

STEPS TO GOOD INTERVIEWING AND REPORT WRITING

During the course of the investigation:

1. Identify the objective criteria governing the investigation. At the outset of an investigation, it is important to set forth the objective criteria that will govern the outcome of investigation. Some possible questions to ask yourself are:
 - a. What are the elements of the alleged policy or legal violation?
 - b. What evidence will be sufficient to prove a violation?
 - c. Who bears the burden of proof of establishing a violation and what evidentiary standard will be used.
2. Avoid focusing on early hypotheses and recognize the potential for all possible outcomes. Avoid anchoring your investigation in early theories based on partial or incomplete information. Write down multiple possible explanations so that you are sure to consider alternative scenarios. Sometimes the best proof that certain events occurred is to consider and eliminate alternative explanations.
3. Find commonality with witnesses. Prepare for interviews by learning as much as possible about interviewees to facilitate a comfortable discussion as free as possible from the effects of social distance. Find something that creates common ground, especially with witnesses who are from out-groups relative to the interviewer. However, do not focus too much time on witnesses who are like you and get lost in in-group confirming dynamics. Make sure to ask appropriate follow-up questions of persons in both groups to allow for context and explanations.
4. Open-ended questions. When conducting your interviews, ask more open-ended questions than closed questions. Open ended questions are shown to reduce confirmation bias and minimize priming of witnesses by investigators.
5. Obtain and consider all relevant evidence. In today's world, electronic communications are a critical resource for evidence in investigations. Read the entire chain of email or text conversations, rather than merely a single section that supports the hypothesis. Ask both sides for the same evidence, particularly given that electronic evidence can be easily manipulated. Do not presume that the email or text string that was provided by one side is complete or accurate. Ask witnesses what additional information you should be considering. Seek out information that could alter or conflict with the allegations and, when it is identified, give it appropriate consideration. Never fail to seek out important information simply because it is difficult to obtain (known as availability bias). Conduct follow up interviews, when necessary, to fill in any gaps.
6. Prepare a detailed chronology of information and evidence. Organize information and evidence chronologically in a timeline to understand the historical context and implication, rather than pointing to individual pieces of information out of context. Sometimes a few individual pieces of evidence appear to confirm a hypothesis, but when the entire timeline of activities and evidence is viewed, holes or inconsistencies appear. Allow sufficient time for evidence to develop and avoid explanations for failure to completely investigate (e.g., heavy workload,

insufficient resources, unavailability of witnesses, and difficulty in obtaining evidence).

Writing the report:

1. **Cite to evidence and acknowledge credibility determinations.** Final reports should be more than findings and conclusions. Include a detailed statement of the facts, with direct quotes to documents and witness interviews and detailed footnotes to reference sources of evidence. Attach key evidence as exhibits to the report, and acknowledge and address conflicting evidence. Where a credibility assessment is required, acknowledge it, and explain the basis for the credibility determination. This methodology makes it less likely that you will ignore or discount evidence that is inconsistent with the findings.
2. **Obtain outside input and feedback mechanisms.** One of the best ways to mitigate the effects of potential bias is to utilize a peer review of your work. Find someone you trust who is unconnected to the investigation to review the draft report and challenge its logic and conclusions. If you are making findings against someone in an out-group, find someone in that out-group to review the report. In addition, seek expert assistance when necessary, particularly if you are required to interpret technical information.

Part II: Credibility Assessment

Assessing credibility is essential during any investigation. As an investigator, your assessment of the witness's credibility will often tip the scales for or against a finding of responsibility. This is especially true in the classic "he said/she said" types of cases – where additional supporting evidence for or against a finding is absent. When interviewing witnesses, investigators must cut through the background noise and extraneous facts, zero in on the heart of the matter, and assess the information to discern the likely facts. While you assess credibility daily (is your six-year-old lying or not, for example), some guidance can assist investigators in making better credibility assessments. The EEOC last provided guidance on this subject in 1999, but their recommendations are still relevant today. The EEOC guidance makes clear that credibility determinations must be made where there are "conflicting versions of relevant events."

As the EEOC explains, "the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors." Employers must evaluate credibility and make a determination.

A number of credibility factors come into play during investigations. Consider the following he said/she said scenario:

Susan, a female employee in the College of Liberal Arts at State University alleges that her boss, the Dean, has made numerous sexual comments to her, including comments about the size of his penis and masturbation. All of the comments were made when they

were alone. Susan also alleges that the Dean follows her into areas of the office he has no need to go. For example, she states that he'll sometimes appear in the copy room or the supply room when she is alone. Since it is well-known around the office that the Dean does not know how to work the copy machine or order supplies, she questions his reasons for showing up in those places. She alleges that her failure to engage in discussion with the Dean about these topics led him to decrease her responsibilities in the office and pass her over for a promotion. As the investigator, you should evaluate the following **“top six” credibility factors** in determining whether Susan's story has merit.

1. Plausibility. In one description of the alleged harassment, Susan claims that one morning while she and the Dean were both getting coffee in the kitchen, the Dean grabbed her butt. Susan stated there had been no other “touching” by the Dean, even though the two had been alone on many other occasions – even in the Dean's private office. Susan stated that the Dean did not say anything to her before, during, or after the alleged touching. When pressed by the investigator, Susan could not recall the specific date that the touching occurred, and she did not mention it to anyone for six months. Here, the investigator should rely on her own experience with people and determine that, more likely than not, this scenario does not seem plausible. First, Susan stated that she and the Dean had been alone on numerous occasions, and nothing like this had ever happened. It seems implausible that the Dean would take such a huge risk to touch Susan in a public area – the workplace kitchen. Moreover, the fact that Susan could not remember exactly when the touching had occurred and did not report the behavior for a full six months, make the story that the Dean grabbed Susan's butt more implausible.

2. Source of Information. The adage, “consider the source,” certainly comes into play in investigations. In addition to speaking with the parties directly, you also want to get a sense of what type of employees they are, as well as their character, generally. To this point, make an effort to interview co-workers, subordinates, and superiors. Question whether those individuals have a positive or negative opinion of both the complainant and respondent. It is important to note, however, that the credibility factors listed in this section may require more thought and consideration in a Title IX investigation.

Also, review the personnel files of the key players. Has the complainant complained about similar conduct from others previously? Has the respondent been accused of similar behavior in the past? In our hypothetical, the investigator learns that this is the first time the complainant has accused another employee of inappropriate conduct. The Dean, however, has been the subject of a sexual harassment investigation previously. That investigation found that there was not enough evidence to support the allegations of harassment. This information is a “plus” in the credibility column of the complainant and a “minus” in the credibility column of the respondent. The investigator knows that it is more likely than not that the complainant is not one to make frivolous claims, and she knows that the respondent has been suspected of bad behavior in the past.

3. Detail of the Testimony. In our hypothetical above, Susan is able to describe in vivid detail the comments the Dean made to her. Indeed, she not only recites the comments, themselves, but she is also able to tell the investigator what she was doing when the Dean made the comments. As she describes the behavior, she becomes visibly upset, seemingly flashing back to when the behavior occurred. The investigator makes note of Susan's ability to provide the same details of the story consistently over time. She also notes that Susan does not evade any of her questions but, instead, tries to answer each question fully and honestly. The investigator continues to assess Susan's credibility by asking the same questions each time she meets with Susan, each time in a slightly different manner. The investigator probes for details and looks for inconsistencies. Similarly, the investigator uses the same techniques with the respondent. When the respondent was presented with a calendar showing the dates of the alleged incidents, he contradicted his previous testimony as well as documentary evidence, lowering his credibility.

4. Demeanor. How a witness acts during the investigation can be extremely telling to the investigator; but like the other factors, a witness's demeanor is not the only determinative factor. As an investigator, to learn the most about your witness, you should first build a rapport with the witness and allow the interviewee to feel relaxed and at ease. Gaining the witness's trust will go a long way toward assisting you in seeing the "true" demeanor of the witness. You can easily form a rapport with the witness by first asking about everyday conversational matters – the witness's job, recent vacations, etc. Let the witness relax before you turn to the key points of the interview. Once you begin questioning the witness about the events in the complaint, carefully observe the witness's body language.

Does the witness maintain his calm demeanor, or does he look agitated?

Does she maintain eye contact, or are her eyes cast downward?

Consider, again, our hypothetical above. When Susan was questioned about the allegations in her complaint, she maintained eye contact with the investigator. Though she became a bit weepy in describing the unwanted comments, she was able to fully describe the Dean's behavior, with the same level of detail she provided in her written complaint. In contrast, the Dean appeared nervous when the questioning turned to Susan's allegations. His answers became short, and he nervously shifted in his seat. While not determinative, the witnesses' demeanor is another tool the investigator can use in evaluating credibility.

5. Corroborating or Conflicting Testimony Though as an investigator you may be dealing with a "he said/she said" scenario like our hypothetical, that fact should not stop you from diligently interviewing other individuals who may provide testimony that corroborates or conflicts with the allegations in the complaint. Moreover, you should review any other documentary or video evidence that could lend credibility to or detract from the credibility of either party. Here, the investigator began by contacting all of the other employees in the Dean's office. She learned that most women in the office had a

poor opinion of the Dean. While they thought he was good at his job in academia, they generally got a “bad vibe” from him and tried to keep their distance. They all stated that Susan was the fifth person in her position in an eight-year time frame. All of the other employees who occupied her position (all women) had departed in just short of one year’s time on the job. Regarding Susan’s claim that the Dean followed her into rooms that he did not need to be in, the investigator checked the access key card swipe data. On several different occasions, she found that the Dean had swiped his key card to enter a room that Susan had entered minutes before. This piece of information also served to corroborate Susan’s claims.

6. Bias. The final factor to consider in evaluating credibility is bias or impartiality. As an investigator, you should consider what motive the witness has to impact the investigation. If you determine that the witness is biased or has a motive to lie, you may not be able to rely on that witness’s testimony. Reasons for bias could include a past relationship with one of the key parties, a dispute with the organization, or a desire for promotion. In the hypothetical described above, the sole witness who spoke highly of the Dean was an employee who would likely be promoted if Susan left the University. The investigator determined that this individual’s testimony was not credible, given the stark contrast to the other employees’ testimony as well as this witness’s bias. Conclusion Credibility determinations are difficult but necessary. Even in classic “he said/she said” scenarios, investigators have to make credibility determinations, and they must reach a conclusion. A finding of “inconclusive” is not acceptable.

In evaluating credibility, the investigator should consider the aforementioned six factors:

- (1) Plausibility;
- (2) Source of the Information;
- (3) Detail of Testimony;
- (4) Demeanor;
- (5) Corroborating or Conflicting Testimony; and
- (6) Bias.

In the next section, we’ll discuss important credibility considerations for investigators in Title IX matters. Credibility in Title IX Matters – Trauma Informed Credibility Assessments Individual complainants in Title IX matters are unique witnesses. They are unique because the content of their complaints often includes some sort of trauma. To minimize the possibility of re-victimization, to conduct better investigations, and to operate with a best practice, we strive to conduct trauma informed investigations. When determining who on your campus should be trained in trauma, OCR tells us that, “any school officials responsible for discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence.” So, what is trauma?

Psychological trauma is the unique individual experience of an event or enduring conditions, in which:

- (1) the individual's ability to integrate his/her emotional experience is overwhelmed or
- (2) the individual experiences (subjectively) a threat to life, bodily integrity, or sanity.

Esther Giller explains that, “[T]rauma is defined by the experience of the survivor. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.” Understanding the effects of trauma on the body can help investigators not only conduct a better investigation but can also help clear away some of the pre-conceived ideas we have about individuals who have suffered trauma. Often, when confronted with an individual who potentially experienced a traumatic event, the initial position is to question the complainant's response or lack of response.

“Why didn't she scream?”

“Couldn't she just leave?”

“Why didn't he fight back?”

“Can it really be rape if she didn't say ‘no’?”

These are all questions that frequently arise when we learn of a new Title IX matter.

These questions, however, reflect an uninformed view of trauma and a lack of understanding of how physiology and psychology can affect an individual's response to a traumatic event. Before diving into an investigation with this inherent bias, however, we should consider the physical and psychological manifestations of trauma and how to take those manifestations into account during an investigation.