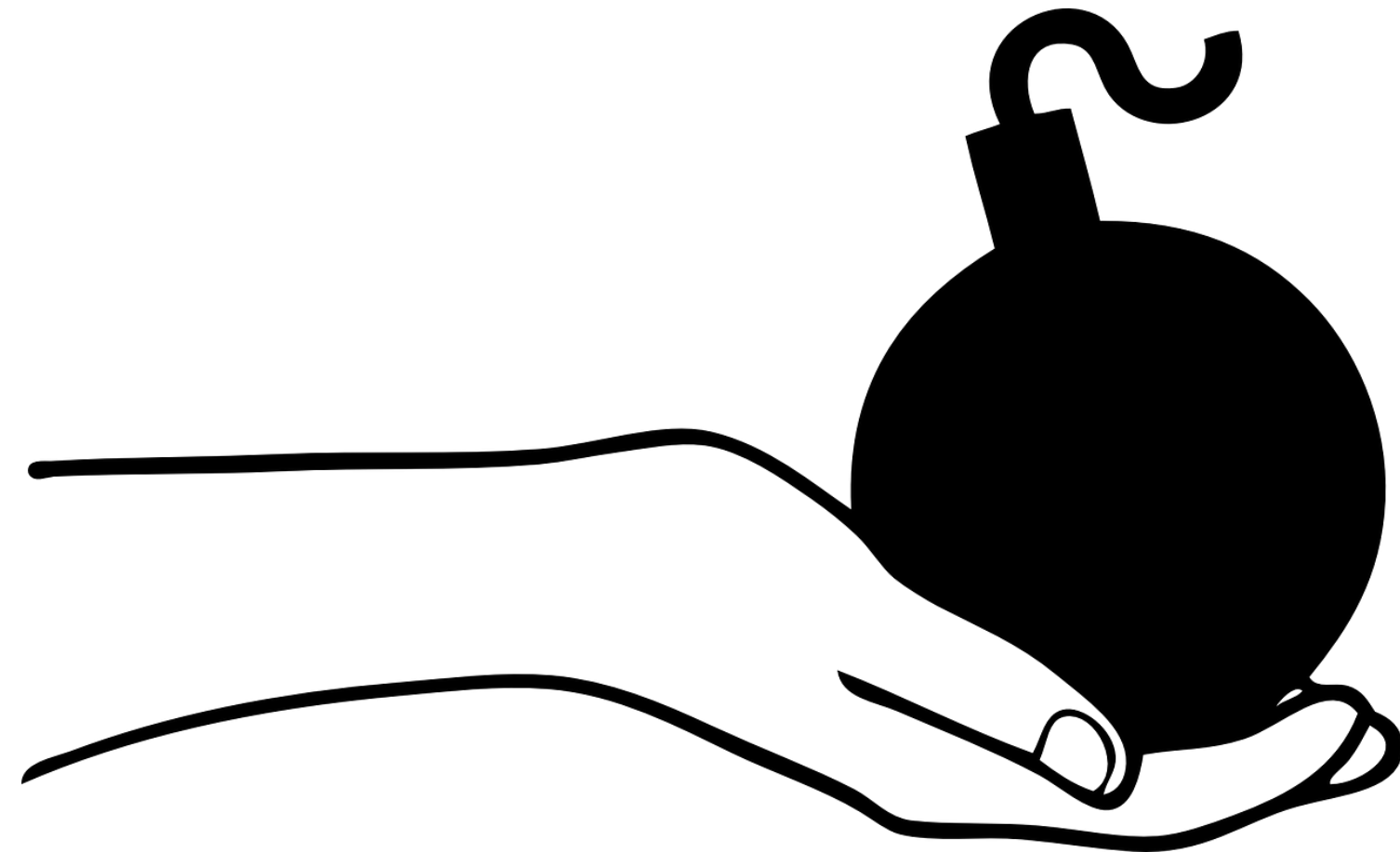
Fighting Words:

- Fighting words require a direct, face-to-face target and immediate breach of the peace
- The words make it clear that violence is imminent
- General profanities and insults alone are not “fighting words”
- Consider contemporaneous conduct (spitting, shaking fist, volume of speech, slurs)



True Threats:

- A true threat is found where a *speaker* understands his/her statements' threatening nature. Recklessness is enough, meaning the speaker is aware that the statements could be viewed as threatening violence and delivers them anyway.
- Consider: Conditional nature, context, hyperbole, warnings, communications by recipient
 - *Prior law suggested words could be considered a threat if a reasonable person would view the statement as a serious intent to harm*



Defamation:

Defamatory speech is that which is untrue and damages a person's good name, character or reputation

Slander = spoken

Libel = written

Students and employees often want the University to take action against those who make defamatory statements



Obscenity:

The work, taken as a whole, appeals to the prurient interest; is patently offensive in light of community standards; and lacks serious literary, artistic, political or scientific value

Extremely subjective

Sexual expression that is indecent but not obscene is protected

CLASSIFIED

Harassment:

Harassing speech is not protected when it creates a hostile educational environment

- Severe or pervasive
- Based on protected status
- Undermines and detracts from the victims' educational experience
- Causes the victim-student to be effectively denied equal access to an institution's resources and opportunities



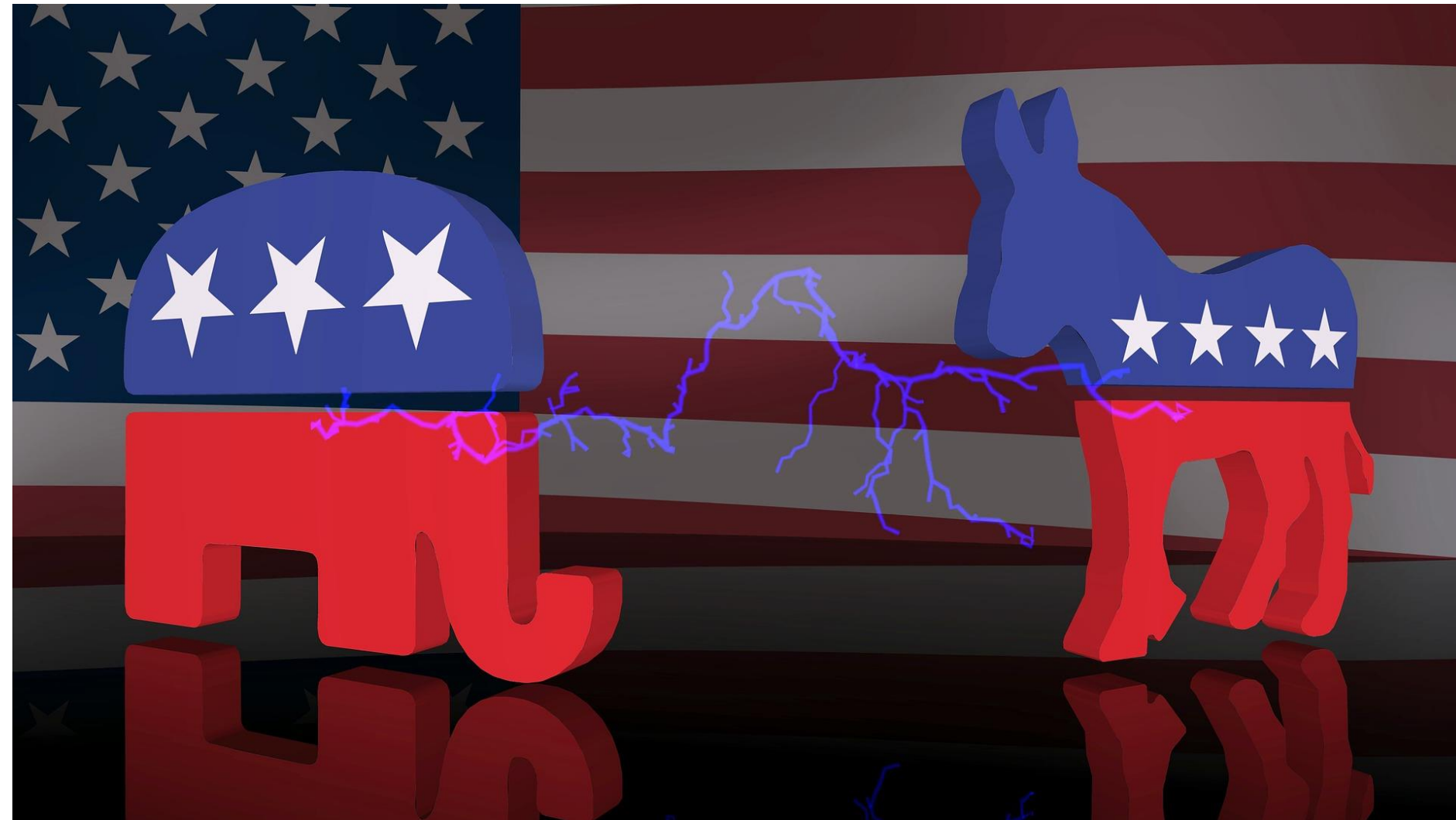
False Advertising:

- Untrue or misleading publications concerning the performance of property or services
- Not for the campus to determine unless it involves campus marks, rights, or interests



Use of Public Funds for Political Activity:

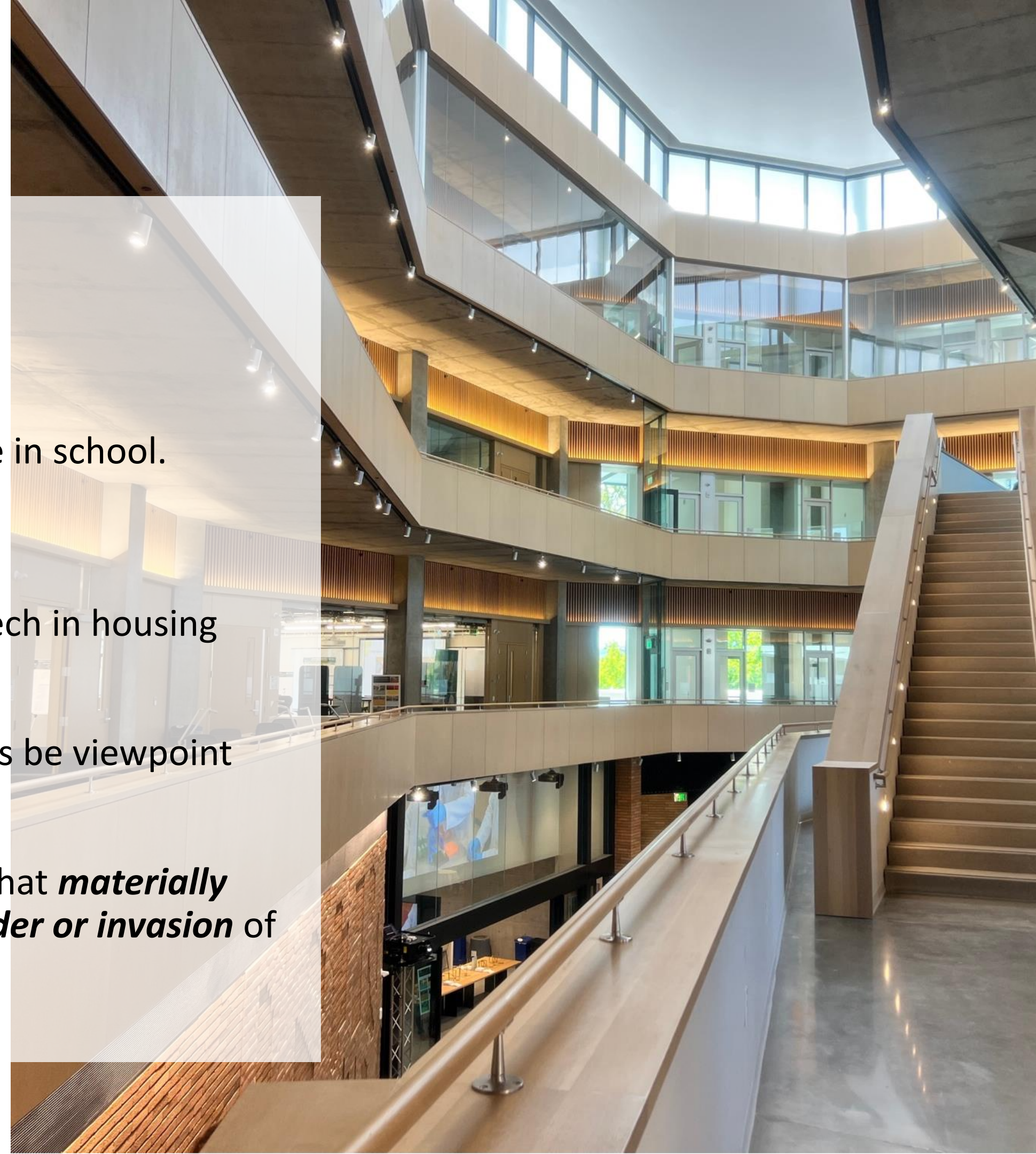
- CSU may not use public funds to promote partisan positions in election campaigns
- Public funds includes money and resources



Who Is Protected?

Students do **not** give up their free speech rights while in school.

- Student speech while in class may be limited
- Campus may impose greater restrictions on speech in housing (must be viewpoint neutral)
- Students don't have the right to insist that a class be viewpoint neutral
- Students may not engage in conduct or speech that **materially disrupts** class work or involves **substantial disorder or invasion** of the rights of others



Who Is Protected?

Faculty/Staff are entitled to academic freedom

- Academic freedom allows professors to exercise their professional judgment in teaching and research, it is not unrestricted free speech rights
- Some speech may exceed the protections provided under the 1st Amendment and academic freedom



Limitations on Academic Freedom

- Verbal abuse of students
- Discussion of political/social topics unrelated to the subject matter
- Defamation
- Verbal or physical harassment of students



Employee Speech

- Public employee speech is protected if they are speaking as private citizens on matters of public concern
- Public employees are entitled to engage in political activities when acting in their private capacity

Employee Speech

- Matters of public concern include speech that relates to any matter of political, social or other matters of concern to the public or community
- Consider the content, form and context of the statement
- Public concern or not?
 - Employee speaking about a personnel dispute?
 - Statements regarding race or gender conflicts in society?
 - Employee shedding light on wrongdoing in the workplace?

Who is Protected?

Outside Speakers

- If the campus allows outside speakers to use facilities, broad access must be provided to speakers from every spectrum, in both formal and informal settings
- There can be no viewpoint discrimination or censorship
- All speakers/groups must be treated equally in our terms and conditions of access



Who Is Protected?

Government speech rights allow the CSU:

- To publish its own materials
- Establish its own internet sites
- Take particular positions without having to also state an opposing view
- Create campaigns, events, and statements that may include values such as inclusiveness and diversity, or defuse controversial presentations



Time, place and manner restrictions

Can be used to govern the use of university facilities



Time, Place & Manner Restrictions

These restrictions regulate when, where, and how speech may occur

They do not regulate on the basis of content





When Does Content of Speech Become Actionable Under DHR/TIX Policies?

Hate Speech?

Bullying?

Insults?

Offensive/Insensitive Social Media Posts?

University Harassment Policies:

- Courts routinely strike down harassment policies that censor speech
- Stanford's 1995 speech code defined harassment to include: "Personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin using insulting or fighting words, or non-verbal symbols"
- CA Supreme Court found the policy too broad:
 - It legitimately prohibited speech that would cause people to react violently, BUT
 - It also prohibited speech that would cause people to feel "merely" insulted or stigmatized

Hate Speech

Many believe that Americans should be prohibited from expressing unpopular opinions

Some believe that universities should control the messages that may be voiced on campus

For the CSU, controlling the messages would constitute government interference with speech



Hate Speech

- Courts have made clear that there is no “hate speech” exception to the First Amendment, and that no one has a right not to be offended by speech
- Most “hate speech” is as fully protected as any other form of protected speech
- We would ideally live in a community free of bias, free of hate, and free of bullying; but we cannot prohibit this in violation of the First Amendment



Bullying/Insults

People have a right to express their dislike for others

Mean words, without more (such as adverse action based on protected status) is not actionable

Non-violent expressions of disagreement and disapproval are protected



Offensive Social Media

Students and employees can generally express what they want on their private social media pages

Racially or sexually offensive material is generally protected, with some possible exceptions

Even hateful symbols or memes are beyond the university's disciplinary reach



Potential Responses to Offensive Speech

- Organize events and activities that support campus values of DEI
- Remind students of their right to express their own values through speech and peaceful protest
- Offer support of campus resources to those impacted
- Employee speech that may not violate DHR policy might still be subject to HR remedies

Harassment:

- Offense and disruption are not enough.
- The speech must genuinely interfere with a reasonable person's ability to participate in the educational process.
- It must be evaluated not only from the victim's perspective, but from the perspective of a "reasonable person" in the victim's position.
- The speech may be prohibited only if it is both subjectively and objectively harassing.

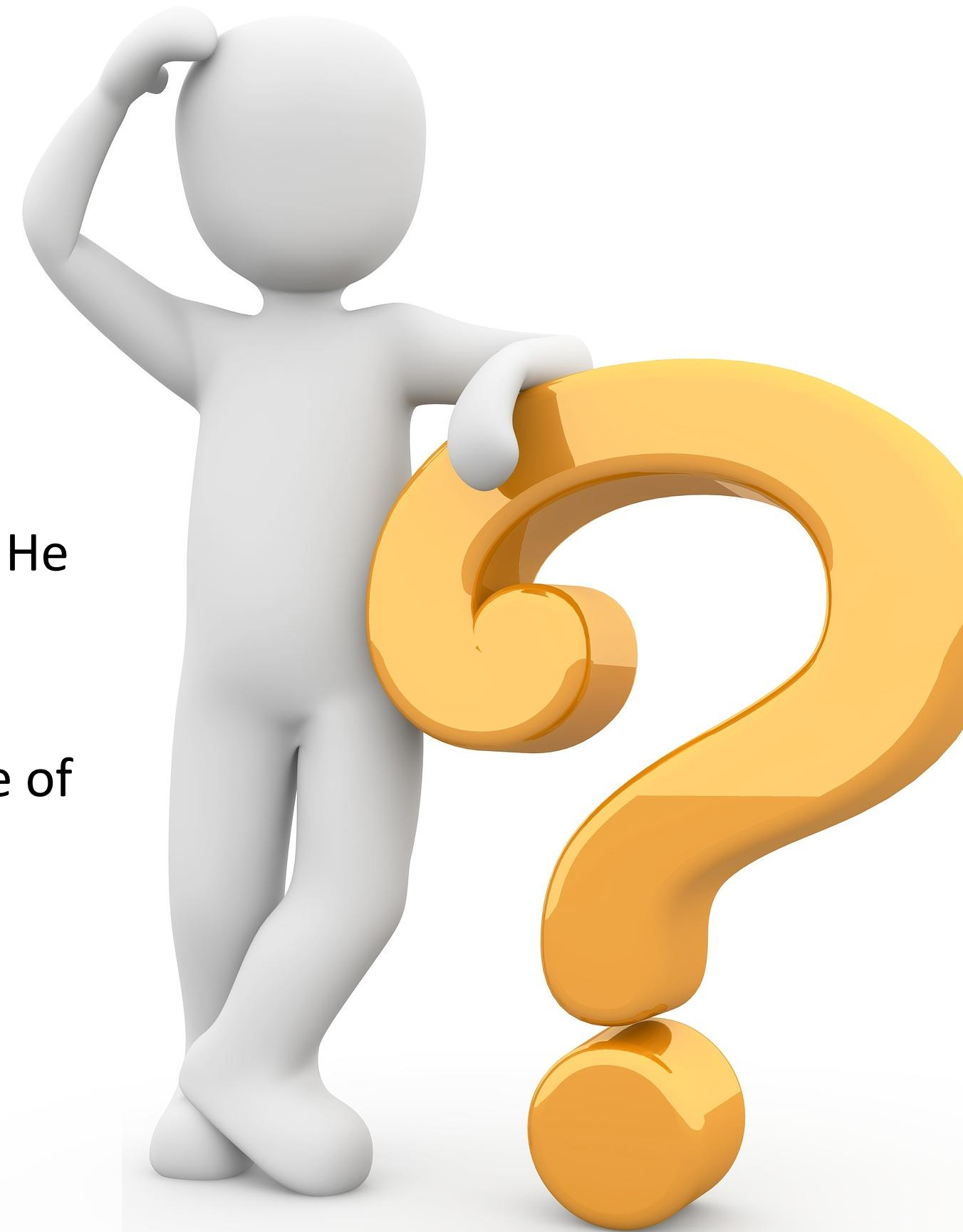
Harassment:

- What can the campus do if student conduct does not constitute harassment?
 - Talk with the student about his/her conduct and what behavior is appropriate
 - Explain to the student the impact his/her conduct is having on others
 - Evaluate whether the conduct is subject to discipline on other grounds

Hypothetical

A literature professor required students to read *To Kill a Mockingbird* as a class assignment. He read passages aloud in class that used the n-word. He also used the n-word in discussions about the novel. Students complained about the nature of the required reading, the professor's use of n-word while reading passages, and the professor's use of the n-word while engaging in class discussions.

- Would you investigate?
- Which allegations would you investigate and why?
- What additional facts would you seek?



Hypothetical

A student complained to the Title IX office that there is a social media group in which she is not a member but is often the subject of discussion. She has heard that the group members talk about the ways they want to have sex with her and discuss different sexual scenarios. The members of the group are the male students in her engineering major.

- Would you investigate based on these facts?
- What additional information do you need about this conduct?



Hypothetical



In between classes, a faculty member regularly goes to the open outdoor spaces on campus and holds a sign that says that homosexuals will go to hell unless they repent and change their ways. Students and faculty members complain that this is harassment.

- Would you investigate?
- What additional information do you need about this conduct?

Resources

First Amendment Watch

<https://firstamendmentwatch.org/>

American Council on Education

<https://www.acenet.edu/Pages/default.aspx>

National Center for Free Speech and Civic Engagement

<https://freespeechcenter.universityofcalifornia.edu/>



The background of the slide is a photograph of a waterfront area. In the foreground, there is a rocky shoreline with large, grey and brown rocks. The water is a clear, light blue. In the middle ground, there is a paved walkway with a few people walking. To the right, there are palm trees and a building with a red roof. In the background, there are more buildings and a clear blue sky.

CSU

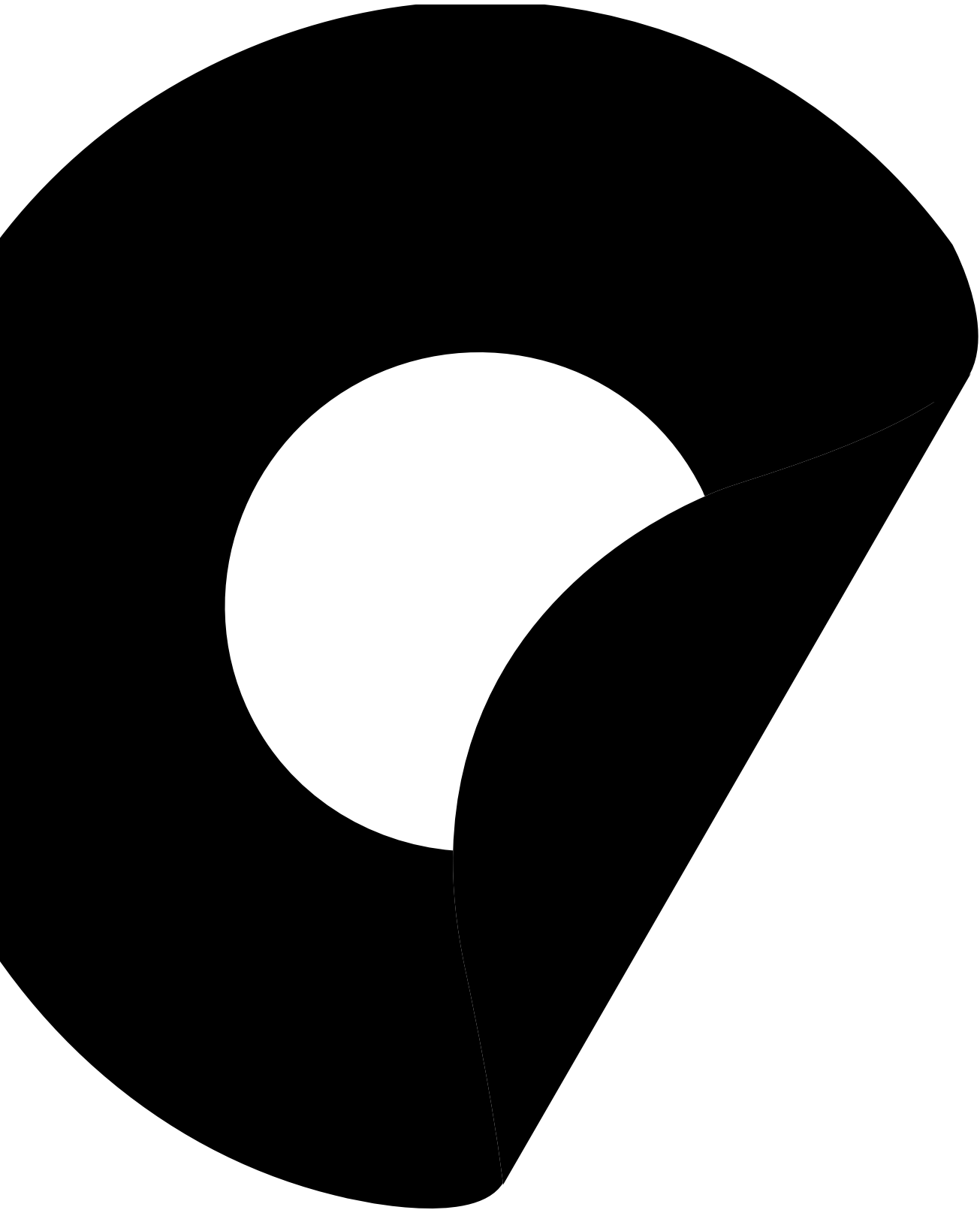
The California State University
OFFICE OF THE CHANCELLOR

2023 TITLE IX & DHR ANNUAL CONFERENCE

UNCONSCIOUS BIAS

Christina J. Ro-Connolly
Oppenheimer Investigations Group, LLP

1:00 p.m – 2:00 p.m.



The Impact of Unconscious Bias in Investigations

CSU Chancellor's Office

July 27, 2023

Oppenheimer Investigations Group LLP

www.oigl.com



OVERVIEW

Biases: The Shortcuts our Minds Take

- Implicit biases, preferences and stereotypes
- Our implicit biases against disadvantaged groups

More Shortcuts: How Cognitive Biases Impact our Decisions

- Intuition vs. Deliberation
- Confirmation Bias

Putting It All Together: Addressing Implicit Bias

- How biases impact investigations
- Investigator biases
- Addressing and eliminating the impact of biases on our investigations



BIASES: THE SHORTCUTS OUR MINDS TAKE

Who Wants to Be Unfair?

How many of you conduct investigations because you want to treat people unfairly?

Make unfair decisions?

Be biased towards or against a particular group?

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Attention

Where we place our attention biases us towards particular conclusions. Our brains naturally take shortcuts by paying attention selectively.



How many of each animal did Moses put on the ark?



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The answer is ...

- a) One
- b) Two
- c) Two of each
- d) None of the above

It was **Noah** who put the animals on the ark



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Implicit/Unconscious Bias

Implicit bias is a form of bias that occurs automatically and unintentionally, that nevertheless affects judgments, decisions, and behaviors.

National Institute of Health (<https://diversity.nih.gov/sociocultural-factors/implicit-bias>)



Why Does It Matter?

It undermines essential
fairness

It is visible to others -
biases leak out!

The “Not Me” Effect



We all have biases and act from them in unconscious ways.



The more we can consciously acknowledge this, the more we can overcome our biases.



People who explicitly know they have biases and admit to them show *less* implicit bias.

It is normal

- It is a normal cognitive process; it's what makes us human.

It is unconscious

- It operates *without conscious intent.*

It can be nefarious

- It tends to mostly impact members of traditionally-disadvantaged groups.

The Impact of Racial Bias

ABA Study of Law Firm Partners Evaluating a Legal Memo (2014)



The memo had 22 errors: 7 minor spelling or grammar errors, 6 substantive technical writing errors, 5 errors in fact and 4 errors in analysis.



Reviewers participated in a “writing analysis study.” Half were told the memo was written by an African-American male and half were told it was written by a White male.

Results of the Study



The African-American male received a 3.2 out of 5.



The White male received an average rating of 4.1 out of 5.

The Impact of Racial Bias (cont.)

White
interviewers

- White interviewers were videotaped interviewing White and Black job applicants.
- The White interviewers:
 - spoke to and smiled more at the White applicants
 - hesitated more and made more speech errors when speaking to Black applicants, which led the interviewees to make speech errors due to "mirroring"
 - sat further back, leaned away, and gave shorter interviews with the Black applicants.

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White interviewers

- When White interviewers were trained to act towards the White applicants the way they had towards the Black applicants, the White applicants:
 - performed worse;
 - were more uncomfortable; and
 - judged the White interviewer to be less friendly.

Word, Carl O., Zanna, Mark P. and Cooper, Joel, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974).

McConnell, A. R., & Leibold, J. M. (2001). *Relations Between the Implicit Association Test, Explicit Racial Attitudes, and Discriminatory Behavior*, Journal of Experimental Social Psychology, 37, 435-442.



MORE SHORTCUTS: COGNITIVE BIASES

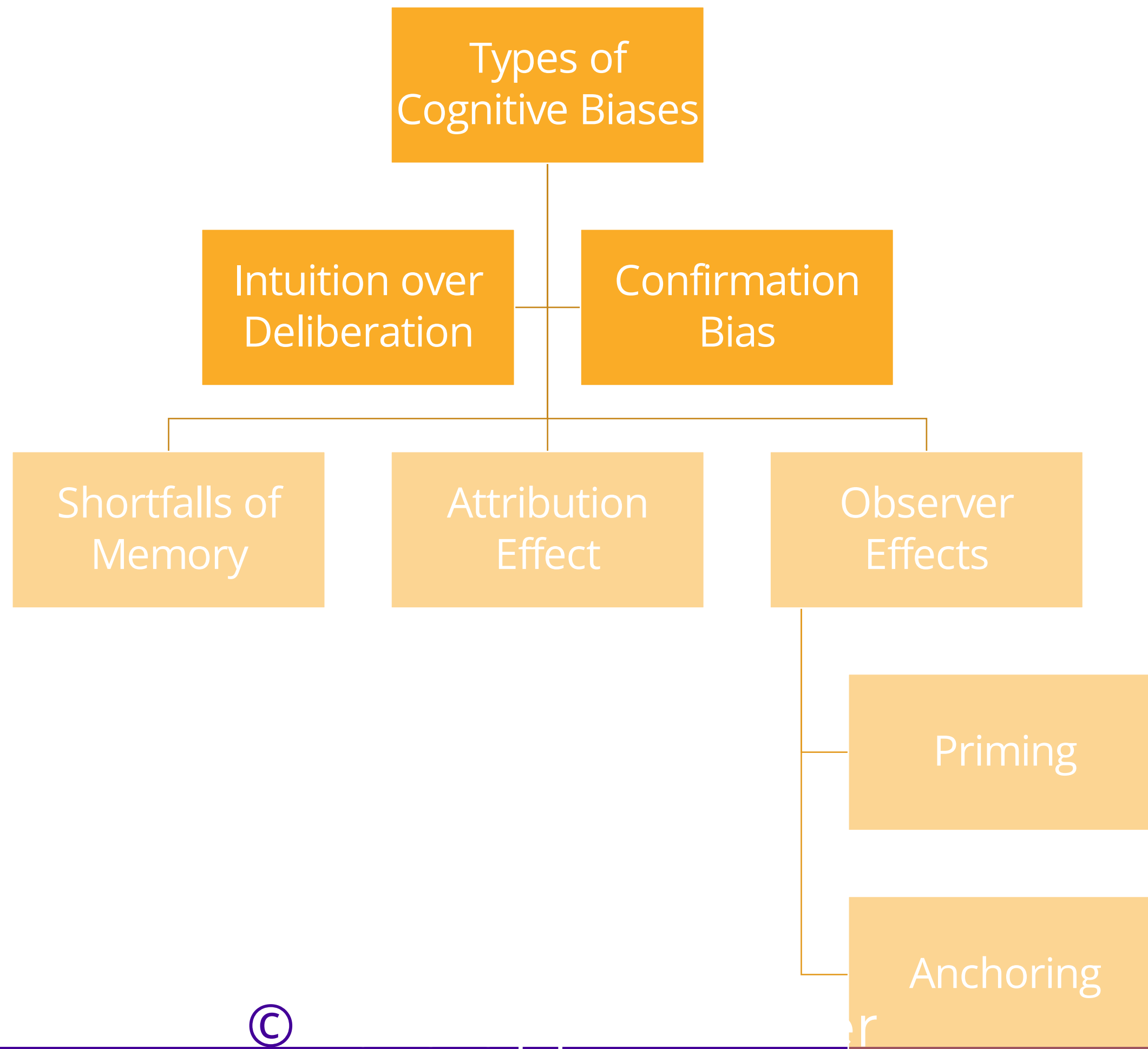
Cognitive Biases

Cognitive bias refers to the systematic ways in which the **CONTEXT** and **FRAMING** of information influences our judgment and decision-making.

- These are different from preferences and stereotypes.
- They are additional ways our brains “play tricks” on us.
- Cognitive biases are based on the way we process information from the external input we receive.

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Deliberation or Intuition?

A bat and a ball cost \$1.10 in total

The bat costs \$1.00 more than the ball

How much does the ball cost?

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The answer is ...

A bat and a ball cost \$1.10 in total.

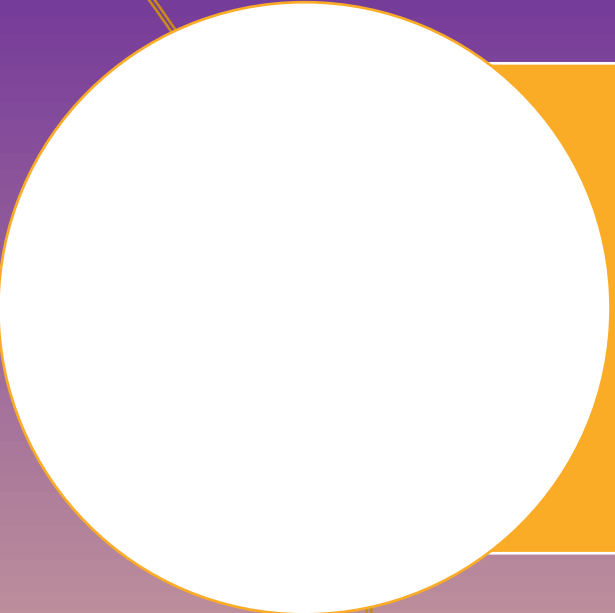
The bat costs \$1.00 more than the ball.

How much does the ball cost?

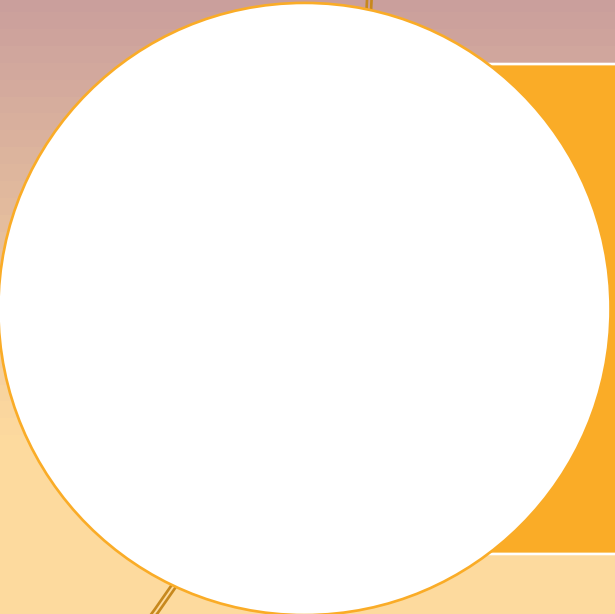
The answer is 5 cents.

\$1.05	\$1.00	Cost of the bat
.05	.10	Cost of the ball
<hr/>		
\$1.10	\$1.10	Total cost
[\$1.00 more]	[.90 more]	

Cognitive Reflection Test



The CRT has a correct answer that is easy to discern upon reflection. It also has an intuitive but incorrect answer that immediately jumps to mind.



The CRT responses provide evidence that ordinary adults have dual-processing systems in which intuition tends to dominate, but this can be overcome by deliberation.

Confirmation Bias

It is difficult to avoid the subconscious tendency to reject for good reason data which weaken a hypothesis, while uncritically accepting those data which strengthen it.

— Seymour Kety

12
ABC
14

The tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence

This is done unconsciously, but it impacts how we interpret information

Confirmation Bias

Participants were asked, before reviewing all of the evidence in a case, to form a hypothesis about who was guilty.

Forming a hypothesis based on incomplete information caused participants to look for reasons to find this person guilty, even in the face of evidence tending to exonerate the person.

Then, some of the participants were asked to explain **why their initial hypothesis might be wrong**. Others were asked to generate two additional suspects.

Those who considered why their initial hypothesis about who was guilty might be wrong showed less confirmation bias than did those who were asked to name additional suspects.



**PUTTING IT ALL
TOGETHER:
ADDRESSING IMPLICIT
BIAS**

Impact on Investigations

We are all likely to adopt dominant social biases, even against groups to which we belong, and these biases are strong when we investigate cases with witnesses from disadvantaged groups.

Implicit biases may prevent an investigator from digging deeper to understand facts and motives.

- Confirmation bias and priming may be hard at work under the surface, leading an investigator to predetermined outcomes.

Bias in favor of a witness

Witness who articulates an experience the investigator has had might not be questioned in detail because investigator unconsciously “fills in the blanks.”

- The witness who articulates sexual harassment/discrimination
- The witness who is crying and clearly upset

Witness who holds a position of power or looks very professional might be presumed credible or may feel “beyond

Bias against a witness

Witness who comes from a background or articulates something that investigator is biased against may be stereotyped.

- The witness who is a jerk but might be “an equal opportunity jerk”
- The witness who uses terms that trigger the investigator

The Question Primes the Answer

"The Misinformation Effect"

Information received after an event interferes with prior memory of the event

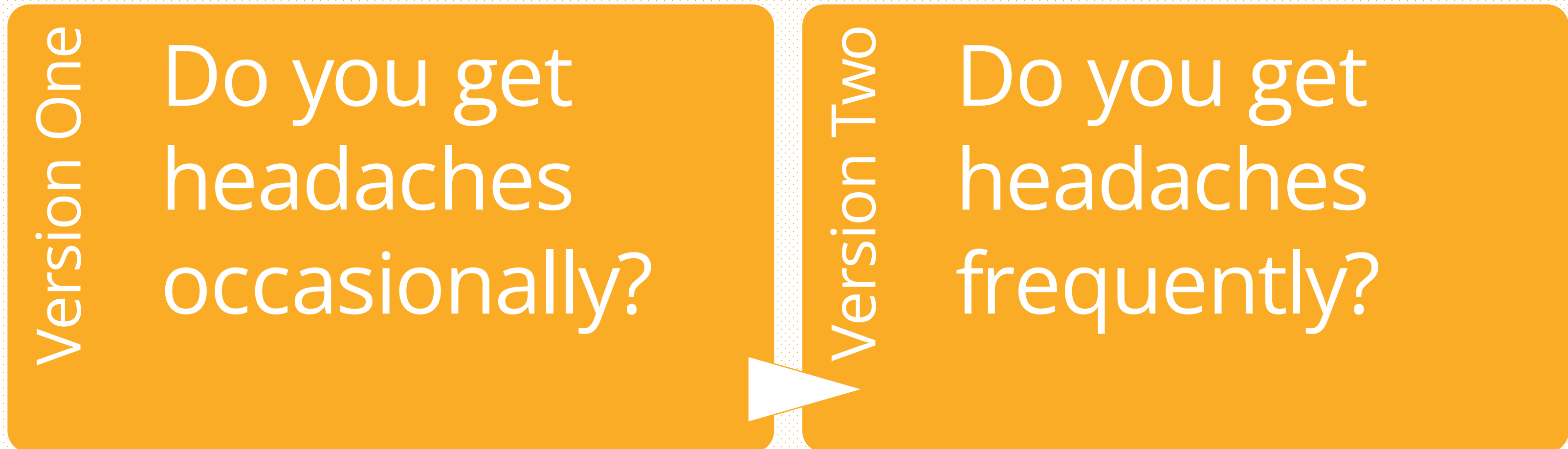
Version One

How fast were the cars going when they hit each other?

Version Two

How fast were the cars going when they smashed into each other?

The Question Primes the Answer



Group asked “occasionally” reported an average of .7 headaches per week

Group asked: “frequently” reported an average of 2.2 headaches per week

The Question Primes the Answer

Version One

How loudly did she yell?

Version Two

What was the volume of her voice?



How the investigator asks the question influences the responses about volume. Make sure to ask about the volume of someone's voice rather than how loudly they yelled.

Studies were derived from Elizabeth Loftus © "The Misinformation Effect" research papers.

Investigator Biases

Anything that makes our job easier

Favoring our employer or client

Delivering bad news

Workplace "whiners"

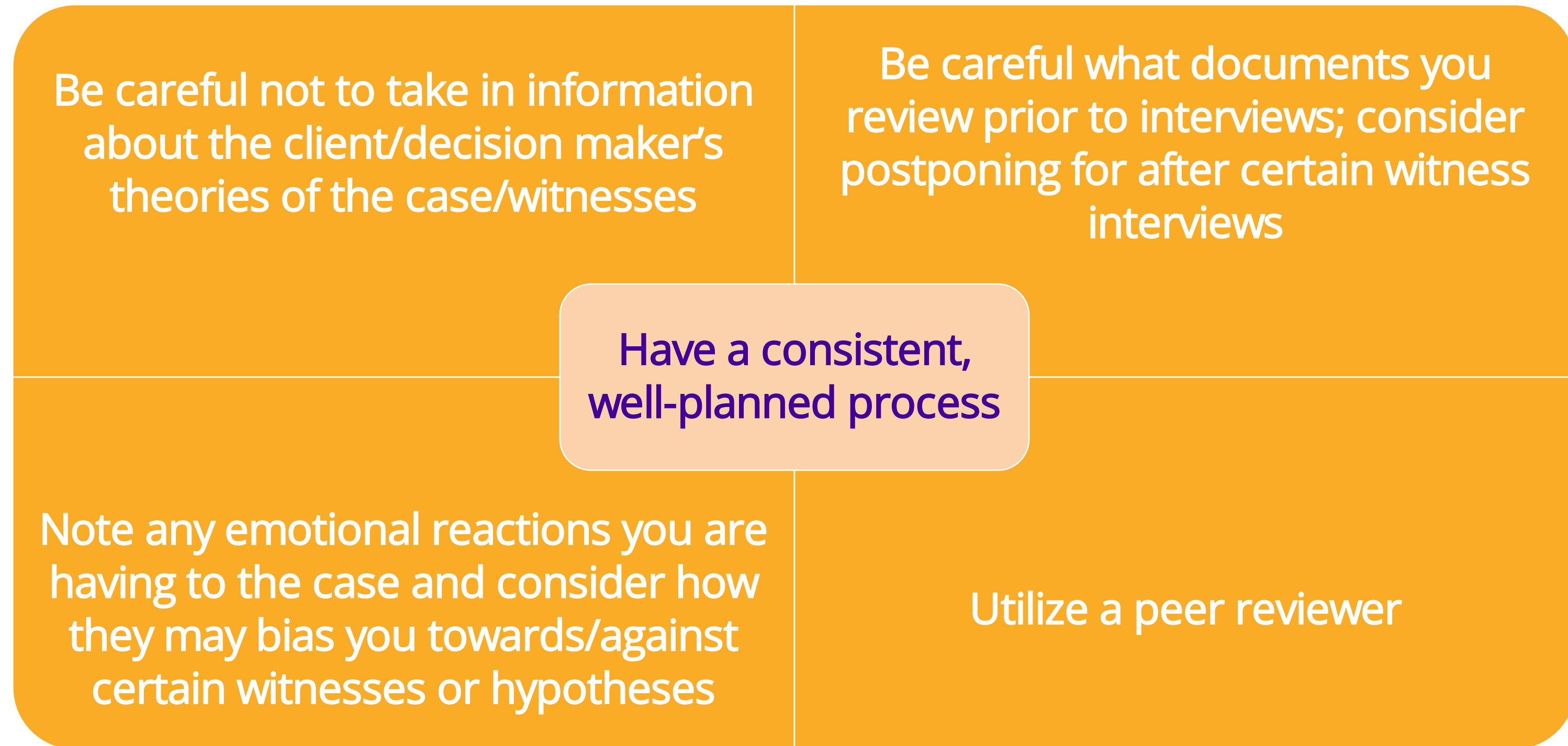
Majority rule

People we sympathize with

People with power

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Techniques to Reduce Investigator Bias



See Ashley Lattal, *The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator*, 24 J. L. & Policy 411 (2016).



Techniques to Reduce Investigator Bias

Prepare Your Mindset

Prepare your mindset

Remind yourself that you are a neutral factfinder

Make sure the words “neutral,” “objective,” and/or “independent” appear in your introduction to interviewees to remind YOURSELF of the goal.

Techniques to Reduce Investigator Bias

Interviewing Witnesses

Refrain from forming an early hypothesis regarding guilt or credibility

Ask open-ended, non-leading questions

Make sure the respondent has sufficient notice of the allegations and a sufficient chance to respond

Techniques to Reduce Investigator Bias

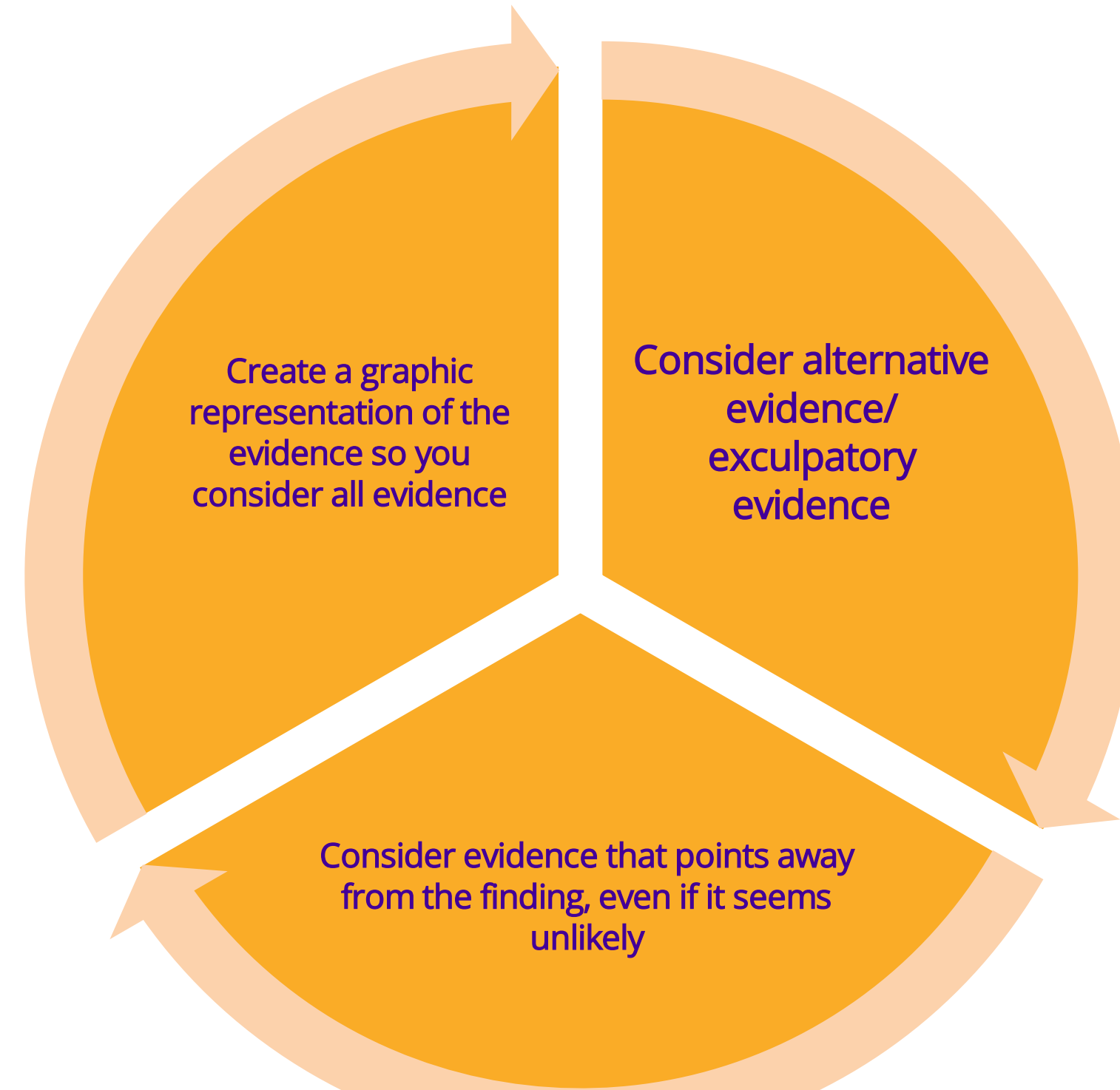
Credibility Assessments

Refrain from relying on appearance
(e.g., dress, body language, affect)

Focus on auditory cues (i.e., vague?
contradictory? tends to exaggerate?
forthcoming? willing to admit
disadvantageous information?)

Consider motive,
possible fabrication of
allegations, negative
feelings one witness
may have against
another

Techniques to Reduce Investigator Bias *Evidence*



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Techniques to Reduce Investigator Bias *Findings*



Consider alternative hypothesis, that is, consider why your current hypothesis could be wrong



Give your findings "strict scrutiny"

- Draft difficult findings both ways - for and against the respondent
- Have another investigator read your report and provide feedback



Any Questions?



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INVESTIGATIONS | TRAININGS | MEDIATIONS

Thank you!

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