



Pepperdine University – Special Topics for Title IX Investigators

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Natasha advises institutions of higher education on a broad range of legal matters, including labor and employment law, Title IX, and compliance issues.

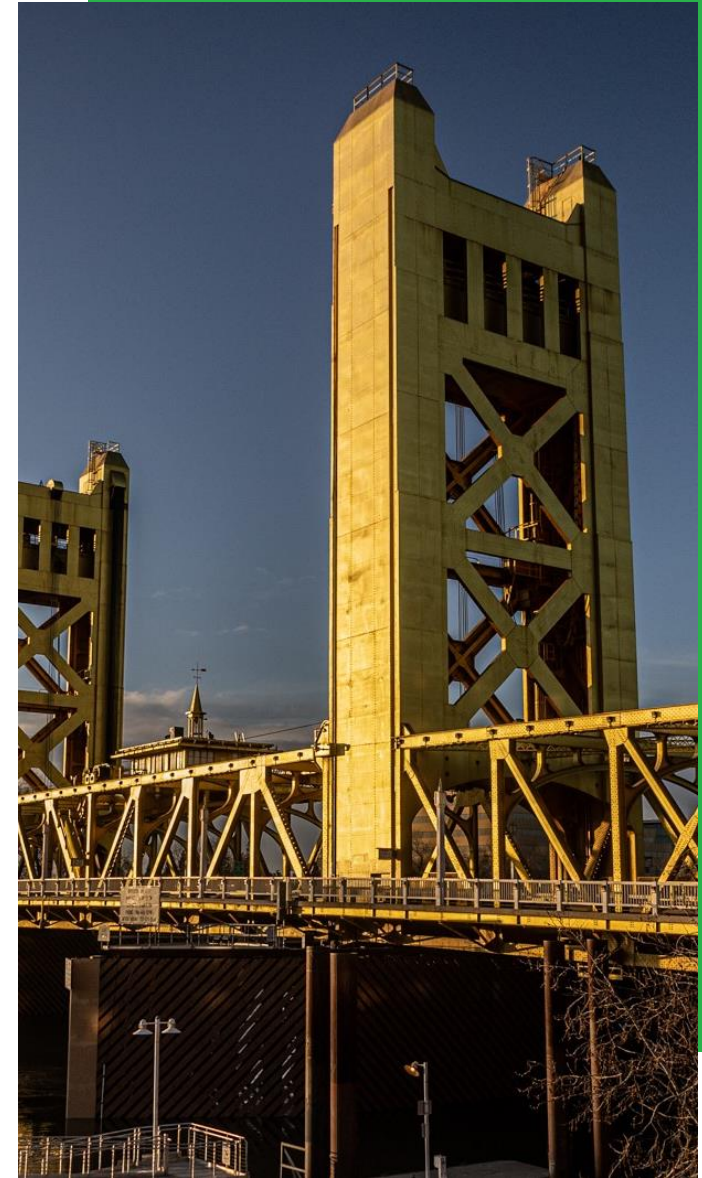
She regularly presents training sessions to administrators and faculty around the country on higher education issues.

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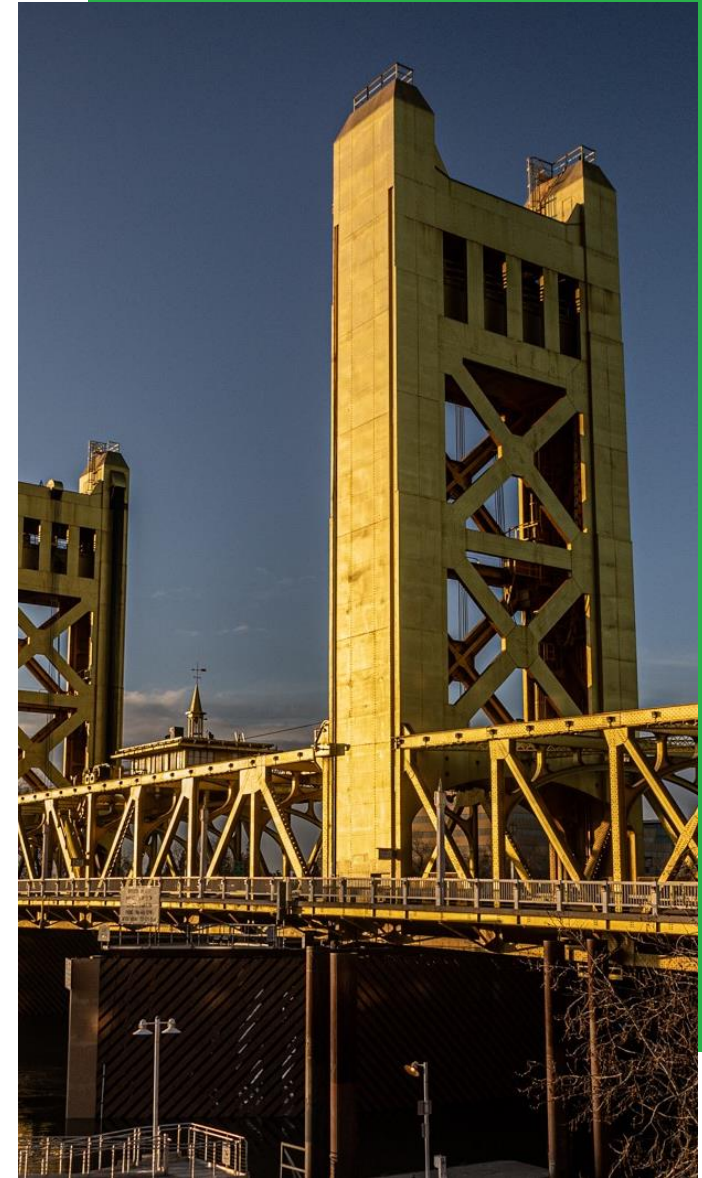
Legal Disclaimer

This presentation is not legal advice, and you should consult with your own counsel if you have specific legal questions.



Agenda

- The role of the investigator
- Effective questioning techniques
- Structuring the evidence review and your report





Individual Goals for the Session

A Note About Language

- “Complainant”
- “Respondent”
- Word against word
vs.
- “Victim”
- “Survivor”
- “Accuser”
- “Alleged perpetrator”
- “Accused”
- “Acquaintance or date rape”
- He said/she said



A Note About Assumptions

- The cases are not always female reporting parties, male respondents.
- Studies and statistical data are also binary in their gender identification.
- Studies show male victims under-report.
- There are also barriers to same-sex reporting.
- Today's training is intended to address how to use trauma-informed techniques for reviewing any report of sexual violence by or against anyone regardless of gender identity or sexual orientation.





What is Being Investigated?

Covered Definitions

Title IX Sexual Harassment (Quid Pro Quo)

Quid Pro Quo Sexual Harassment prohibited by Title IX occurs when a Pepperdine employee conditions the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct.



Covered Definitions

Title IX Sexual Harassment (Environment)

Sexual Harassment (Environment) prohibited by Title IX is defined as unwelcome conduct determined by a reasonable person to be so severe, pervasive (more than once), and objectively offensive that it effectively denies a person equal access to the University's education program or activity.



Covered Definitions

- Title IX Sexual Harassment (Sexual Assault)
- Rape
- Sodomy
- Sexual assault with an object
- Incest
- Fondling
- Statutory Rape





Non-Title IX (SB 493) Sexual Harassment

Conduct against a student that includes unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

- Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.
- Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.



Non-Title IX (SB 493) Sexual Harassment

- The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or
- Of creating an intimidating, hostile, or offensive work or educational environment.
- Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

Title IX Jurisdiction

- In the educational programs and activities of Pepperdine
- On the campus or on property owned or controlled by Pepperdine
- At University-sponsored events, or
- In buildings owned or controlled by Pepperdine's recognized student organizations.



Policy Jurisdiction

- That falls within the location of Title IX jurisdiction but does not meet the definition of conduct prohibited by Title IX and is therefore dismissed as a “Title IX Matter.”
- That occurs outside the location of Title IX jurisdiction (off-campus misconduct, online misconduct, in the University’s international programs) and
- That effectively deprives someone of access to Pepperdine’s educational programs or activities.



Policy Jurisdiction

- Against a student that is prohibited under this Policy as “SB 493 Sexual Harassment”
- That occurs in connection with any educational activity or other program of the University
- As well as incidents that occurred outside of those educational programs or activities, whether they occurred on or off campus
- If, based on the allegations, there is any reason to believe that the incident could contribute to a hostile educational environment or otherwise interfere with a student’s access to education.



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A matter will be designated as a **non-Title IX matter** if the conduct is alleged to meet one or more of the following definitions or if it meets a definition of prohibited conduct under Title IX but does not satisfy the Title IX jurisdictional location requirement:

- **Non-Title IX (SB 493) Sexual Harassment**
- **Sexual Violence**
- **Rape**
- **Sexual Battery**
- **Sexual Exploitation**





Deeper Dive: Affirmative Consent

Affirmative Consent

- Consent as used in the definition of Sexual Assault above means "Affirmative Consent."
- Affirmative Consent means informed, conscious, voluntary, and mutual agreement to engage in sexual activity.
- It is the responsibility of each person involved in the sexual activity to ensure that he or she has the Affirmative Consent of the other(s) to engage in sexual activity.
- Affirmative Consent must be ongoing throughout a sexual activity and can be revoked at any time.



Affirmative Consent

- Lack of protest or resistance does not mean Affirmative Consent, nor does silence mean Affirmative Consent.
- The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of Affirmative Consent.



Affirmative Consent

- In evaluating whether Affirmative Consent has been freely sought and given, the University will consider the presence of any force, threat of force, or coercion;
- Whether the Complainant had the capacity to give Affirmative Consent; and
- Whether the communication (through words and/or actions) between the parties would be interpreted by a reasonable person (under similar circumstances and with similar identities) as a willingness to engage in a particular sexual act.



Affirmative Consent

- Affirmative Consent cannot be obtained through physical force; or
- Where there is a reasonable belief of the threat of physical force;
- When one person overcomes the physical limitations of another person; or
- By taking advantage of another person's incapacitation.



Affirmative Consent

An individual is also unable to provide consent to engage in sexual activity when the individual:

- 1) Is a minor (age 17 or under);
- 2) Has a mental disorder or developmental or physical disability that renders her or him incapable of giving knowing consent;
- 3) Is asleep or unconscious; or
- 4) Is incapacitated from alcohol or other drugs, and this condition was known, or reasonably should have been known or recognized by the Respondent.



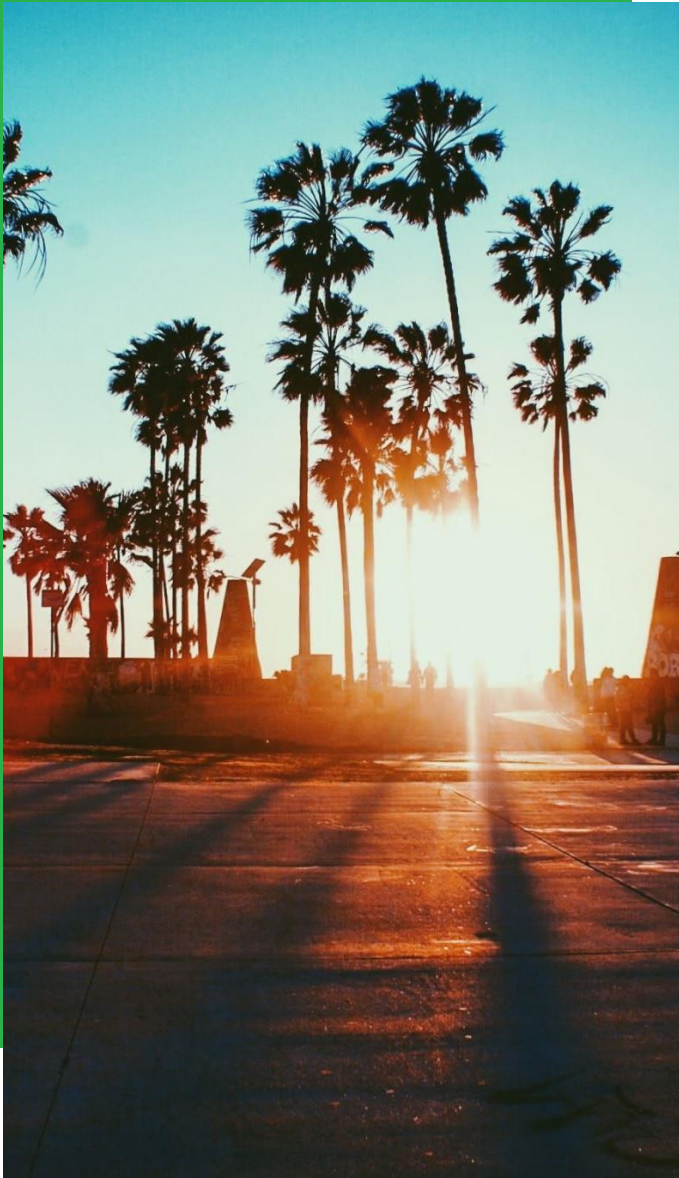


The Spectrum of Sobriety

Sober

Impaired

**Incapacitated
Unable to
Consent**



Terminology

- Passed out: Asleep or unconscious due to amount of alcohol consumed
- Blacked out: Periods of amnesia during which a person actively engages in behaviors like walking and talking but does not create memories for these events as they transpire
 - Person in black-out state could appear intoxicated or could appear completely sober.
 - Memories are either partially or totally lost during black-out.



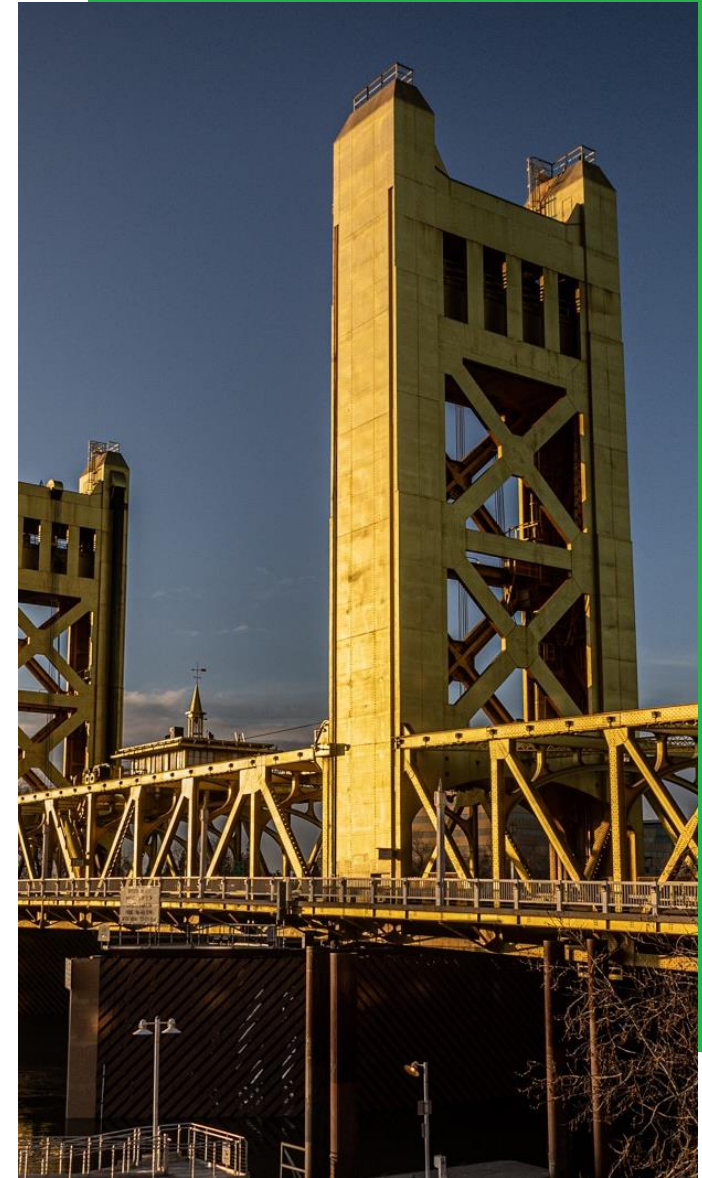
Structuring an Interview and Asking Effective Questions

Learning Outcomes

- Setting the table with Interviewees - Introductions, Admonitions
- Managing the Interview Dynamic
- Strategies for Questioning
- Formulating Effective Questions

Preparing for an Interview

- Request for the interview
- Purpose of the interview
- Standard admonitions
- Outline of questions (yours and any proposed by the parties)
- Evidence handling
- Notice
- Disclosures of information to third party witnesses



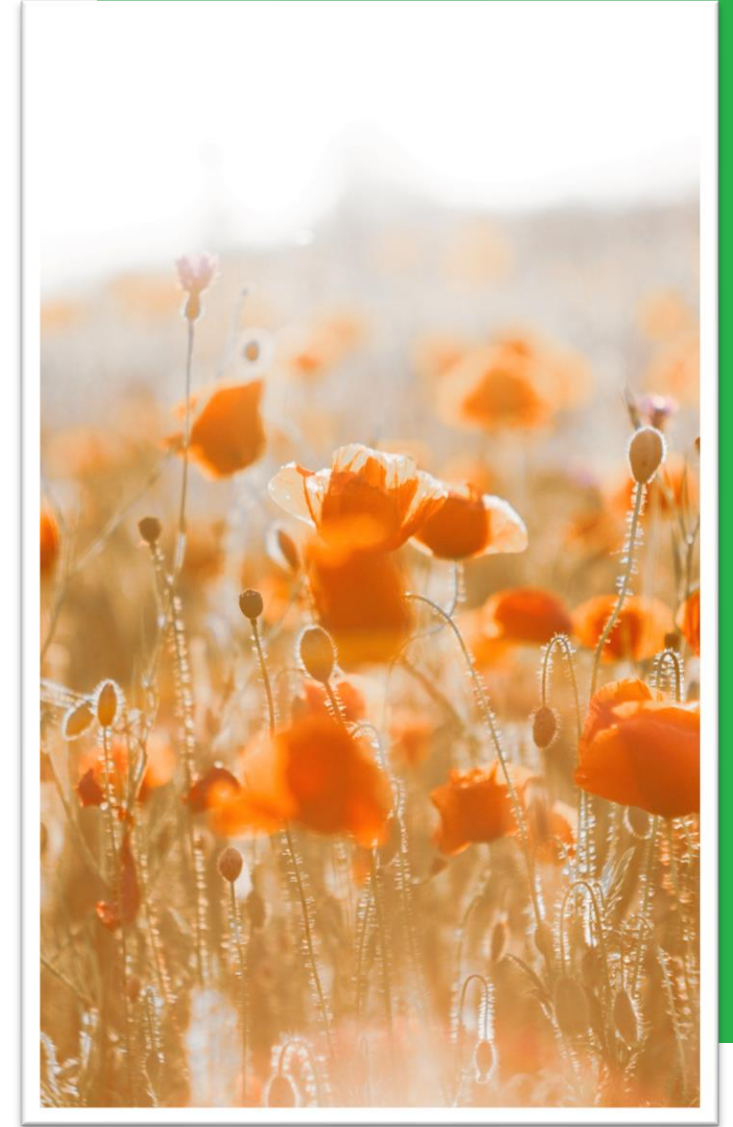
Initial Meeting – Purpose/Objective

- Instilling confidence in the system and you
- Gathering facts
- Identifying issues



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





Managing the Interview Dynamic

- Seating
- Timing
- Attendees
- Questioning by interview
- Building rapport
- Goal: Flow of information

Formulating 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).





Special Considerations for Interviewing the Parties

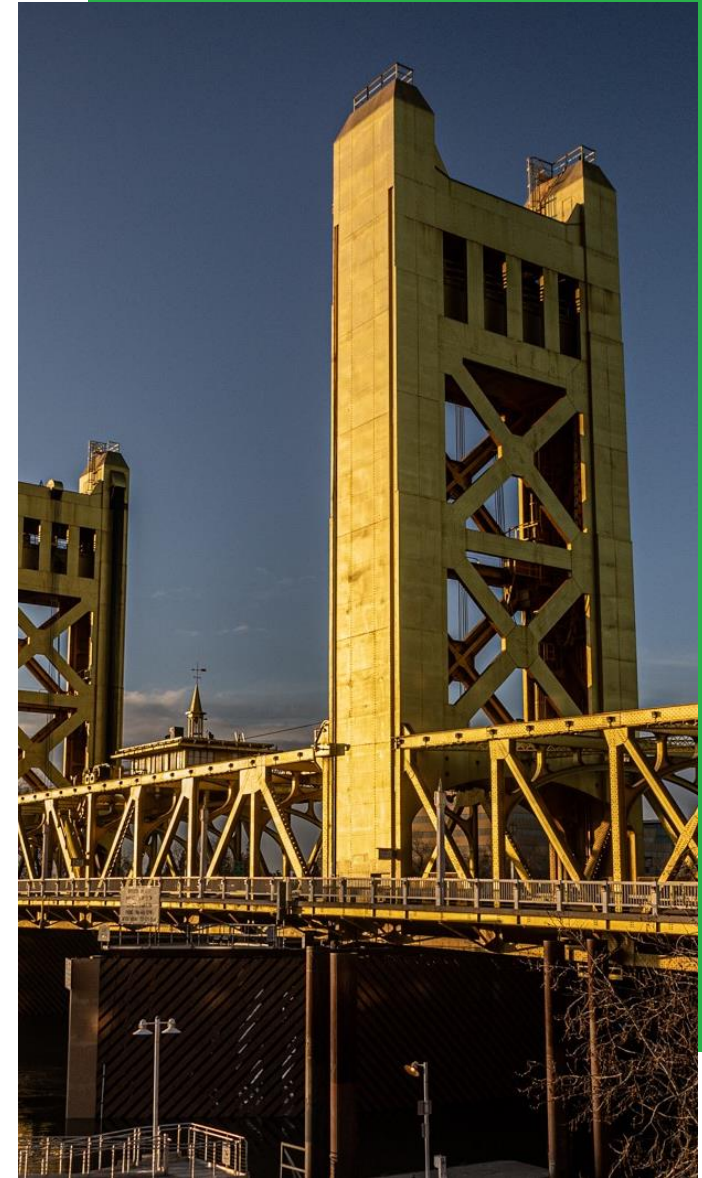
Learning Outcomes

- Considerations when interviewing the Complainant
- Considerations when interviewing the Respondent



Considerations for the Reporting Party

- Scoping the allegations – No magic words
- Don't put words in people's mouths
- Why don't people want to come forward?
- Fearful of retaliation
- Don't understand/fear the process
- Don't understand how information will be used
- Pressure from peer group
- Shame, blame, guilt
- Just want it to go away
- Minimizing the impact



How to Manage a Reluctant Reporter

- Clearly explain the process.
- Clearly explain how information will be used.
- Don't make promises that you cannot keep.



Tip

- A respondent may also have the same reluctance.
- The same strategies can be used to empower participation in the process.



Questioning Reporting Parties

- Post-traumatic stress can manifest itself in many ways
- Sexual violence involves disempowerment and disconnection
 - Connect and empower interviewee – i.e., how to retell events, seating during interview
- Central vs. peripheral details
 - Central details – paid attention during assault, as coping mechanism;
 - Facts will be consistent over time
 - Peripheral details – received no attention because irrelevant to surviving trauma;
 - Facts can be confused over time, with repeated questioning



FETI Recommendations (From FETI/UCI)

- Assess behavioral and psychological changes following the reported event
- Avoid certain inquiries:
 - Sequence of events
 - Asking questions designed to confuse/test their narrative (problem: discerning between normal trauma or falsifications)
 - “Why” questions
 - Why didn’t you fight back?
 - Why did you wait to report this?

Questioning Tips for Someone Reporting Trauma

- Empower participation in the process
- Avoid judgmental attitudes
- Recognize that events do not need to be extreme to be traumatic
- Concurrent crises can occur
- Provide for safety of complainant
- Make referrals to proper resources
- Provide clear guidance on process



Interview Tips for Interviewing Someone NOT Reporting Trauma

- Empower participation in the process
- Avoid judgmental attitudes
- Recognize that events do not need to be extreme to be traumatic
- Concurrent crises can occur
- Provide for safety of respondent
- Make referrals to proper resources
- Provide clear guidance on process



Critiques of Using Trauma-Informed Techniques

- Use of the signs of trauma as evidence of a policy violation.
- Deference to counter-intuitive behavior
- Calling someone a survivor, trainings aimed at interviewing “survivors.”
- Failure to clarify inconsistencies.
- Failure to explore delay or reluctance to report.
- Failure to consider exculpatory evidence such as post-incident communications.
- Open-ended approach only used with complainants.



Trauma and Credibility

- Signs of trauma do not make someone MORE credible.
- Signs of trauma do not make someone LESS credible.
- We do not know why someone reacts the way they do.
- Make no assumptions.



Trauma and Credibility

Lapses in memory should be explored:

- Is there a credible reason for the loss of memory?
- What is it?
- What other evidence is available?

Reactions after the event should be explored:

- Is there a credible reason for the behavior after the event?
- What is it?



Summary

- Trauma-informed techniques should be used with an understanding of why and how to use them.
- Many trauma-informed techniques are useful for any type of decision-making.



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?





What if the Respondent Denies Wrongdoing?

- Explore possible ill-motives
- ASK: “Do you have any idea why they would say this?”
- ASK: “Have you had any conflicts or problems with this person?”



Application to Scenarios

Analyzing our Word Against Word Situation

- Complainant said they did not affirmatively consent.
- Respondent says they obtained Complainant's affirmative consent.
- No other witnesses present.
- How do these parties know each other?
- Were there any inconsistencies by Complainant or Respondent?
- Did you explore those inconsistencies?
- How credible were the reasons for those inconsistencies?

Analyzing our Word Against Word Situation

- Complainant said they did not affirmatively consent.
- Respondent says they obtained Complainant's affirmative consent.
- No other witnesses present.
- Who interacted with them immediately before?
- Who interacted with them immediately after?
- Did anyone have contradictory statements?
- Does their testimony support Complainant or Respondent?
- Any motivation?



Analyzing our Word Against Word Situation

- Complainant said they did not affirmatively consent.
- Respondent says they obtained Complainant's affirmative consent.
- No other witnesses present.
- How does character evidence impact any analysis (It shouldn't)
- How does demeanor impact any analysis? (It shouldn't)
- How does pattern evidence impact any analysis?
- Is it really pattern evidence?



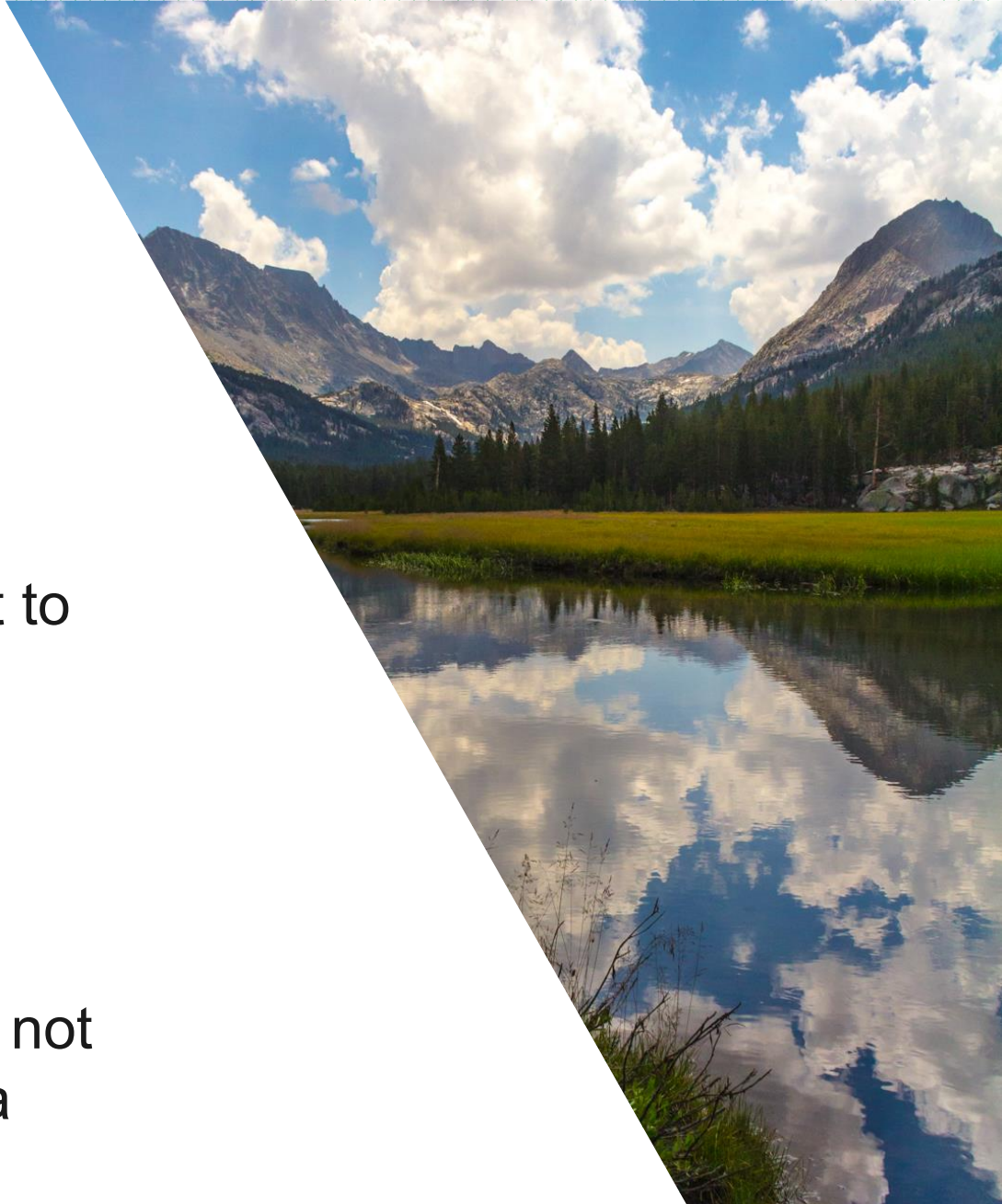
How Does the Standard of Proof Impact Your Fact-Gathering?

- Preponderance of the evidence – caution re higher standards from other contexts
- Word against word situation – the question is whether the Complainant (more likely than not) affirmatively consented.



How Does the Standard of Proof Impact Your Fact-Gathering?

- Burden on investigator to gather the evidence
- (Not on Complainant to prove, nor Respondent to disprove).
- Hearing Panel needs to resolve who is MORE credible.
 - If Complainant is more credible, does the evidence establish a policy violation?
 - If the Respondent is more credible, is there not enough evidence to conclude that there is a policy violation?



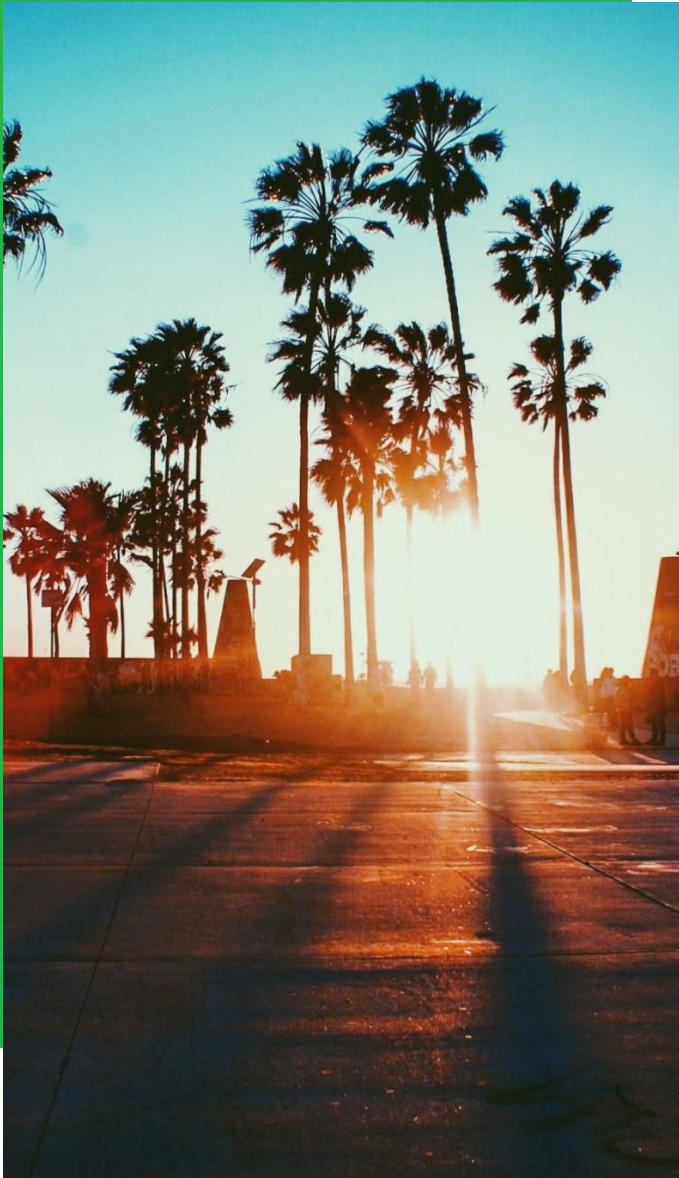


Example of Gathering Up Information

- *In addition, Respondent was inconsistent when describing how affirmative consent was demonstrated by Complainant. When asked to clarify these inconsistencies, Respondent declined to do so.*
- *Respondent also provided a messaging thread with Complainant; however, a review of the same messaging thread provided by Respondent demonstrated that portions relating to the night of the incident had been deleted. Respondent declined to clarify why, citing a new phone that may have erased parts of the thread.*



Preparing the Investigation Report



Agenda

- Identify the required elements of an investigation report
- Understand how to convey the evidence so the hearing panel and parties can assess it.



SMP Investigation Reports

Summary of all relevant evidence (inculpatory and exculpatory), including any relevant evidence received during the evidence review.

- Any relevant evidence provided by the Parties or witnesses or gathered by the Investigator should be attached to the final investigation report as exhibits.
- Fact-gathering report – not fact-finding.

Sample Structure for an SMP Report

- A summary of the allegations
- The investigation process
- The preponderance of the evidence standard
- A detailed summary of evidence organized by definition of prohibited misconduct
- Attachments/all relevant evidence



Summary of the Allegations



Precision



Check notices and
amended notices



Quote the policy – the exact definitions of
prohibited misconduct





Investigation Process



Audience



Tone



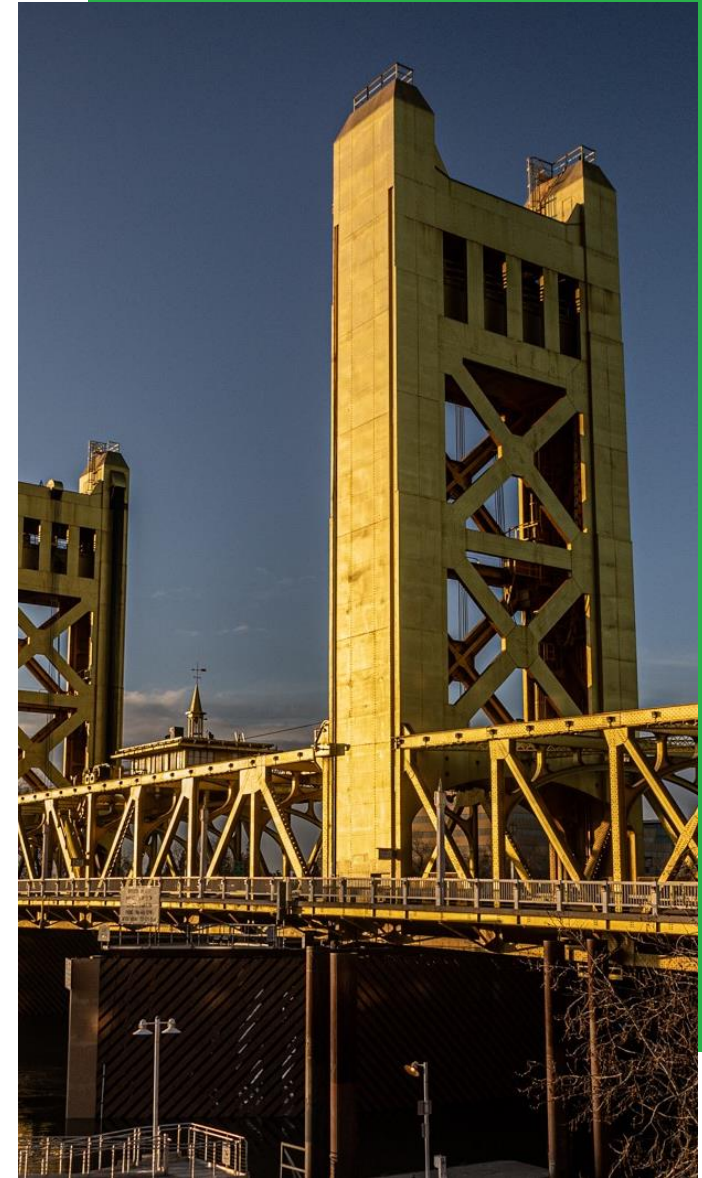
Strategy



Include minor
procedural details that
you will not remember

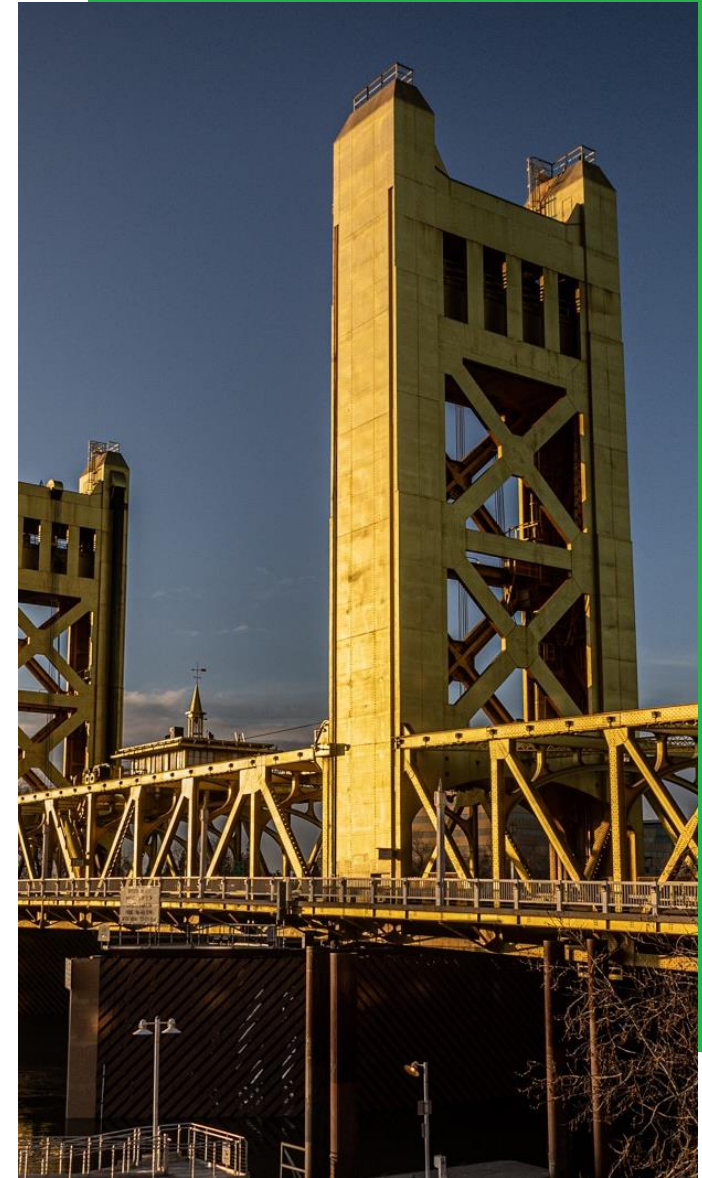
Checking for Specific Details

- Location of each action in each allegation for jurisdictional analysis.
- Dates of incident(s) in each allegation for prohibited conduct determine definitions are the correct for the time in question.



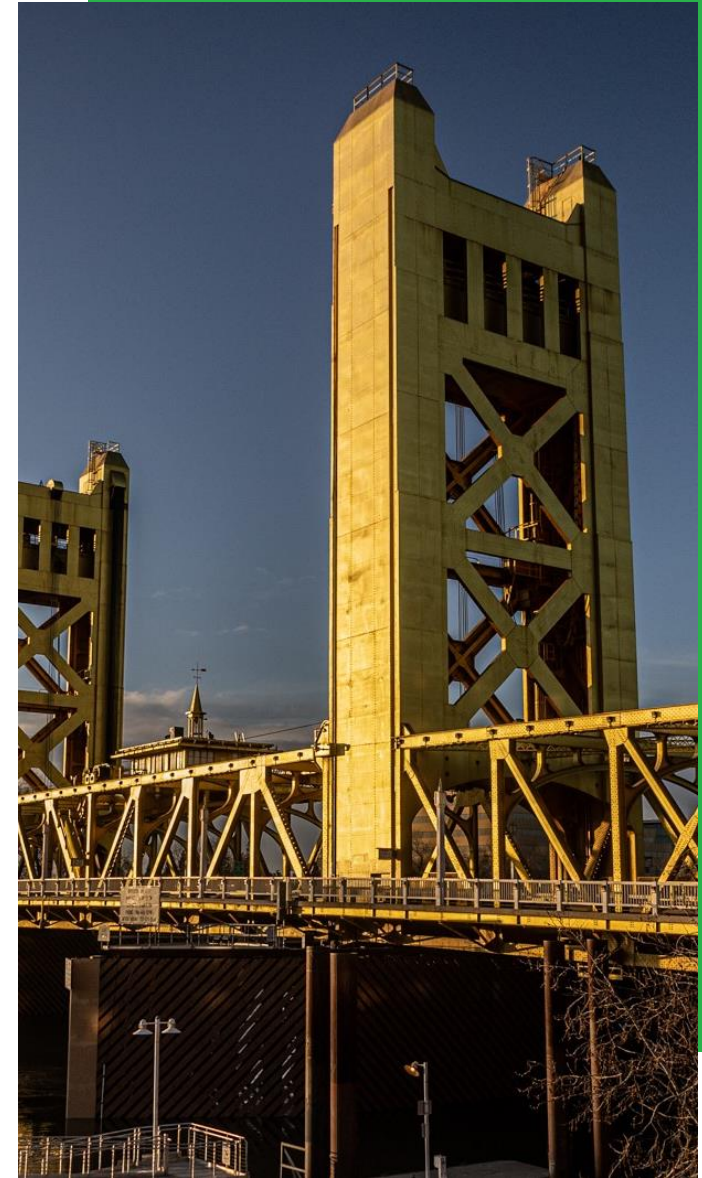
Detailed Description of Evidence

- Organization of this section is critical. I prefer witness by witness under each definition of prohibited conduct, not chronological so you have a clear path from where evidence came from.
- This is not the same as findings. This is what was gathered and where it came from. There is no analysis. The tone of this section matters. Complainant “reported that...” “Respondent responded that...”



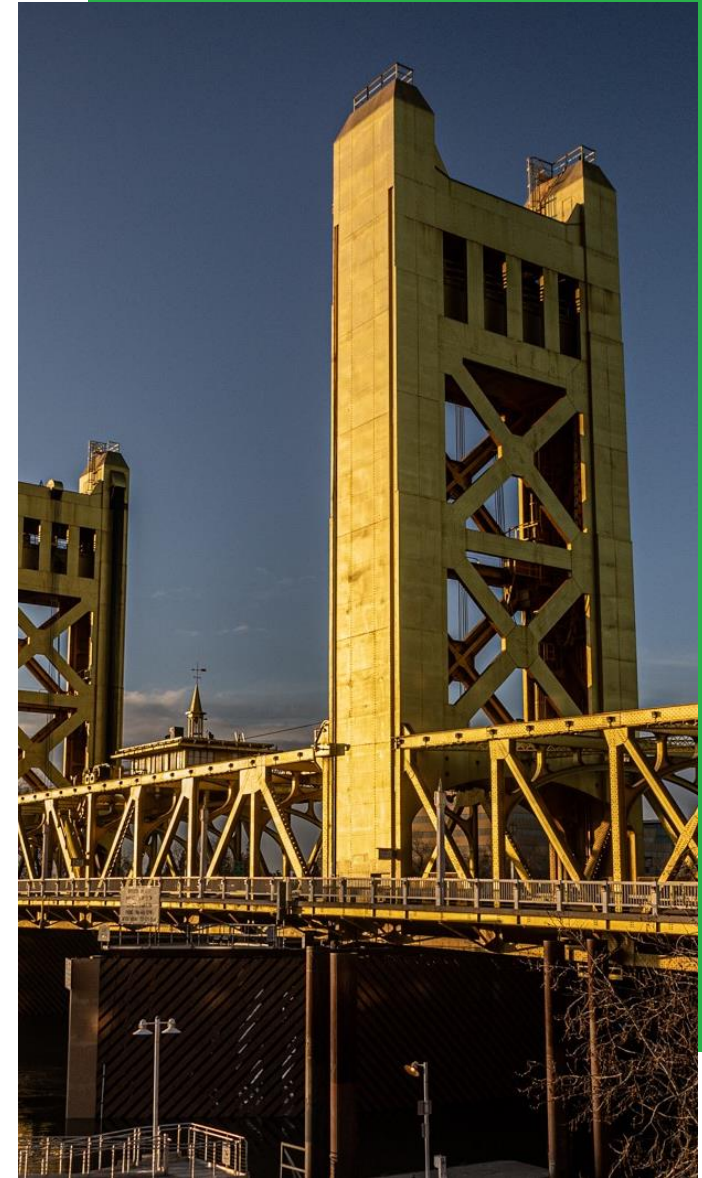
Detailed Description of Evidence

- Demonstrating amendments/modifications after the review process.
- Link to evidence provided by each witness to establish the clear path.
- If you do chronological, must be able to trace where the evidence came from and cannot be a persuasive tone. Often devolves into analysis.



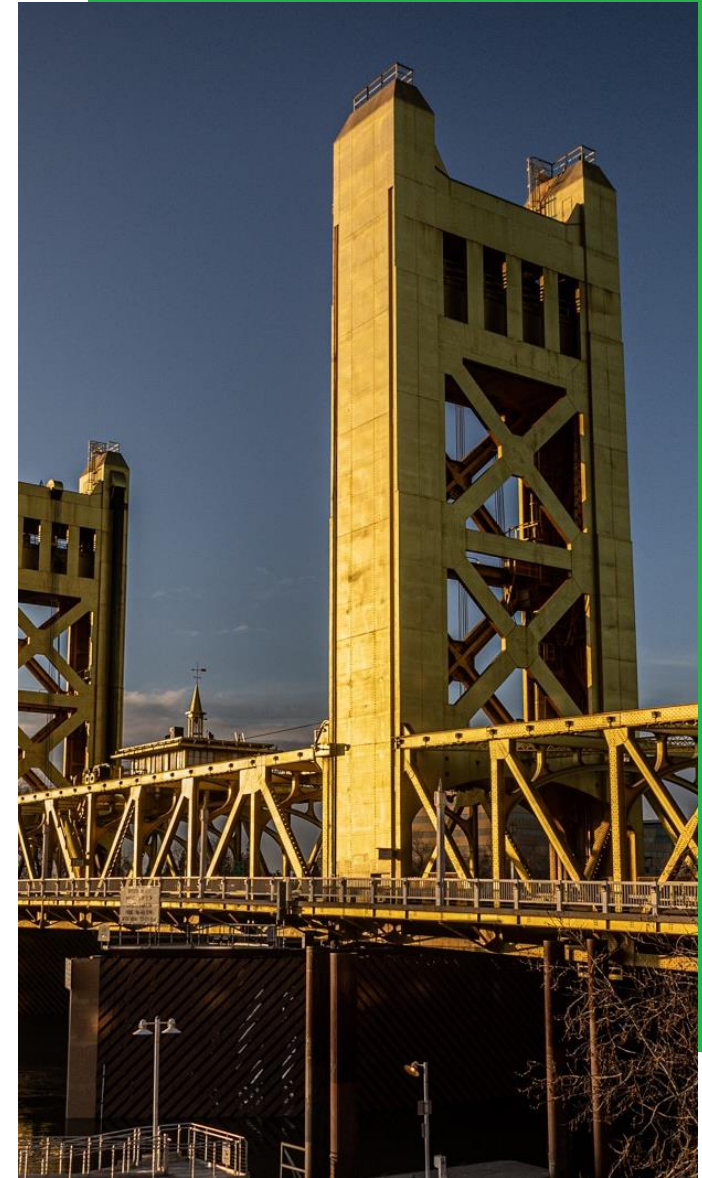
Other Best Practices

- 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.
- Set it aside, come back and review for errors, typos, gaps in analysis.



Do a Technical Review of a Report

- Structure
- Completeness
- Tone – technical vs. persuasive
- Comments vs. redlines
- Application of attorney-client privilege





Questions?





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THANK --- YOU

