

# Words That Wound

When Expression Becomes Aggression

**Office of General Counsel 2024**

Ruth Jones, University Counsel-Civil Rights

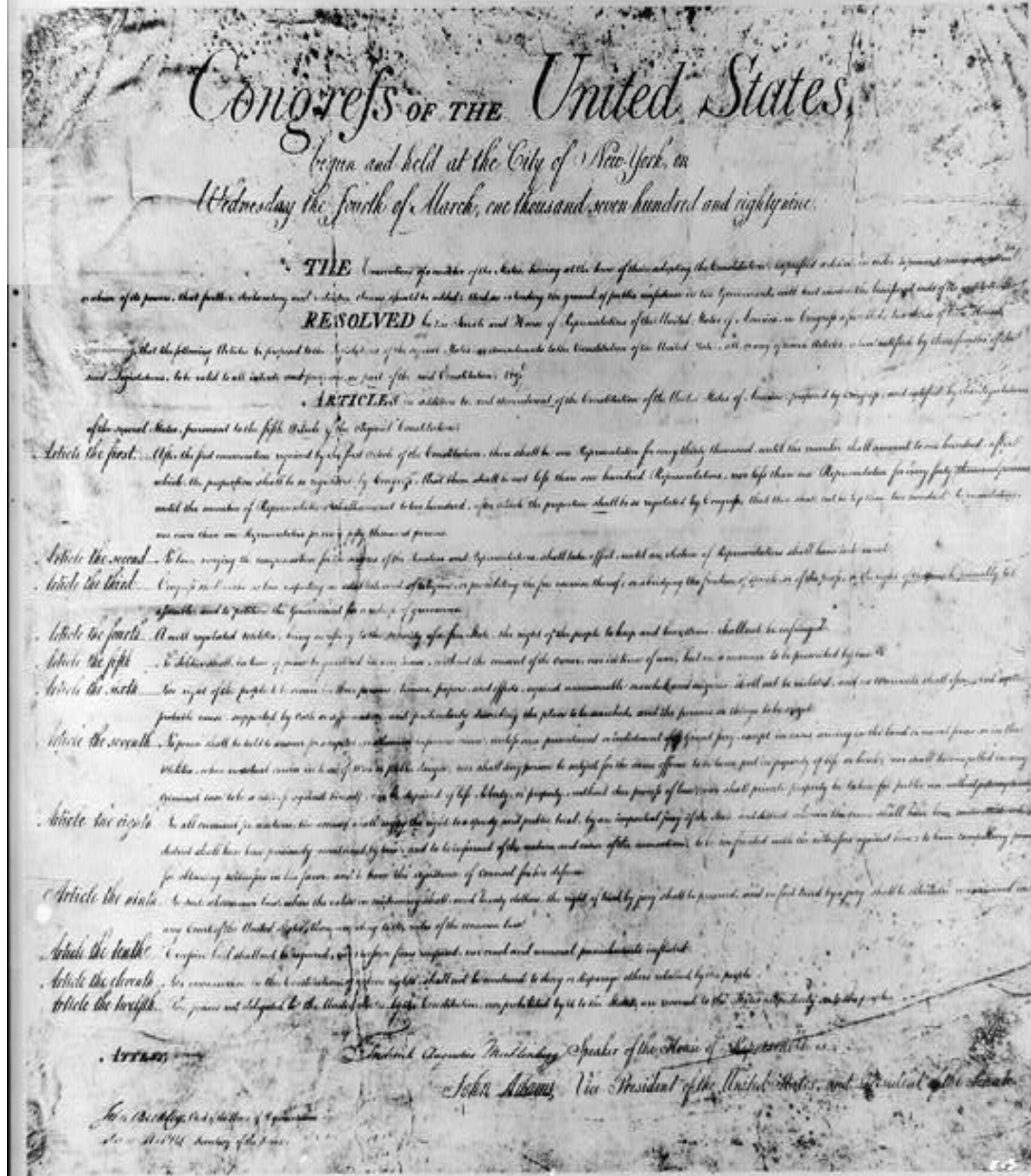
Robin Webb, University Counsel





# Topics

- Freedom of Speech Basics Principals
- Protected Speech or Actionable Misconduct
- Academic Freedom
- Time, Place and Manner Restrictions
- Supportive & Responsive Measures
- Implementing the CSU Nondiscrimination Policy and Protecting Free Speech
- Hypotheticals





# Freedom of Speech

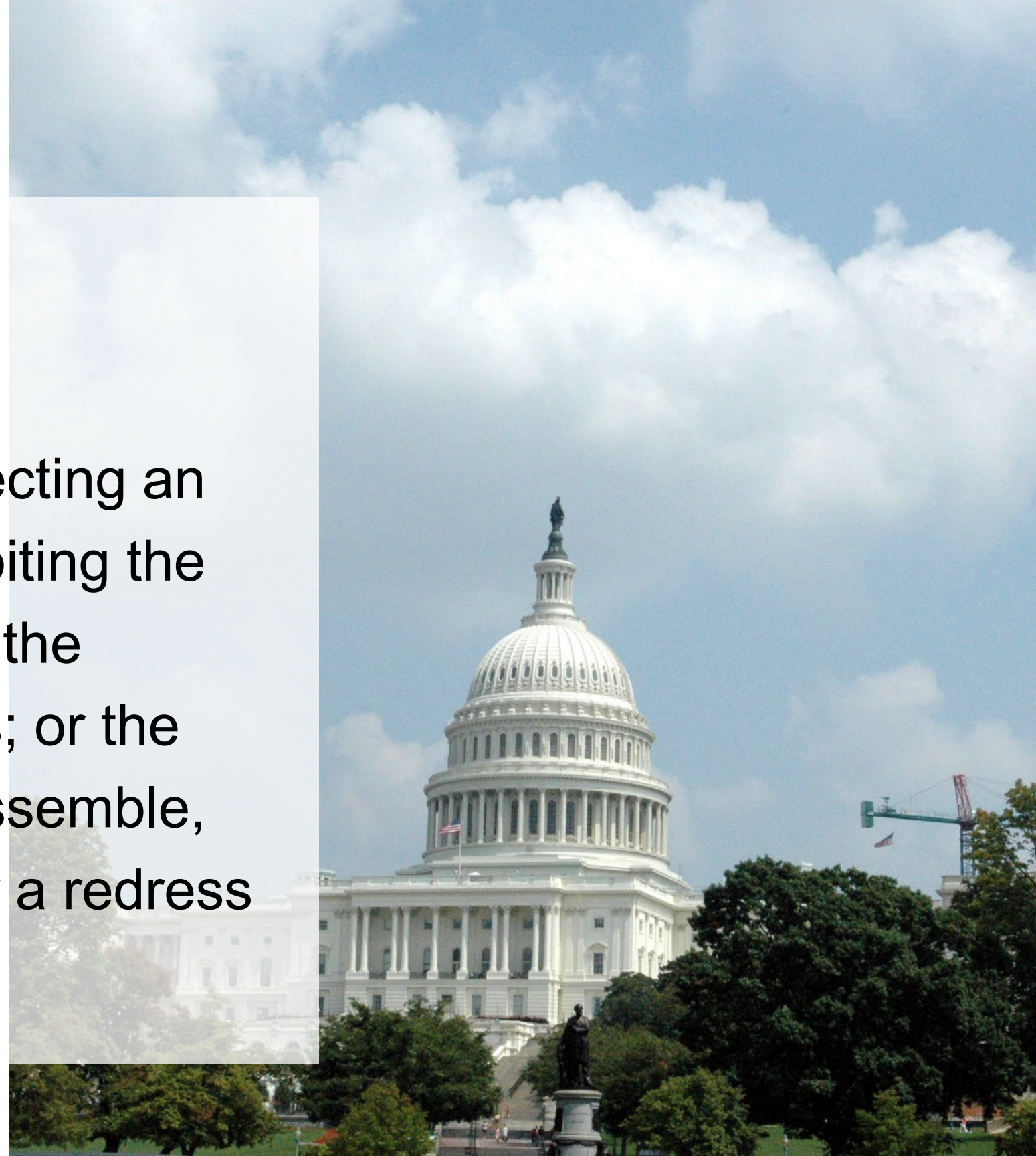
## Basic Principals





# 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





# What Does This Mean?

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





# The Value of Speech

Encourages dialogue

Allows us to see other points of view

Fosters new ideas

Provides progression in society

Prevents authoritarianism





# All Forms of Speech Receive Protection

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





# Student Rights

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





# Employee Rights

## Employees retain rights to free speech

- When speaking as a private citizen on a matter of public concern
  - **except where the impact on the employer's ability to provide services outweighs the employee's interest in the speech**
- When exercising academic freedom in connection with teaching





# Outside Speakers Rights



Outside speakers are entitled to fair access for speech

- If the campus allows outside speakers to use facilities, broad latitude must be provided for 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



# Public Rights

Members of the public have rights speak on campus

- Sidewalks, streets, and open areas of campus are “public forums” and generally cannot be closed to expressive activity, including from members of the public
  - Subject to narrowly tailored restrictions that serve a significant government interest





# Government Rights

The CSU has its own rights

- 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





**Protected  
Speech**

**Or**

**Actionable  
Misconduct**





# Speech Is Generally Protected Except:

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



# 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
- For the CSU, controlling the messages would constitute government interference with speech
- Details about the speech may reveal it is more than just simple hate speech.



# 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/True Threats:

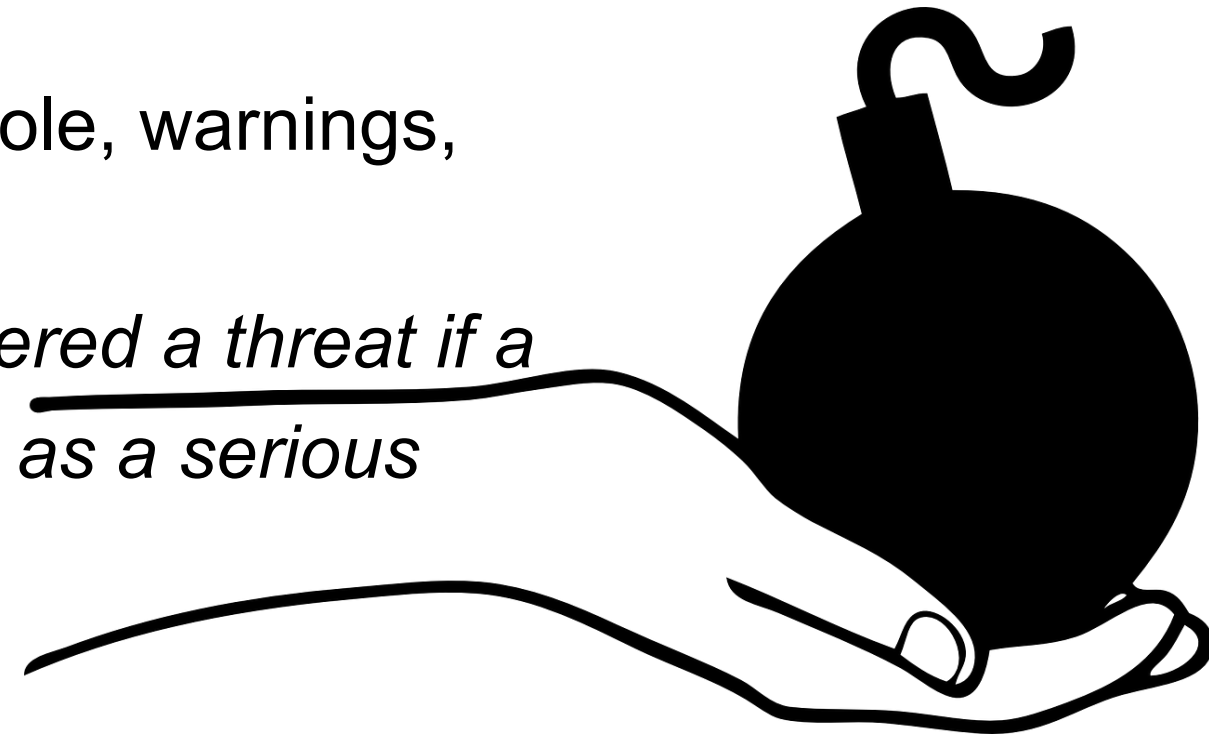
- Fighting words require a direct, face-to-face target and immediate breach of the peace
- The words make it clear that violence is imminent
- General profanities and insults alone are not “fighting words”
- Consider contemporaneous conduct (spitting, shaking fist, volume of speech, slurs)





# 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*





# Harassment:

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

Harassment means unwelcome verbal, nonverbal or physical conduct engaged in because of an individual's protected status. *In general terms*, it is:

- Severe, persistent, or pervasive
- Undermines and detracts from the victim's ability to participate in or benefit from the services, activities or opportunities offered by the university; or
- Creates an intimidating, hostile or offensive environment

**CONSULT THE CSU NONDISCRIMINATION POLICY FOR FULL DEFINITIONS**





# Harassment:

- Offense and disruption are not enough.
- The speech must be abusive or interfere with a reasonable person's ability to participate in the educational process or perform their work.
  - 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.



# Academic Freedom





# What is “Academic Freedom?”

- Teaching faculty are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties . . .
- Teaching faculty are entitled to academic freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.

(From CSU Academic Freedom Policy)



# 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 1<sup>st</sup> Amendment and academic freedom





# Limitations on Academic Freedom

- Discussion of topics unrelated to the subject matter
- Any type of unprotected speech, unless there is a pedagogical purpose
- Demonstrably false information





# Time, Place & Manner





# Time, Place & Manner Restrictions

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

They do not regulate on the basis of content

The level of permissible restriction varies by the nature of the location (open quad vs. closed classroom)





# Enforcement of Time Place and Manner Policy

**Students** – CSU Student Conduct Code

**Employees** – Education Code § 89535

**Visitors** – Penal Code





# Supportive And Responsive Measures For Those Affected By Protected Speech

Hate Speech

Hurtful Slogans

Intolerance

Bullying

Insults

Offensive Social Media Posts





# Potential Supportive Measures

Supportive Measures are designed to restore or preserve equal access to CSU education programs or activities, or the workplace without unreasonably burdening the other party, including to protect the safety of all parties or the educational or work environment.

Supportive Measures may include

- Counseling
- Extensions of deadlines or other course or work-related adjustments
- Modifications of work or class schedules
- Campus escorts
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus



# Other Responsive Measures

- Present community dialogue sessions that address hurtful conduct and acknowledge impacts to others
- Promptly communicate the administration's disapproval of hateful messages
- Provide spaces for those experiencing stress from the speech
- Host interactive events designed to promote unity and understanding



# Implementing The CSU Nondiscrimination Policy and Protecting Free Speech







# CSU Nondiscrimination Policy

## Article IV. Academic Freedom and Freedom of Speech

Freedom of expression is a cornerstone of a democratic society and is essential to the educational process. Universities have a special obligation not only to tolerate, but also to encourage and support, the free expression of ideas, values, and opinions, even when unpopular or controversial. At the same time, the exercising of freedom of expression and assembly must comply with all applicable federal, state, and local laws and CSU policy. Speech activity is not protected by the First Amendment to the U.S. Constitution or by this Nondiscrimination Policy when it includes terrorist threats or the promotion of actual or imminent physical violence or bodily harm. Freedom of expression is not an absolute right. It coexists with other rights and the need for public order and safety.

Not every act that may be offensive or insulting constitutes Discrimination or Harassment, as defined by law and this Nondiscrimination Policy. At the same time, all members of the campus community should recognize that the manner in which they choose to express themselves has consequences and that freedom of expression includes a responsibility to acknowledge and respect the right of others to express differing opinions. Conduct that violates this Nondiscrimination Policy, including statements that constitute Discrimination, Harassment, Sexual Harassment, Retaliation or Stalking, is not protected by academic freedom or freedom of expression.



# Intake and Assessment of Free Speech and Academic Freedom Issues

The Systemwide Intake checklist and guidance cover most of the relevant topics. The questions below are potential follow up questions to assess and analyze Free Speech and Academic Freedom issues

- What did the Respondent allegedly say or do?
- What are the roles of the Complainant and Respondent, e.g. professor, supervisor, etc. ?
- What are the detailed circumstances of the alleged statements or conduct?
  - Did the conduct occur on campus, or off campus? Is there a nexus to the university? Was the speech on social media or online?
  - Did the conduct occur during class or in an educational setting? What was the name/ description of the course? Is a course syllabus available? What are the course learning objectives?
  - Is this a required course?



## Intake and Assessment (continued)

- Was the conduct during a meeting?
  - What group was meeting e.g., department meeting, 1 on 1 meeting, etc.
  - What was the meeting objective?
  - Is a meeting agenda available?
  - How often did the speech or conduct occur?
  - What did the Respondent allegedly do or say each time?



- Social Media
  - What is the social media platform that the messages are displayed on?
  - Were messages sent directly to the Complainant?
  - If not, how and when did the Complainant see the messages?
  - Is the social media platform a personal or university platform?





# Hypotheticals





# Hypothetical #1

- The university has identified the “quad” as an outdoor area for tabling. Individual students and student organizations are permitted to sign up for an available space in the quad. The university assigns each group a table that they can decorate and use to provide written materials and talk to members of the community. Space is granted on a first come basis.
- The Pro-Palestinian student group has reserved and operated a table every day for the past month. There is a large banner across the table that says, “From the river to the sea.” The group also distributes flyers with the faces of various professors, calling the professors baby killers and calling for an end to the war in Gaza.
- Over the last few days, students have come up to the table and yelled at the students behind the table calling them terrorists and killers.



# Hypo #1 Poll A (Place your responses in the chat)

## A COMPLAINT HAS BEEN MADE REGARDING THE STUDENT GROUP'S BANNER AND FLYERS

- **Is the conduct of the tabling student group protected by the First Amendment?**
  - **Yes**
  - **No**
  - **Needs more information**
- **What additional information do you need to assess the Free Speech issues of the student group?**
- **If the student group's conduct is protected speech, what if anything, should the university do to respond to the allegations?**

**HYPO RECAP:** Tabling in the quad is permitted by the University for student groups to use a space which they can decorate, provide written materials, and talk to members of the community.

The Pro-Palestinian student group has properly reserved and was given permission to operate a table every day for the past month. There is a large banner across the table that says, "From the river to the sea." The group also distributes flyers with the faces of various professors referring to them as "baby killers" and calling for an end to the war in Gaza.

Over the last few days, students have come up to the table and yelled at the students behind the table calling them "terrorists" and "killers."



# Hypo #1 Poll B (Place your responses in the chat)

## A COMPLAINT HAS BEEN MADE REGARDING THE STUDENTS WHO YELLED AT THE TABLING STUDENTS

- **Is the conduct of the yelling students protected by the First Amendment?**
  - **Yes**
  - **No**
  - **Needs more information**
- **What additional information do you need to assess the Free Speech issues of the student group?**
- **If the yelling students' conduct is protected speech, what if anything, should the university do to respond to the allegations?**

**HYPO RECAP:** Tabling in the quad is permitted by the University for student groups to use a space which they can decorate, provide written materials, and talk to members of the community.

The Pro-Palestinian student group has properly reserved and was given permission to operate a table every day for the past month. There is a large banner across the table that says, "From the river to the sea." The group also distributes flyers with the faces of various professors referring to them as "baby killers" and calling for an end to the war in Gaza.

Over the last few days, students have come up to the table and yelled at the students behind the table calling them "terrorists" and "killers."



# Hypothetical #2

- A student files a written complaint with the DHR office alleging that their political science professor is creating a hostile environment for students of color.
- The complaint alleges that the professor makes disparaging remarks about the Black Lives Matters movement. The student also alleges that the professor makes racist remarks on social media.

# Hypo #2 Poll (Place your responses in the chat)

## A COMPLAINT HAS BEEN MADE AGAINST THE PROFESSOR

- **Is the professor's alleged conduct protected by the First Amendment?**
  - **Yes**
  - **No**
  - **Need more information**
- **What additional information do you need to assess the Free Speech issues?**
- **If the conduct is protected speech, what if anything, should the university do to respond to the allegations?**

**HYPOTHESIS RECAP:** A student files a written complaint with the DHR office alleging that their political science professor is creating a hostile environment for students of color.

The complaint alleges that the professor makes disparaging remarks about the Black Lives Matters movement. The student also alleges that the professor makes racist remarks on social media.



# Hypothetical #3

- The University's philosophy department has a department webpage on the University website. The webpage has department policies, faculty bios, and other department information relevant to students enrolled in department courses.
- Several students have reported that there is a banner at the bottom of the opening page of the department webpage that says, "Peace for Israel," and that several faculty members have made statements in class complaining about Pro-Palestinian demonstrations on campus.
- The students complain that the department is discriminating against Palestinian students.

# Hypo #3 Poll (Place your responses in the chat)

## A COMPLAINT HAS BEEN MADE AGAINST THE DEPARTMENT

- **Is the department's conduct protected by the First Amendment or Academic Freedom?**
  - **Yes**
  - **No**
  - **Need more information**
- **What additional information do you need to assess the Free Speech issues?**
- **If the conduct is protected speech, what if anything, should the university do to respond to the allegations?**

HYP0 RECAP: The University's philosophy department webpage has department policies, faculty bios, and other department information relevant to students enrolled in department courses. The webpage is on the University's website.

There is a banner at the bottom of the department webpage that says, "Peace for Israel." Several department faculty members have made statements in class complaining about Pro-Palestinian demonstrations on campus.

The students complain that the department is discriminating against Palestinian students.

:



# 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/>





# Clarity and Care – Navigating Intake to Notice

July 24, 2024

Stephen Silver, Assistant Vice Chancellor &  
Chief Counsel – Civil Rights

Alex Pursley, Systemwide Sr. Director for  
Civil Rights





# TODAY'S SESSION

## Intake and Initial Assessment

- Checklist
- Guidance

## Clarity and Care – Effective Intake

## The Preliminary Inquiry

## Notice of Investigation

## Scenarios

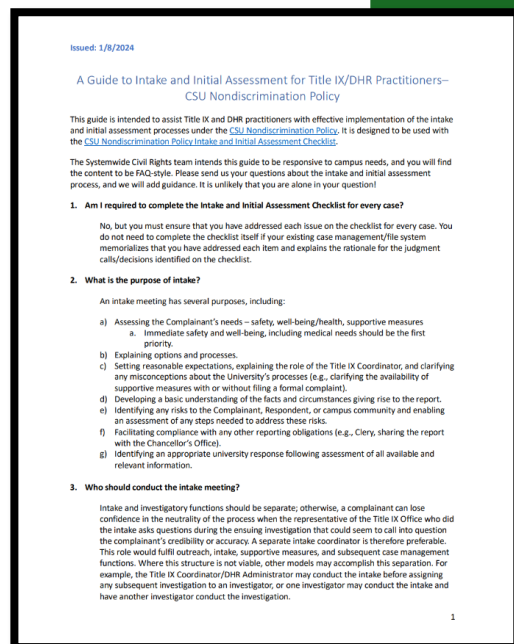
# INTAKE AND INITIAL ASSESSMENT GUIDANCE AND CHECKLIST

The purpose of intake

Using the Intake Checklist

Intake

Strategies for handling various intake outcomes



**CSU Nondiscrimination Policy Intake and Initial Assessment Checklist**

Please ensure that you have addressed each issue in this checklist for every case. You do not need to complete the checklist itself if your existing case management/file system memorializes that you have addressed each item and explains the rationale for the judgment calls/decisions identified in the checklist.

**RECEIPT OF REPORT**

Date Report Received: \_\_\_\_\_ Campus: \_\_\_\_\_

Name of Title IX/DHR team member receiving report: \_\_\_\_\_ Case ID: \_\_\_\_\_

Entered in case management system

**How report was received by the Title IX or DHR office:**

Third Party Report (non-law enforcement)

Third Party Report Acknowledgement Sent

Law enforcement

Complainant (Self) Report

Other (specify) \_\_\_\_\_

**Verbal or written submission:**

Verbal submission

Phone call

In-person

Written submission

Online form submission

Email

Hand-delivered

Other (specify) \_\_\_\_\_

**PARTY INFORMATION**

**COMPLAINANT'S NAME:** \_\_\_\_\_

Complainant is a/an:

Student  Employee (represented or non-represented)

Student Employee  Third Party

Applicant for employment

**Age Consideration:**

Complainant is a minor or was a minor at the time of the alleged incident/s

Assessed for any necessary Child Abuse and Neglect Act reporting obligations

Complainant's Email Address: \_\_\_\_\_

Complainant's Contact Number: \_\_\_\_\_

Complainant has an Advisor:  Yes  No

Name of Advisor: \_\_\_\_\_ Contact Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

Updated: October 2023

1



# CLARITY AND CARE – EFFECTIVE INTAKE

- Plan! (to the extent possible – walk-ins happen)
- Staying on-track and knowing when to redirect
  - “I hear that, but I’d like to bring you back to the question, it’s really important for me to understand your perspective on this – [repeat question].”
  - “[Name], I know it’s important to you to ensure you are sharing everything. Let’s come back to that in a few minutes – before we do that, I’d like to ensure I understand your response to the question I just asked [repeat question].”
  - “[Name], I’m sorry to interrupt you but we only have about 30 minutes left, and it is crucial that I try to get a better understanding of your concerns, which means I need to ask some specific questions. This will help me properly assess your complaint. Can we go through those questions? I am happy to schedule a follow-up meeting to ensure you feel like you have had the chance to share everything that you think it is important for me to know.”
- Being trauma-informed does not mean we do not ask questions, even difficult questions
- Follow-up is acceptable and sometimes necessary
  - “Thank you for the information you have shared with me today. To ensure I fully understand your concerns, I am going to review my notes, and then I would like to schedule 30 minutes with you for me to ask some specific follow-up questions.”

# PRELIMINARY INQUIRY

- What is a preliminary inquiry?
- When is a preliminary inquiry necessary?
- 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 NOTICE OF INVESTIGATION

- There are multiple purposes of the Notice of Investigation, but an important one is to inform the Respondent of what they are being accused
- The Notice of Investigation must:
  - Include the who, what, when, and where, with as much specificity as possible
  - Identify the alleged Policy violations and the applicable Track
  - Satisfy all the other requirements in the Policy (for that Track)
- If there is uncertainty about what the Complainant has alleged, it is essential to get clarity before issuing the Notice
  - Complainant should not be surprised by the characterization of their allegations

# QUESTIONS





# SCENARIO #1



# SCENARIO #1 (ALEX)

You receive a responsible employee report from a faculty member, who shares that one of their students, Ainsley, requested an extension on an assignment because they are “dealing with a sexual assault.” You send outreach to Ainsley, who comes to your office for an intake meeting.

Ainsley starts by sharing that during a recent weekend trip to the lake with the Paddleboard Club, they and another student, Avery, (who is likely to be the next Vice President of the Paddleboard Club) had sex but Ainsley “didn’t really want to.”



# SCENARIO #1 Continued

During the intake, you learn the following from Ainsley:

- Ainsley and Avery hooked up at Ainsley's apartment following a Paddleboard Club social outing approximately three weeks before the lake trip. This interaction was consensual, although they discussed via text after the fact that it would not happen again and agreed that they would just be friends.
- On the day of the lake incident, Ainsley consumed two cans of hard seltzer.
- During the lake trip, Ainsley was ok with Avery kissing them, but Ainsley did not want to have sex.
- When Avery began removing Ainsley's clothing, Ainsley said, "I don't think we should, remember what we said." Avery said, "we can change our minds" and continued removing Ainsley's clothing. Ainsley then "gave up" because they felt like Avery was not going to listen to them.
- Ainsley then gave Avery oral sex because they thought this might distract Avery from intercourse.
- After a few minutes of Ainsley giving Avery oral sex, they then had intercourse. Ainsley says that they do not remember everything that happened or how intercourse ended.
- Ainsley felt coerced into having sex with Avery and reiterates that they never wanted it to happen.

# SCENARIO #1 Continued

- 1) What questions would you ask Ainsley during the intake?
- 2) What additional clarification would you need?
- 3) In the Notice of Investigation, would you include:
  - a) Incapacitation? Why or why not?
  - b) The oral sex? Why or why not?
  - c) Coercion? Why or why not?



# SCENARIO #2



# SCENARIO #2

An employee in the Accounting department, Rhaenyra, complains of a colleague, Aemon. She says while Aemon is generally cordial with other staff members, he has never been warm to her. And he's made odd or offensive statements. For example, several times he has pointed out she wears a necklace with a cross. And one time when there was a discussion about sunburns, he said to her, "Your skin's so dark I bet you can't even get a sunburn." She also says in assembling a coed work softball team, Aemon excluded her, inviting only women under 40. When Rhaenyra asked about the team, Aemon responded sarcastically, "Do you even know what an outfielder does or how to hold a softball bat?" And she thinks he might even be responsible for her getting a "Needs Improvement" on her recent performance evaluation, because he's friends with her supervisor.



## **SCENARIO #2 (Continued)**

- What offenses under the Policy might be applicable?
- What additional information do you need?
- What specific questions should you ask Rhaenyra?
- What are next steps? Any interviews? Review of records?

# QUESTIONS





# Race and National Origin Discrimination, Title VI, and the CSU Nondiscrimination Policy

Civil Rights Conference

Ruth Jones, University Counsel-Civil Rights, Office of General Counsel

Lele Yutzy, System-Wide Senior Director-Civil Rights

July 23, 2024



# Background

- Increased antisemitic and Islamophobic incidents resulting in increased scrutiny of campus responses
- Encampments and demonstrations
- OCR investigations against Universities– including publicly posting that there are “open Title IX Shared Ancestry Investigations” of Columbia, Cornell, Penn, Wellesley, and SDSU
- CA bills on campus climate and notification of rights



## Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance.

*42 U.S.C. § 2000d et seq.*

# OCR Guidance on Race and National Origin Harassment

Universities must provide a nondiscriminatory environment, including both prevention and redress, while not interfering with free speech rights.



# OCR Guidance on Responding to Race and National Origin Harassment

- The university must respond to allegations of antisemitism, Islamophobia, and other types of race and national origin discrimination, ***even in the absence of a complaint from a complainant or identification of a respondent.***
- A single victim may experience a hostile environment when **the conduct of multiple offenders, taken together, meets the definition.**
- The university's response must be **immediate and effective.**
- Harassing conduct need not be directed at a particular individual.
- **Even First Amendment-protected speech may require a university response (but that response will not include discipline).**
  - If the speech meets the “objectively offensive” standard, **the university must respond.**
- <sup>5</sup>The university should communicate to students the actions taken, so students know their concerns are being taken seriously and the protections being afforded to them.

# Title Race, National Origin Discrimination and OCR Enforcement

- OCR issued informal guidance
  - May 7, 2024 Dear Colleague Letter
    - [Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based Shared Ancestry or Ethnic Characteristics \(PDF\)](#)
  - July 2, 2024 Fact Sheet
    - [Fact Sheet: Harassment based on Race, Color, or National Origin on School Campuses \(PDF\)](#)
- Public database of open investigations:
  - OCR opened more than 150 Shared Ancestry Investigations in Fiscal Year 2024
  - <https://www2.ed.gov/about/offices/list/ocr/sharedancestry-list.html?ftag=MSF0951a18>
- Recent resolution of race, national origin (shared ancestry complaints)



# Recent OCR Resolutions

- Brown: [Brown University \(PDF\) \(ed.gov\)](#)
- CUNY: [City University of New York Resolution Letter \(PDF\) \(ed.gov\)](#)
- University of Michigan: [University of Michigan Resolution Letter \(PDF\) \(ed.gov\)](#)
- Lafayette: [Lafayette College Resolution Letter \(PDF\) \(ed.gov\)](#)

# CSU's Response to Race and National Origin Discrimination





# A Multipronged Approach To Addressing Discrimination

## CSU Nondiscrimination Policy

- Assessment of individual accountability
- Generally, requires a complainant and identification of respondent(s). The DHR Administrator can initiate an investigation without a complainant with sufficient factual allegations for an investigation.
- Intake interview issues
  - Specificity, clarify feeling unsafe or uncomfortable
  - Clarify/explanation of possible stereotypes or coded insults/threats
- Free Speech and Academic Freedom Analysis

## Supportive Services

- Maintaining student access to education programs and opportunities
- University provides **reasonable** supportive services **even in the absence of an investigation or other response**
- Supportive Service Categories
  - Housing
  - Parking
  - Safety
  - Academic

## Addressing the Campus Climate

- Preventive and reactive response to discriminatory environment
- Requires the collaboration of multiple university units (Identify existing infrastructure for this task)
- Other conduct of concern, professional misconduct analysis
- Communication establishing community values, expectations for behavior and resources for reporting and support
- Consider examples from the *OCR document Protecting Students from Harassment and Hate Crime, A Guide for Schools, January 1999\**

# Highlights from the Resolution Agreements

- Application of the nondiscrimination policy only one element of university response; a response may also include supportive measures and addressing campus climate
- Outreach to individuals should include information on reporting and supportive services
- OCR found a concern that even after outreach, the University conditioned a fuller response on the Complainant's response to that outreach.
- The alleged use of social media as harassment should analyzed for impact of social media on campus environment
  - Free Speech issues should be an aspect of the analysis



# Responses to Objectively Offensive Conduct

- Assess whether it is appropriate to address both individuals and campus climate
- Provide reasonable supportive services to individuals impacted by objectively offensive conduct – may include others who did not make a formal complaint
- Have an educational conversation with students
- Apply other policies, such as professional misconduct, computer use, in a content neutral, consistent fashion
- Address speech with more speech, this will typically not be sufficient to respond to objectively offensive conduct

# OCR Suggestions for Addressing Campus Climate

- Assess the campus climate to determine the prevalence and types of harassment that may exist and the potential for hate-motivated violence
- Institute, improve, or expand activities to prevent or reduce prejudice and conflict
- Develop guidelines and procedures for collaboration with law enforcement officials for any criminal conduct
- Develop crisis intervention plans to minimize the possibility of violence or disruption of the educational process
- Develop a process to document all harassment incidents and the university's response
- Regularly assesses the effectiveness of the university's anti-harassment efforts
- Written and verbal communications to the campus community offering supports during crisis periods; and stating opposition to stereotypical, derogatory opinion and support for an inclusive campus environment

Adapted from OCR document Protecting Students from Harassment and Hate Crime, A Guide for Schools, January 1999  
<https://www2.ed.gov/about/offices/list/ocr/checklist.html>



# Communication in Response to an Incident

## Adapted from OCR Guidance

- Restate community values and expectations for behavior
- State how the university will respond to the incident (What will the university do? This will probably require multiple statements or website updates. )
- Provide information on how to report allegations of harassment and discrimination
- Provide information on how to access supportive measures

# Educating the Community

## Ongoing Communication Topics

- What is racial, national origin harassment and discrimination?
- What conduct/speech violates the nondiscrimination policy or the student conduct policy?
- How to report harassment and discrimination
- Free Speech
  - Why is freedom of speech important?
  - What speech is protected speech?
- How to engage in civil conversations



# QUESTIONS?



# Update re the Kansas Injunction & CSU Impacts

**STEPHEN SILVER**

Assistant Vice Chancellor & Chief Counsel – Civil  
Rights

**HAYLEY SCHWARTZKOPF**

Associate Vice Chancellor for Civil Rights  
Programming and Services





# BACKGROUND OF KANSAS CASE

- Federal court: Plaintiffs are four States (not including California), an individual and three private organizations; Defendant is U.S. Dept. of Education
- Challenge to 2024 regulations, focusing on definition of “sex” that includes gender identity and gender expression
- Plaintiffs had sought a nationwide injunction; court granted more limited scope
- Injunction issued against Dept. of Ed., preventing enforcement of 2024 regulations but does **not** affect California protections for gender identity and gender expression

# KEY DATES

- July 2, 2024: Injunction issued
- July 15, 2024: Deadline to identify universities with Plaintiff members; this is when we learned of CSU campuses
- July 17, 2024: Ruling denying Dept. of Education's request for a partial "stay" (delay) of the injunction



# WHAT INJUNCTION MEANS FOR CSU

- 10 CSU campuses identified
- Potential impact on implementation of 2024 regulations
- Consulting with OGC, stakeholders and experts in California
- No decision made yet

# WHAT WE KNOW . . .

- One legal entity
- Consistency
- Operational impacts
- August 1



# WHAT WE WANT TO DO . . .

- Care for students, employees, community members
- Implement decision with least amount of confusion
- Clearly articulate impacts of any decision

# Questions?





# Informal Resolution

Best Practices for Title IX and DHR Administrators

Jessica Brown- Senior Systemwide Civil Rights Director

Sarah Clegg – Senior Systemwide Civil Rights Director



## This resource IS intended to:

- Offer Title IX and DHR practitioners with key concepts, guiding principles, and best practices related to Informal Resolution.
- Foster creative thinking about using methods of Informal Resolution before, in place of, during, or following a formal investigation and/or hearing.

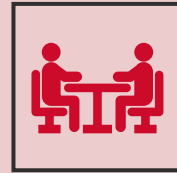
## This resource IS NOT :

- A blueprint for program design, implementation, or assessment.
- A deep dive into the specifics of the Title IX regulations or CSU's Nondiscrimination Policy and Procedures related to Informal Resolution.
- Legal advice.

CSA Recommendation: *“To ensure the effectiveness of the informal resolution process, the Chancellor’s Office should, by July 2024, provide additional guidance to campuses related to this process. In particular, the guidance should clarify how campuses should offer complainants information about possible remedies that address their concerns. For example, the Chancellor’s Office could work with campuses to create a template for an informal resolution agreement that also includes examples of specific corrective action options or other outcomes that parties could consider when determining remedies.”*



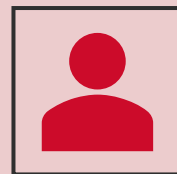
# What IS Informal Resolution?



Informal Resolution is a flexible process involving a voluntary agreement by both parties that is subject to approval by the TIXC. Informal Resolution is one option that may be available for resolving a complaint under the CSU Nondiscrimination Policy.



A voluntary complaint resolution process that provides an alternative to a formal grievance or complaint resolution process (such as a full investigation and/or hearing under the CSU Nondiscrimination Policy & Procedures),



Wherein a facilitator assists the parties in resolving the concerns alleged and/or reported by the Complainant.



Typically, prioritizes educational and conciliatory approaches over a contestation of the facts.

# Informal Resolution – Is it an Option?

- Informal Resolution is not appropriate for every situation.
- For matters where Informal Resolution is not prohibited by Title IX or the CSU Nondiscrimination Policy, the TIXC or DHRA must still determine whether Informal Resolution is appropriate for each case.
  - *May or may not be an option if the TIXC/DHRA files the Formal Complaint in lieu of the Complainant.*
  - *Informal Resolution is prohibited, and therefore not an option, in matters involving allegations that an employee sexually harassed a student\*.*
- Once a determination is made as to whether or not a respondent violated the Policy, Informal Resolution is no longer an option.



Factors to consider in determining whether Informal Resolution is an *appropriate* option.

- Safety
- The gravity or severity of the alleged offense
- Patterns and Recidivism
- History between the parties

Remember...

Show your work,

Document your analysis, including if you decide that IR is *not* appropriate

Monitor for consistent application and implicit bias (i.e. similar fact patterns should be handled consistently).

## When there is a history of emotional, physical and/or sexual abuse between the parties:

- Generally speaking, Informal Resolution is NOT a good option when the parties were previously or are currently in a relationship with each other that is/was allegedly abusive.
  - *This includes all forms of power and control in relationships (i.e. verbal/emotional abuse, physical abuse, sexual violence, financial abuse).*
  - *Abusive relationships involve patterns of deceit, intimidation, manipulation, and often very complicated dynamics.*
  - *The history and use of power, control and/or violence in the relationship inhibits effective communication and the ability to reach agreement in the Informal Resolution process.*
  - *The Informal Resolution process itself can provide an abusive partner with an opportunity to use the process to continue patterns of deceit, intimidation, manipulation and abuse (often in ways undetectable to the facilitator of the Informal Resolution process).*

Considering the history of the parties when determining whether Informal Resolution is an *appropriate* option.

## Facilitators

- Facilitation of an Informal Resolution process requires specific skill sets and training.
- Informal Resolution practices are not just “add on” responsibilities of a TIXC/DHRA.
- Facilitators of any given Informal Resolution process must be properly trained in the process(es) they use (for example training in mediating difficult conversations).
- Facilitators must be free from conflicts of interest and bias and must be trained to serve impartially.
- TIXCs and DHRAs should seek to connect and engage with existing Informal Resolution programs/services and professionals, whether campus or community-based. For example, Restorative Justice, Mediation, and other Informal Resolution processes should be facilitated by subject-matter experts specially trained to facilitate such processes.



## Resolution process is a voluntary process?

An Informal Resolution is a ***VOLUNTARY*** process.

- Communicate clearly. Provide the parties with something in writing that describes the Informal Resolution process\*.
- Be timely, but do not rush or pressure the parties to engage or not engage in an Informal Resolution.
- Require the parties to sign a clear agreement to participate in Informal Resolution\*.
- Check in with the parties periodically. Let the parties know proactively that you will be doing so as a matter of course and that your check-ins do not mean you are making any assumptions about their thoughts or feelings.
- Reiterate where appropriate that either party can stop the process. Again, let the parties know proactively that you may remind them of this fact as a matter of course and that you're doing so does not mean you are encouraging them to stop or continue the process.
- Ask yourself, what might be some signs or "red flags" that a party's participation may not be or is not voluntary?
- General rule of thumb: When in reasonable doubt share your concern and pause the process to address your concern(s).

Reminder: Show your work, document your efforts to ensure the parties are voluntarily engaged in the Informal Resolution process (not just at the outset but also along the way).

## Discussing Options

## An Empowerment Approach

### **Welcome & Reassure**

Let the person know you are glad they asked for help and that an important part of your job is to provide them with information about options and resources for additional information and support. You want to communicate that We Care.

### **There Are Options**

When someone reports they experienced harm, their options may include doing nothing, getting medical and/or mental health care, talking with a victim/survivor advocate, seeking supportive measures, filing a complaint with the university, filing a police report, seeking a court-ordered protective order, and/or filing a civil suit.

For those accused of causing harm, their options may include seeking mental health care, engaging in respondent services offered by the campus, choosing not to participate in a formal or informal resolution process, admitting responsibility, and seeking counsel.

### **Self-Determination**

Explain you can help individuals understand the various options available to them and to support them in their decision-making process. And, that it is important they decide what option or options they feel are best for them.

## Discussing Options:

## An Empowerment Approach

### **There are no “shoulds”**

Communicate to the party that there is no one best option for someone in their situation, there are no hard & fast rules about what someone in such circumstances “should” do.

### **Individuals have agency and choice**

Let them know they may choose to seek and/or engage in none, one, or multiple options.

### **Time to think it over**

Let the person know that they don’t have to decide right now, acknowledge that they might feel uncertain and need some time to think about it, that is fine.

### **People change their mind**

Similarly, it is helpful to let the party know they can change their mind. Let them know it is common for someone to decide on a particular course of action and later decide they want to do something else.

### **Resources for support**

It is always important to share with the parties that there are resources for support and what those resources are. You might suggest they consider talking to a professional counselor, seek legal counsel, or confide in someone they trust to help them decide.



## Discussing Options:

## How do I decide?

### Things to Consider

Let the individual you are working with know that sometimes it helps people to think about how they feel about the following questions. Their answers might help them decide what option(s) are best for them.

- **What is important to you?**
  - *Punishment*
  - *Accountability*
  - *Reparation*
  - *Closure*
  - *Time*
- **What is your comfort level?**
  - *Working with the other party, either directly or indirectly?*
  - *Discussing the complaint with others (investigators, hearing officers, etc.)?*
  - *Stating what you want versus asking others to reach a decision?*

# Neutral & Impartial

Talking about  
Informal  
Resolution:

Neutral &  
Impartial

- When discussing any option with a party it is very important to refrain from directly or indirectly encouraging the party to exercise or not exercise any given option.
- There are advantages and disadvantages associated with all options. Those are not the same for every person.
- These advantages and disadvantages are dependent upon what each party hopes to accomplish, their priorities, their capacity to engage in various ways, etc. There is no one right way.
- Prioritize a non-judgmental approach and check yourself for any bias you might have.

Talking about  
Informal  
Resolution:  
  
Potential  
Advantages &  
Disadvantages

---

Often less time-intensive

---

Greater flexibility

---

Greater party participation in determining the outcomes

---

Remedies and/or sanctions can be tailored to meet the needs of unique situations

---

May enhance feelings of agency and empowerment for a party

---

May increase compliance with outcomes

---

Most often does not include an admission of responsibility

---

Some parties may engage in the informal resolution process (intended or not) in a manner that seeks to assert power or control or further perpetuate unhealthy and/or abusive relationship dynamics.

---

This is relatively new to higher ed, we don't have a deep bench of experience.



## Talking about Informal Resolution:

## Sample Outcomes

- While Informal Resolutions are not new to the field, they are not commonly understood by those outside of the field.
- It is common for the parties involved to feel like they have no idea what such an agreement might actually look like.
- For this reason, it can help to let the parties know a guiding principle is to craft an agreement with terms that are reasonable given the allegations and surrounding circumstances. Explain that, while the parties participate in identifying the terms of an Informal Resolution, the TIXC/DHRA must approve the terms of the Informal Resolution.
- Also, it can help to provide the parties with some general EXAMPLES of what might be included in an Informal Resolution agreement.
- It is important to provide general examples to stimulate the parties' own thinking and to refrain from providing them with specific outcomes you think should be a part of the agreement.

## Talking about Informal Resolution:

## Sample Outcomes

- Administrative accommodations such as adjusting class/work schedules, changing class sections or work environment/building, etc.
- Apologies
- Voluntary educational, mentoring, coaching, or counseling sessions that may or may not include stipulations (i.e. proof of successful completion, statement from the mentor/coach/counselor that the respondent actively participated in the program and/or successfully completed the program, etc.)
- Relocation or removal from a residence hall or other on-campus housing
- Limitations on or agreements related to participation in and/or presence in/at events, extracurricular activities, student organizations, recreational facilities, athletics, etc.
- Verbal cautions/warnings
- Training
- Collaborative agreements on behavioral or institutional changes
- On-going No-Contact Directives
- Alternative seating arrangements for graduation
- Voluntary suspension or withdrawal from university

## Writing Informal Resolution Agreements

**For many reasons, including enforcement, it is important that:**

**Informal Resolution agreements are S.M.A.R.T.**

**Specific:** the agreement specifies what will happen to resolve the situation, who will do what, where and when it will happen, how it will happen, and what happens if the terms of the agreement are not met.

**Measurable:** all parties should know and agree on the conditions under which each term/item contained in the agreement is ongoing and being met and/or time-limited and completed.

**Attainable** – all items agreed upon should be realistic and achievable

**Relevant** – the agreed-upon solution(s) should be directly related to the allegations and the harm caused by the alleged conduct.

**Time-Based** – a deadline should be set for completing each term of the agreement.



# FAQ: Timeliness and Informal Resolution

- How long should the process take?
  - *There are no hard and fast rules.*
  - *The 2020 Title IX regulations call for the process to be “reasonably prompt” and allow for extensions “for good cause” with written notices to the parties.*
  - *The timeline should also comply with the CSU Nondiscrimination Policy and any relevant state law.*
    - "...no later than 60 Working Days after both Parties provide voluntary, written consent to participate in the Informal Resolution process, unless the Parties and the Title IX Coordinator/DHR Administrator agree to an extension"

# FAQ: Types of Informal Resolution

- Conflict Coaching
- Facilitative Conversations
- Shuttle Facilitation
- Mediation
- Restorative Practices
- Adjudication/Admission of Responsibility

Questions?

Thank you!!



# INTERSECTIONS BETWEEN OTHER CONDUCT OF CONCERN AND CIVIL RIGHTS

2024 Systemwide Civil Rights Conference

July 24, 2024

*Laura Anson, Senior Systemwide Director, Civil Rights*

*Dr. Sarah Fried-Gintis, Senior Systemwide Director, Academic and Staff HR*

*Marc Mootchnik, Assistant Vice Chancellor & Chief Counsel*



# TODAY



Context



Defining  
OCC



Guidance



Intersections



Q & A

# CONTEXT





## Cozen O'Connor Assessment

- “On every campus, there is no policy, process, or practice for consistently responding to other conduct of concern that may not rise to the level of a violation of the University’s Nondiscrimination Policy (typically, where the conduct is not severe, persistent or pervasive) or that is not based on a protected status (for example, unprofessionalism, bullying, abusive conduct).”
- “...other conduct of concern can be deeply impactful, both to individuals and to the campus climate and culture more broadly. To this end, we observed a great need to acknowledge the prevalence of this conduct, to set expectations about forms of conduct that are disruptive to campus culture and climate, and to develop specific processes for reporting, responding to, and tracking other conduct of concern.

## Joint Legislative Audit Committee

- “Campuses did not consistently take disciplinary or corrective action to address problematic behavior.”

# MISCONDUCT

**Other Conduct of Concern**

## **Title IX**

- Sex discrimination, Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking

## **Discrimination, Harassment and Retaliation**

- Age, Disability, Gender, Genetic Info, Gender Identity, Gender Expression, Marital Status, Medical Condition, Nationality, Race or Ethnicity, Religion/ Religious creed, Sex, Sexual Orientation, Veteran/ Military Status

**Office of Civil Rights**

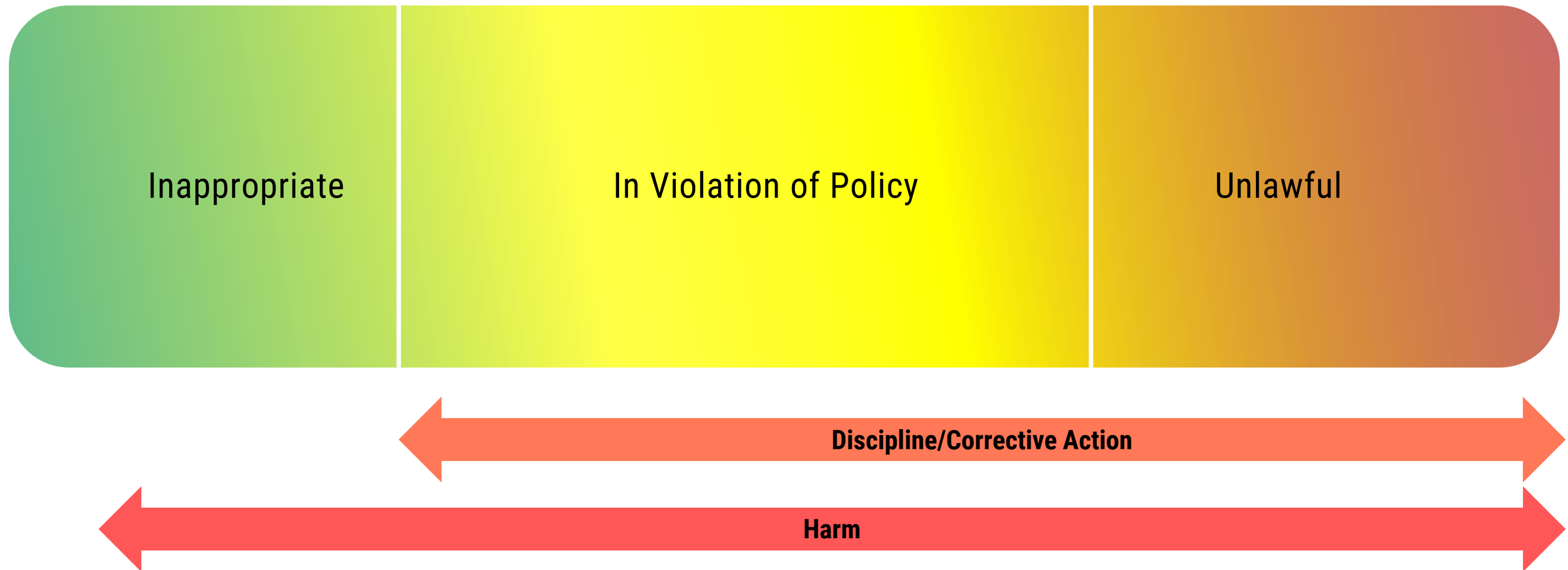


# DEFINING OCC





# BROAD SPECTRUM OF CONDUCT



# DEFINING OCC

The CSU refers to conduct that is incongruous with CSU's shared values as "Other Conduct of Concern" (OCC). OCC includes one or more of the following:

Conduct	is directed at a person because of their protected status, but that does <u>not</u> violate CSU's Nondiscrimination Policy because the conduct is not "severe," "pervasive" or "persistent" as defined by CSU policy and federal and state law.
Conduct	that is materially disruptive to the learning, living, or working environment of the CSU, but for which discipline likely may not be imposed because it constitutes protected speech or conduct.
Conduct	that is considered "abusive" as defined in Cal. Govt Code section 12950.1(h)(2) or otherwise unprofessional, for which discipline may be imposed in accordance with Education Code section 89535(b).

# EXAMPLES OF OCC

CA Ed Code  
89535

Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes:

- Immoral conduct.
- Unprofessional conduct.
- Dishonesty.
- Incompetency.
- Addiction to the use of controlled substances.
- Failure/ refusal to perform normal & reasonable duties of job.
- Felony conviction/ any misdemeanor involving moral turpitude.
- Fraud in securing appointment.
- Drunkenness on duty.

Additional  
Examples:

- |                          |                            |
|--------------------------|----------------------------|
| Identity-based harm      | Microaggressions           |
| Bias incidents           | Acts of intolerance        |
| Unprofessional conduct   | Abusive conduct (bullying) |
| Harassment               | Hostile language           |
| Dishonesty               | Fraud                      |
| Violations of CSU Policy |                            |



# POTENTIAL RESOLUTIONS

- Education, Counseling & Training
- Restorative Processes
- Corrective Action or Discipline
- Violation of Student Conduct Code



# OCC AND PROTECTED ACTIVITIES

- Individuals have the right to freely express their opinions and beliefs, even when those expressions may be controversial, incendiary, and/or upsetting.
- OCC may involve protected activities such as the right to free speech and academic freedom which are not subject to discipline.
- These forms of OCC are generally addressed through non-disciplinary actions such as education, counseling, coaching, mentoring & training, and restorative processes.
- Discipline may be imposed where a law and/or university policy has been broken. Violations of policy often related to OCC and protected activities include:
  - Time, Place and Manner (TPM)
  - Non-Discrimination
  - Inappropriate use of public resources



# KEY CONCEPTS IN THE GUIDANCE

1

OCC applies to all members of the CSU community.

2

Supervisors will typically respond to OCC.

3

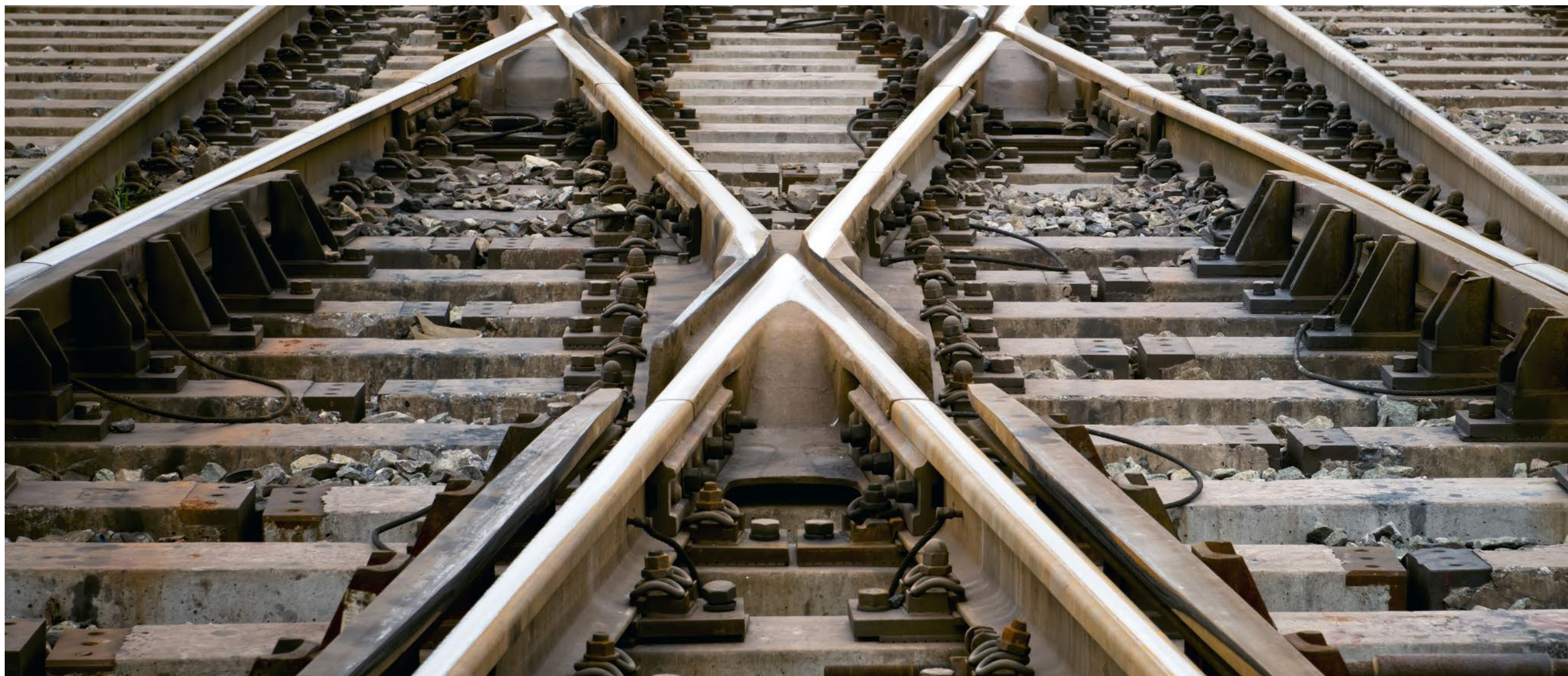
Supportive measures are a critical means of creating a culture of care and accountability.

4

Addressing OCC is not limited to discipline.



# INTERSECTIONS





# REPORTING CHALLENGES





# WHO SHOULD RESPOND?

**Employee**

**Supervisor**

**Administrator  
(Often Civil  
Rights)**

**Collaboratively**





# INITIAL ANALYSIS OF CONDUCT

## BY A SUPERVISOR OR NON-CIVIL RIGHTS ADMINISTRATOR

**Immediate harm or danger:** Could the reported conduct pose ongoing harm to community members, and does it need to be addressed immediately?

**Policy violations:** Does the conduct violate systemwide or campus policy?

**Protected status violations:** Who is best positioned to address the conduct, provide support, investigate, and resolve ?

**Academic Freedom and First Amendment Rights:** Is this conduct a protected activity?

**Individuals involved:** Do the provisions of a collective bargaining agreement apply? Can a supervisor address the conduct?

**Extent of fact-finding required:** Does the report warrant further fact-finding? If so, by whom?

**Likely resolutions:** Is the conduct subject to corrective action or formal discipline, or is it more appropriately resolved via other mechanisms?



# ADDITIONAL TWISTS AND TURNS

- Civil Rights Investigations
  - Determines no violation of the Non-Discrimination policy
  - Discovers OCC and must coordinate response.





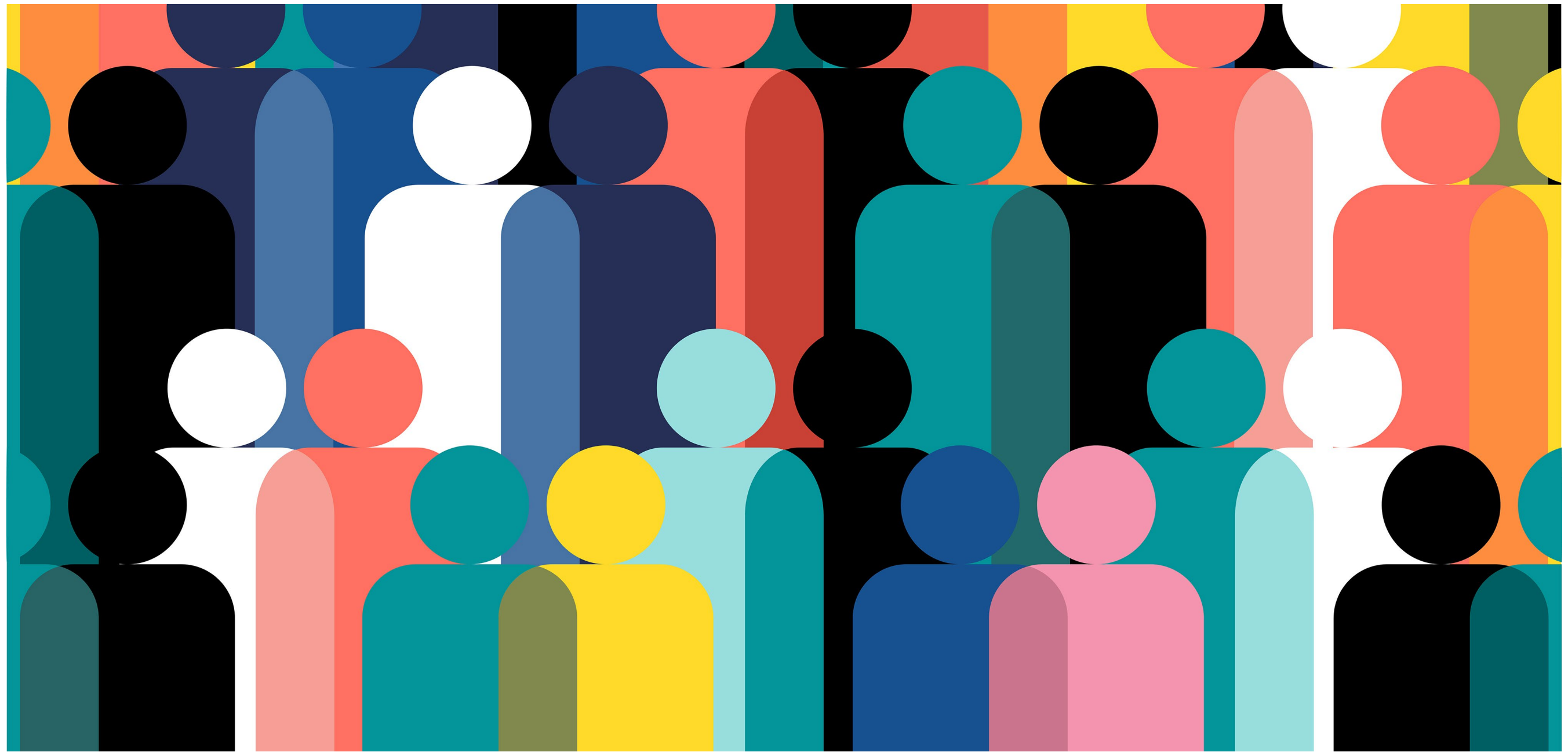
# The Hand Off

- When OCC is reported to the Title IX/DHR program, in many instances, the nature of the conduct...would fall outside or would not meet the threshold for a violation of the Nondiscrimination Policy ...this conduct is often then referred to another university office... on most campuses, there is no consistent, coordinated, documented process for addressing the hand-off.
- When individuals report OCC to the Title IX/DHR program, which does not provide a substantive response, those individuals often develop a negative perception of the effectiveness of the Title IX/DHR program ... these reporting experiences connected to OCC shape the broader community perception of the utility of reporting discrimination and harassment.





# OVERLAPPING ISSUES



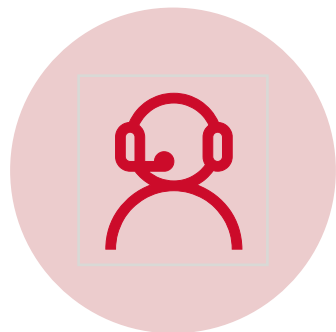
# NEXT STEPS



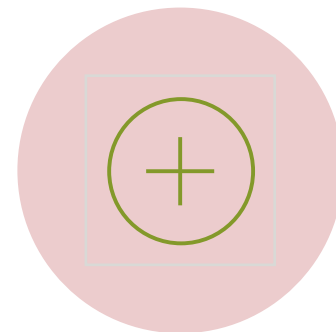
Meet with stakeholders



Finalize guidance



Trainings



+2 More

# STAKEHOLDERS

<i>Stakeholders</i>	<i>Recommendations</i>
Chancellor’s Civil Rights Oversight Committee	
Presidents	Reporting Hotline
Unions	Systemwide Values
Academic Senate	Additional Context
Provosts	Address Resource Restriction
CABO	Too Legalistic
Vice Presidents of Student Affairs	Discomfort with Discretion
Associate Vice Presidents of Human Resources	Academic Freedom
Associate Vice Presidents of Faculty Affairs	Training
Senior Diversity Officers	Assessment
California State Student Association	Upper Management
	Enforcement



# ADDITIONAL PROJECTED GUIDANCE

Trainings, FAQs, Best Practices

- Fact-Finding Practices
- Documentation Practices
- Conflict Resolution Workshops
- Case Studies



# QUESTIONS FROM YOU



The session description leaves out OCC for students which is the largest population on campuses and could see a great impact to Dean of Student Offices. Was it intentionally left out or will it be addressed at a later date/time?



This seems like a lot of work. Will campuses need to hire new people to deal with this?



Is there a plan to provide training to individuals who will be responsible for addressing other conduct of concern? Many (especially Faculty Affairs AVPs) do not have experience handling employee relations, etc.



How can we best stop the ping-pong from HR/FA to us then back to HR/FA? Is there a way to do some joint intakes?



What is the expectation of the follow up between teams (HR, FA, Student Affairs) as it relates to OCC? Assuming educational conversations, restorative justice, training, conflict resolution, etc. Any other thoughts and/or training available for colleagues responsible?



Will there be systemwide standards for campuses to consistently track other conduct of concern?



Are there specific criteria the CO recommends be included in any referral of other conduct of concern? (Will there be a template memo)

# QUESTIONS AND DISCUSSION





# Triage: Example 1

Naomi is an Assistant Director in the financial aid office at a CSU campus. Her office is located next door to a peer (Mason) who enjoys listening to music while he works. The lyrics of these songs often include derogatory language and racial epithets. Naomi reports to her supervisor, Max, that the music is offensive to her. Naomi finds the music misogynistic and racist. What should Mason do with this information?





## **TRIAGE: Example 2**

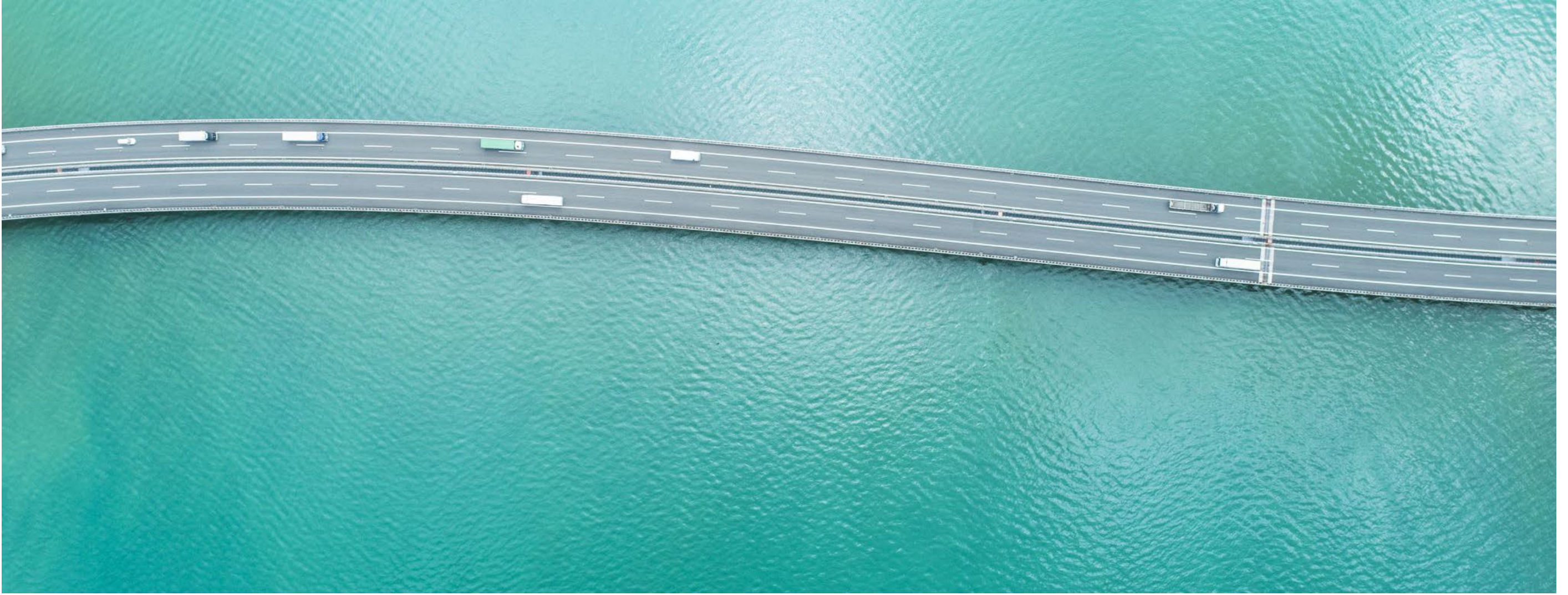
Kingsley is an Assistant Professor in the department of physics. As part of his 3-year evaluation, the department chair (Jordan) notes that Kingsley, among other things, needs to improve his approach to communicating with peers. Jordan notes that he has been disruptive in several department meetings. Whereas Kingsley had been teaching a combination of classes on campus and remotely, he is offered all classes on site the next semester. Kingsley reports to you as Dean that he believes he is the subject of retaliation for exercising his right to free speech and criticizing colleagues for discriminatory practices in teaching. What should the Dean do with this information?





**THANK YOU**

[sfried-gintis@calstate.edu](mailto:sfried-gintis@calstate.edu)







California State University Civil Rights  
Programming and Services Conference



## Session 1

# Words Matter: Unpacking Every Element of a Definition

July 25, 2024



# Natasha J. Baker

Co-founder and Managing Attorney

Advises institutions of higher education on a broad range of legal matters, including labor and employment law, Title IX, and compliance issues. Regularly presents training sessions to administrators and faculty around the country on higher education issues.

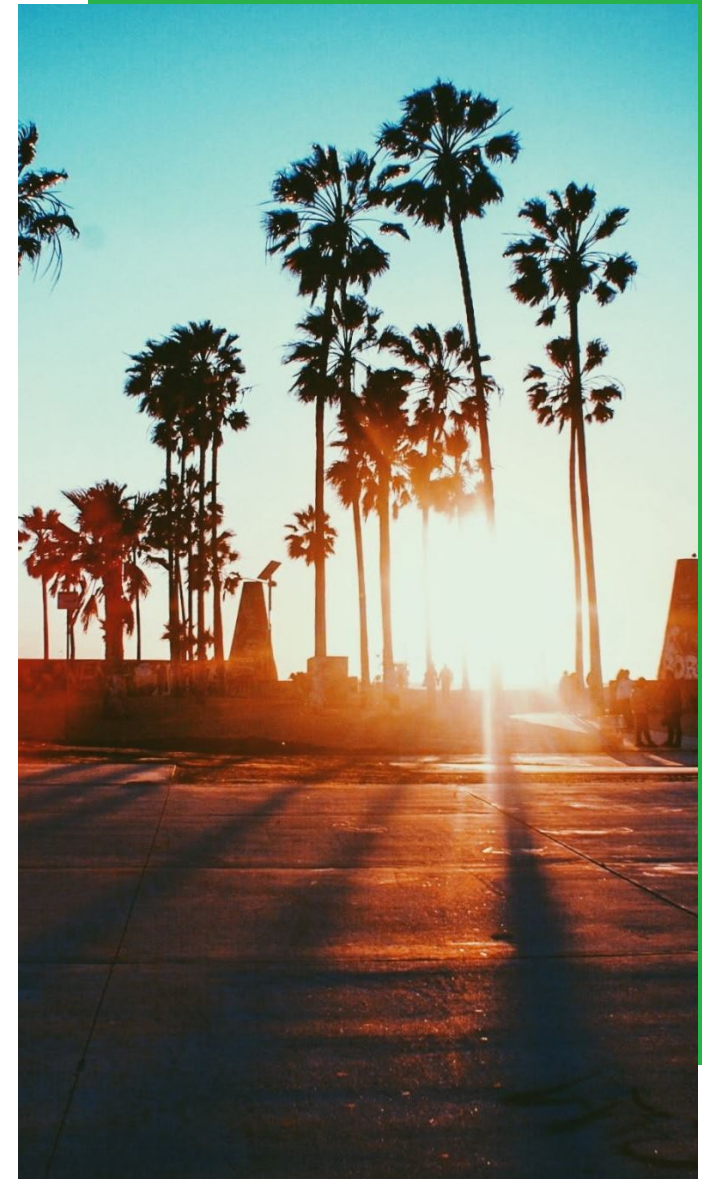
Past member of the National Association of College & University Attorneys (NACUA) Board of Directors and frequently speaks for NACUA, the Council of Independent Colleges (CIC), and other higher education associations.





# Session 1: Outcomes

- How to organize an investigative approach based on the definitions of prohibited misconduct and other key definitions being used in the investigation
- How to analyze elements of definitions at varying stages in the investigative process





## Reminders

---

- This presentation is not legal advice.
- Investigations are challenging.
- There are no bad or dumb questions.

# The Importance of Definitions

- Determine which policy is being invoked
- Determine the correct charges for the Notice of Investigation and Allegations
- Assessing which questions to ask
- When to amend a NOIA
- Analyzing elements (when a decision-maker)
- Assessing an appeal



## Which Definition(s) Challenges You?

- Discrimination based on Protected Status
- Harassment based on Protected Status
- Sexual Harassment (including hostile environment and quid pro quo)
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Misconduct
- Prohibited Consensual Relationships
- Retaliation under the Nondiscrimination Policy
- Definitions of Protected Statuses
- Affirmative Consent

# Case Study

Students have returned for Fall 2024. Tensions are high on campus in advance of the election and the proliferating protests based on current events. Your office receives a report from a student that they feel unsafe walking through campus as a result and they would like to know how to file a complaint under your DHR Policy.

***What definitions immediately come to mind?***



# Potential Definitions?

- Discrimination?
- Harassment Based on a Protected Status?
- Retaliation?
- Other Conduct of Concern?





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# Discrimination

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.**



# Discrimination (continued)

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.

An allegation that an Employee is receiving unequal pay because of their Protected Status (for example, under the California Equal Pay Act) constitutes a Discrimination Complaint under this Nondiscrimination Policy.





# Harassment

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 (continued)

Harassment may occur when:

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

1. Decisions that adversely affect or threaten employment, or which are being presented as a term or condition of the Complainant's employment; or
2. 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

# Harassment (continued)

Harassment may occur when:

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.







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## Harassment (continued)

Harassment includes, but is not limited to, verbal harassment (e.g., epithets, derogatory comments, or slurs), physical harassment (e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement), and visual forms of harassment (e.g., derogatory posters, cartoons, drawings, symbols, or gestures.). Single, isolated incidents will typically be insufficient to rise to the level of harassment.





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# Retaliation

Retaliation means that a substantial motivating reason for an Adverse Action taken against a person 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 Nondiscrimination Policy,



## Retaliation (continued)

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

- Assisted or participated in an investigation/proceeding under this Nondiscrimination 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 Nondiscrimination Policy.





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## Retaliation (continued)

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





## Case Study

During the intake, the student identifies that when walking through campus, they have heard anti-trans slurs and antisemitic protest chants. These are not directed at the student. The student cannot identify who made these statements. (Reminder re free speech analysis during intake.)



# Potential Definitions?

- ~~Retaliation?~~
- Harassment Based on a Protected Status?
- ~~Discrimination?~~
- Other Conduct of Concern?





## Case Study

The student returns to your office a week later. This time they report that they can identify an individual who is engaging in antisemitic protest chants. The student is Jewish and they do not feel they should hear these slurs that are generally recognized as offensive. It is their economics faculty member, who is failing the student, which the student believes is in response to their attempts to confront the faculty member regarding the protest chants. (This confrontation happened during a recent economics lecture.)





# Potential Definitions?

- Discrimination?
- Harassment Based on a Protected Status?
- Retaliation?
- Other Conduct of Concern?



# Case Study

A Notice of Investigation and Allegations is issued against the faculty member for

- Harassment
- Discrimination (? – because of Protected Status)
- Retaliation

Next steps: create an investigation plan to investigate these specific definitions. (Use the system-wide intake checklist and guidance.)

***What elements of each definition do you need to elicit?***





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# Potential Definitions?

- Discrimination
  - Adverse Action
  - Because of Protected Status
  - A Substantial And Material Adverse Effect On The Complainant's Ability To Participate In A University Program, Activity, Or Employment





# Potential Definitions?

- Retaliation
  - Adverse Action
  - Because of a Protected Activity
  - Substantial Motivating Reason



# Potential Definitions?

## Harassment

Unwelcome verbal, nonverbal or physical conduct engaged in **because of** an individual Complainant's Protected Status.





# Potential Definitions?

Harassment can occur when:

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.





## Case Study

During the investigation, the faculty member stated that they felt unsafe when the student confronted them during the lecture. They would like to file a complaint against the student. The faculty member does not identify that they feel that this conduct is based on a Protected Status. (Should you ask?) They want you to take action against this retaliation that they feel is based on their expression of free speech during the recent campus protests. (Tip: if doing an intake, use the system-wide intake checklist and guidance.)



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# Potential Definitions?

- Discrimination?
- Retaliation?
- Harassment Based on a Protected Status?
- Other Conduct of Concern?





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# Potential Definitions?

A Notice of Investigation and Allegations is issued against the student for

- Other Conduct of Concern.

Next steps: create an investigation plan to investigate these specific definitions.





# Case Study

During the investigation, the following reports are made:

- (1) The student described their need to confront the faculty member during an economics lecture regarding the faculty member's role in recent campus protests. They feel this is part of their academic freedom.
- (2) In addition, the student provided the investigator with information that the faculty member was shouting antisemitic slurs that were specifically directed at them. When asked how they felt it was directed at them, the student reported that the faculty member used their name and a specific antisemitic slur (one that is generally recognized as offensive) as they walked by.
- (3) Since that shouting of the slur occurred, they have been uncomfortable attending their economics with the faculty member and they are now failing the class.



# Case Study

During the investigation, the following reports are made:

- (4) The faculty member denies making such a statement at the protests.
- (5) No other witnesses recall hearing the faculty member making such a statement, though they acknowledge that the protests were chaotic and loud such that they might not have heard it.
- (6) The faculty member provides evidence of the student's tests and quizzes predating the initial report to your office – the student has experienced a significant decline over the course of the term and is now failing due to their failure to attend class or participate in tests and assignments.





# Case Study

During the investigation, the following reports are made:

(7) The faculty member felt unsafe when confronted by the student in class due to the aggressive nature of the statements and the lack of connection to the topic of the lecture. The faculty member did not identify that this confrontation was based on a Protected Category but, at another point in the interview noted that their religious identity differed from the student's.

(8) Students from the economics class confirmed the student was aggressive as evidence by their raised voice and insistence on continuing their attack on the faculty member, even when it was clear that the topic was over, and everyone was uncomfortable.





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# Analyzing Definitions

- Discrimination against the student?
  - Adverse Action?
    - Failing
  - Because of Protected Status?
    - Any evidence?
  - A Substantial And Material Adverse Effect On The Complainant's Ability To Participate In A University Program, Activity, Or Employment?
    - Impact of class participation?



# Analyzing Definitions

- Retaliation Against the Student for Reporting
  - Adverse Action
    - Failing
  - Because of a Protected Activity
    - Existence of protected activity?
    - Because of?
  - Substantial Motivating Reason
    - Motivation





# Analyzing Definitions

## Harassment

- Unwelcome verbal, nonverbal or physical conduct engaged in **because of** an individual Complainant's Protected Status.
  - Unwelcome verbal conduct
  - Because of Protected Status





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# Analyzing Definitions

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.

- Severe or pervasive?
- Effect?
- Considered by Complainant?
- Denies or substantially limits?





# Questions?





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California State University Civil Rights  
Programming and Services Conference





## Session 2

# Word Against Word? Assessing Credibility

July 25, 2024



# Natasha J. Baker

Co-founder and Managing Attorney

Advises institutions of higher education on a broad range of legal matters, including labor and employment law, Title IX, and compliance issues. Regularly presents training sessions to administrators and faculty around the country on higher education issues

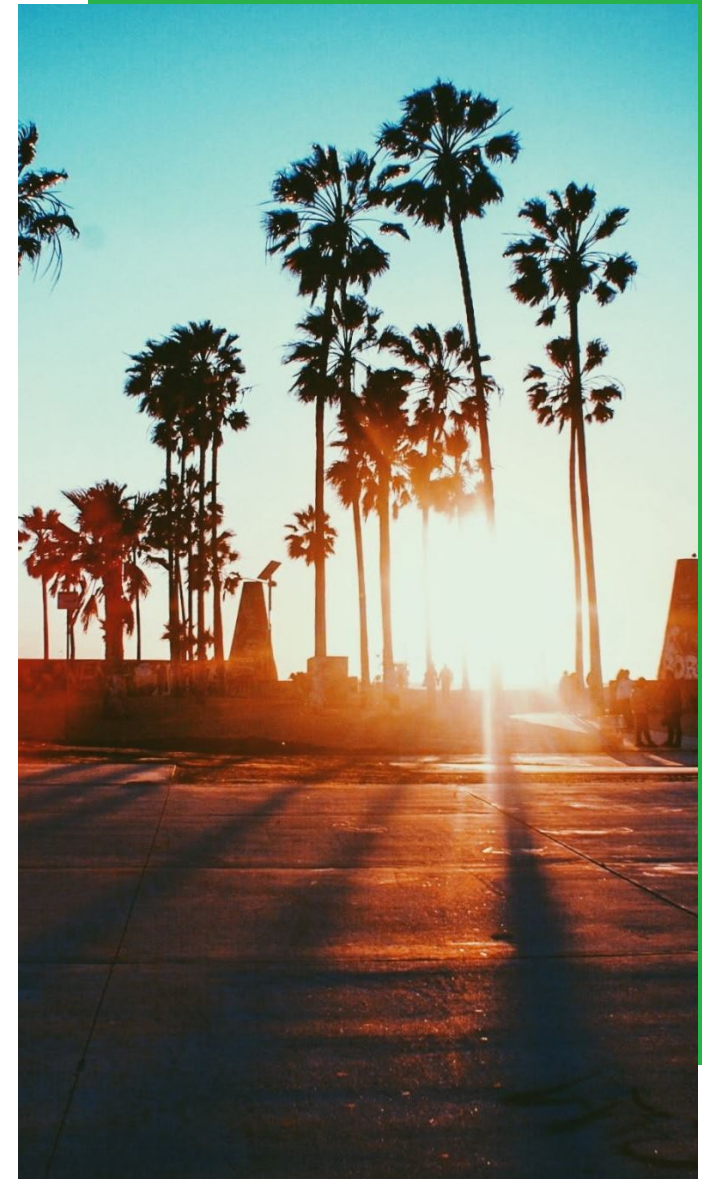
Past member of the National Association of College & University Attorneys (NACUA) Board of Directors and frequently speaks for NACUA, the Council of Independent Colleges (CIC), and other higher education associations.





# Session 2: Outcomes

- Assess how implicit bias and other assumptions need to be avoided in a credibility analysis
- Understand the permissible factors for a credibility analysis
- Understand how the standard of proof applies to a credibility analysis
- Understand how to prepare a defensible credibility analysis in a report





# 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.

# What is Credibility?

- Analysis of whether speaker was reliable when making a particular statement.
- Not whether they are an honest or bad person.
- Not based on vibes.
- Used to resolve word against word situations:

Complainant said they did not affirmatively consent. Respondent says they obtained Complainant's affirmative consent. No other witnesses present.



# Step 1: What Are You Bringing to the Table?

In your **breakout room**, please share:

- Any steps you have taken (or would like to take) to recognize your own implicit biases?
- How do you control for your own implicit biases when assessing a party or a witness?

Please designate one person to report back some tips for the group.

# Step 2: Gather Evidence in Support of a 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



## 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?
- Who did you find credible?
- Why?
- Does their testimony support Complainant or Respondent?
- Any motivation to analyze?

## 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 you weigh Complainant's texts to their best friend immediately after the event?
- How do you weigh Respondent's texts to Complainant after hearing that Complainant was upset?
- What was the quality of any corroborating evidence provided to you (omissions, falsifications)

# 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 your analysis? (It shouldn't)
- How does demeanor impact your analysis? (It shouldn't)
- How does pattern evidence impact your analysis?
- Is it really pattern evidence?





# How Does the Standard of Proof Impact Your Analysis?

- 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 Analysis?

- Burden on investigator to prove (not on Complainant to prove, nor Respondent to disprove). Need 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?

---

## Step 3: Credibility Resolutions & Findings

This is AFTER  
the summary  
of evidence.

This is  
analysis of  
the evidence.

Only analyze  
what you  
need to.



# Credibility Analysis Tips for Non -Track 1 Report

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 Complainant did not affirmatively consent to the sexual conduct.*
- *In making this determination, I found that Complainant was more credible than Respondent on this point.*
- *I found that Complainant was more credible because they provided corroborating evidence for their statement. This corroborating evidence included a text immediately after the incident to their best friend describing the lack of affirmative consent for the act of penetration. I reviewed the entire text conversation between Complainant and their best friend. Both provided copies and it did not appear to have been altered.*

---

# Example

- *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.*



# Resolving Credibility

Please share:

- How would you analyze this affirmative consent issue? (NO other information is going to become available. This is all you can gather.)

- 
- *I found that Complainant was more credible because they provided corroborating evidence for their statement. This corroborating evidence included a text immediately after the incident to their best friend describing the lack of affirmative consent for the act of penetration. I reviewed the entire text conversation between Complainant and their best friend. Both provided copies and it did not appear to have been altered.*
  - *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.*

# Closing Remarks

- Use the right standard of proof
- Control for implicit bias
- Gather enough information to do a credibility resolution
- Analyze what you have
- Show your work







# Questions?





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California State University Civil Rights  
Programming and Services Conference



## Session 3

# Many Words? How to Review an Investigation Report

July 25, 2024



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Co-founder and Managing Attorney

Advises institutions of higher education on a broad range of legal matters, including labor and employment law, Title IX, and compliance issues. Regularly presents training sessions to administrators and faculty around the country on higher education issues.

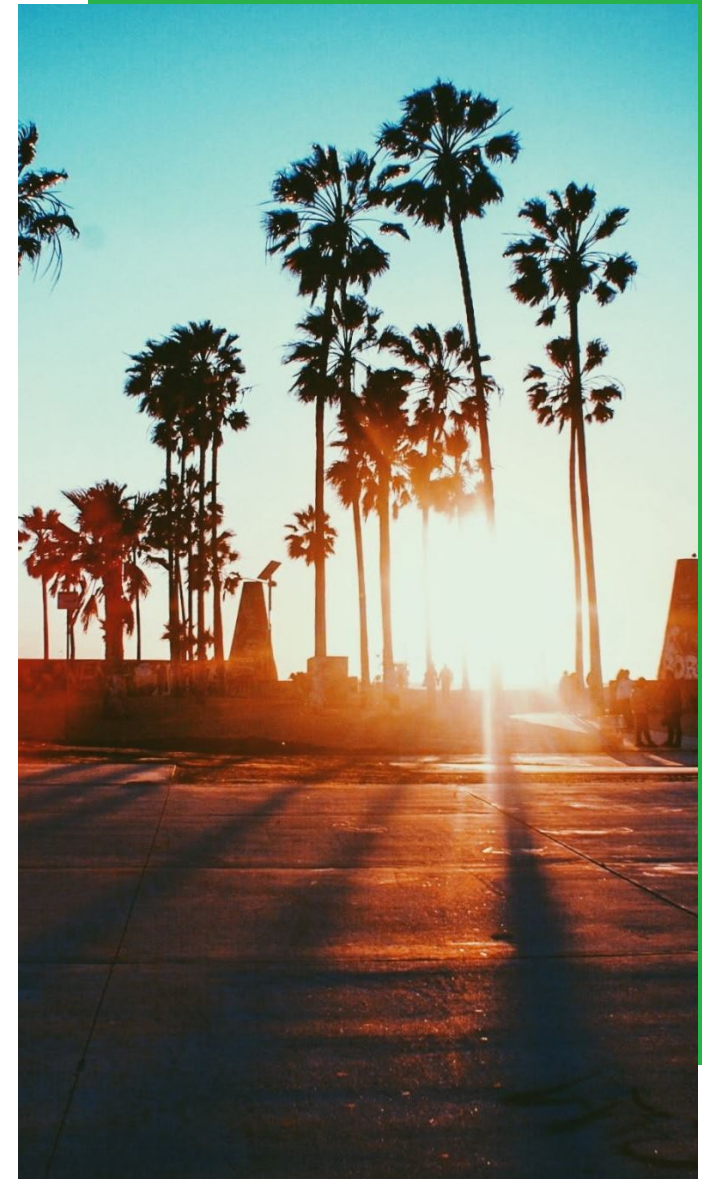
Past member of the National Association of College & University Attorneys (NACUA) Board of Directors and frequently speaks for NACUA, the Council of Independent Colleges (CIC), and other higher education associations.





# Session 3: Outcomes

- Identify the required elements of an investigation report
- Understand how to review the analysis in an investigation report, where required to do so and the applicable analytical framework
- Best practices for review an investigation report while preserving the autonomy of the investigator



# How to Do a Technical Review of a Report

Discuss in your **breakout room**:

- What are the top technical challenges you face when reviewing an investigation report?
- What do you do with an incomplete report?

Please designate one reporter to report back.

# Reminder re Types 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.

## Track 3

- The final investigation report will include ... analysis of the evidence including relevant credibility evaluations, and appropriate findings.



# Reminder re Types of Investigation Reports

---

## 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**
  - Repeat the text of the Notice to avoid inconsistencies
- **The investigation process/procedural history**
  - Explain timelines, diligence, etc.
- **The preponderance of the evidence standard**
- **A detailed description of the evidence considered**
- **Analysis of the evidence including relevant credibility evaluations, and findings**
  - **ANALYZE DEFINITION BY DEFINITION.**

---

# Summary of the Allegations



Precision



Check notices and amended notices



Quote the policy – the exact definitions of prohibited misconduct



# Checking for specific details

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- 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.



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# Description of Investigation Process



Audience



Tone – this is not persuasive writing. Avoid conclusory remarks like “clearly.”



Strategy should be demonstrated by technical recitation

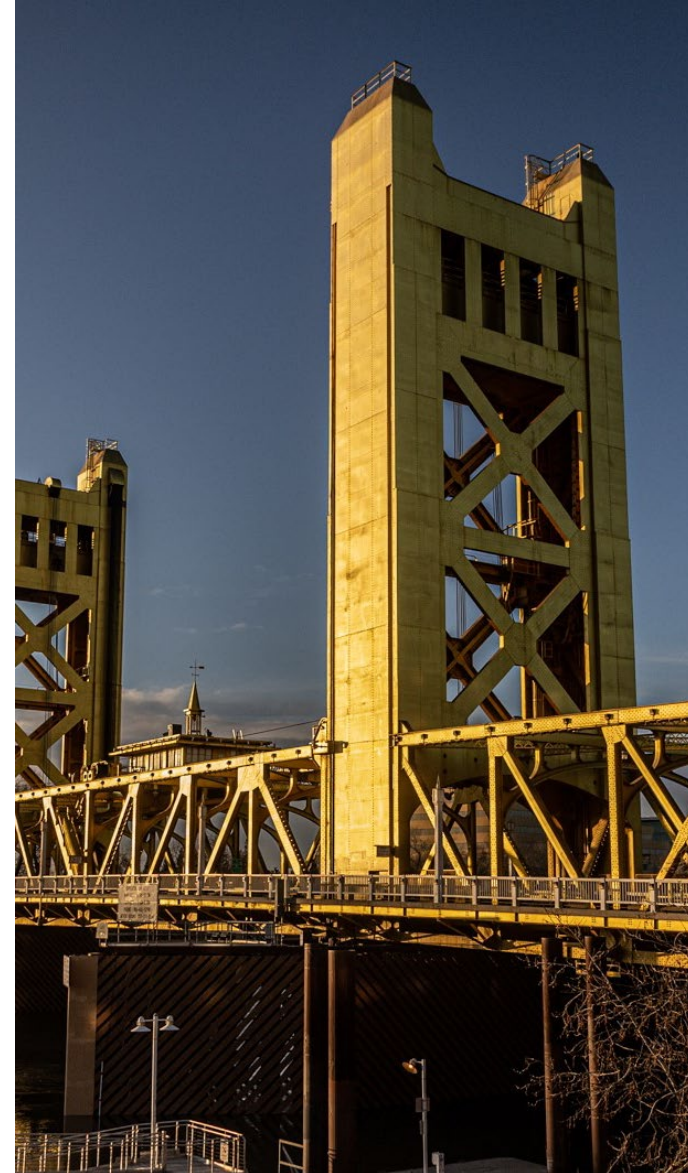


Check for minor procedural details that investigator will not remember

# Detailed Description of Evidence

---

- Organization of this section is critical. I prefer witness by witness, not chronological so you have a clear path of 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 yet. The tone of this section matters. Complainant “reported that...” “Respondent responded that...”

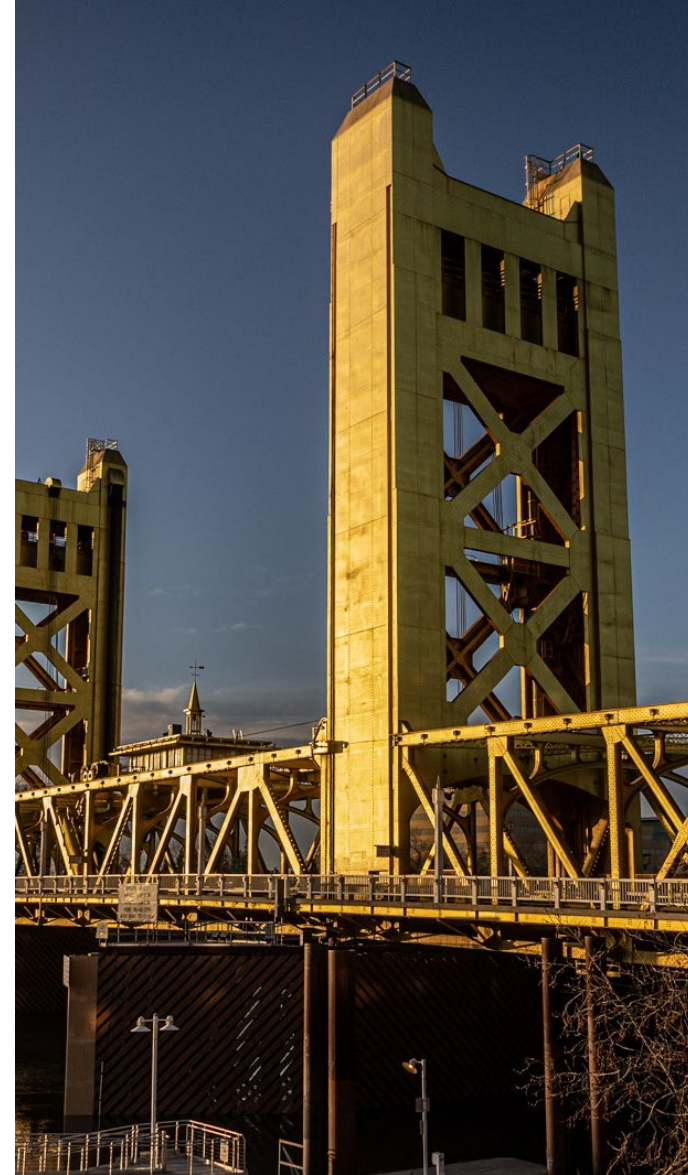




# Detailed Description of Evidence

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- 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.



---

# Analysis, Credibility Resolutions, Findings

This is AFTER  
the description  
of evidence.

This is analysis  
of the  
evidence.

Only analyze  
what you need  
to.

# Example: Organizing a Retaliation Report

- Summary of Allegations
- Investigation Process
- Standard of Proof Statement
- Summary of Evidence
  - Complainant's Report
  - Respondent's Response
  - Witness Summaries
- Factual Findings
  - Make Findings Related to Protected Activity
  - Make Findings Related to Adverse Action
  - Make Findings Related to Substantial Motivating Factor



# Example: Organizing a Retaliation Report

- Summary of Allegations
- Investigation Process
- Standard of Proof Statement
- Summary of Evidence
  - Complainant's Report
  - Respondent's Response
  - Witness Summaries
- Factual Findings
- Analysis of Definition of Retaliation
  - Protected Activity y/n?
  - Adverse Action y/n?
  - Substantial Motivating Factor y/n?
- Recommendation Based on Authority

---

# Preparing to Analyze 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?

Would a chart help?

# Credibility Analysis (Covered in Session 2)

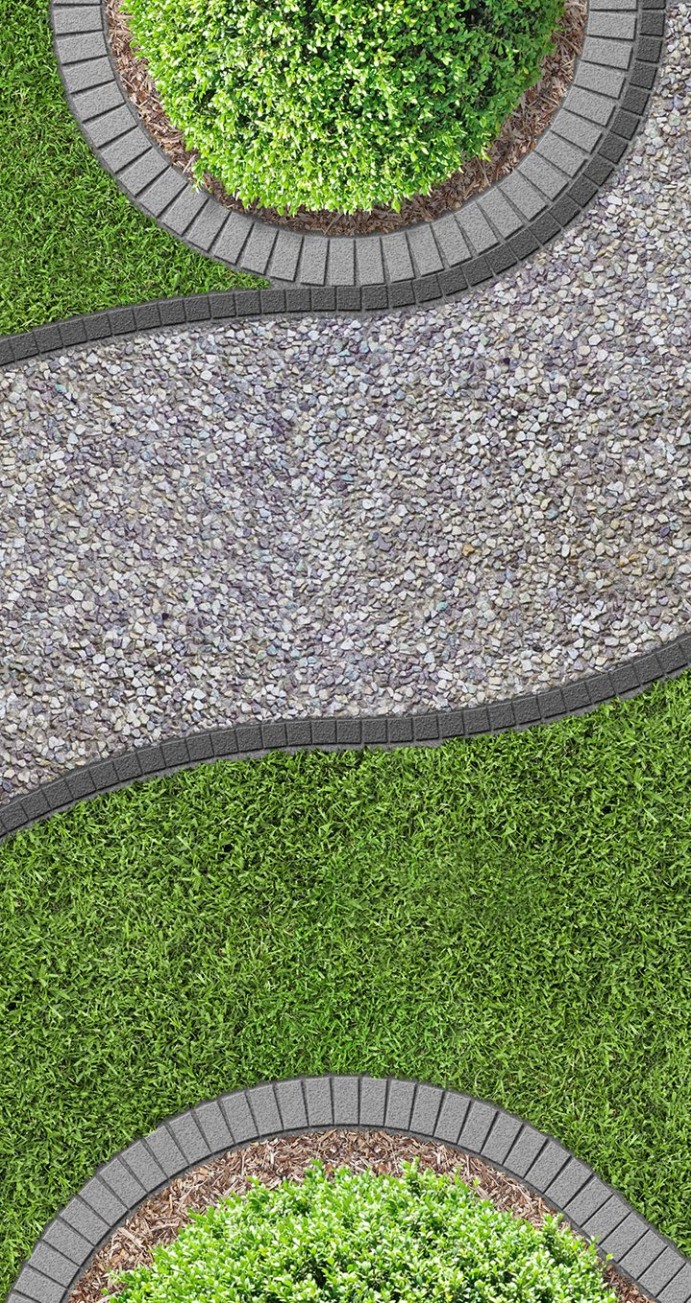
- Motivation/relationships
  - Reluctant witnesses
  - Witness who loves the limelight
  - Witness with an ax to grind
- Demeanor (?)
- Logic/consistency of story
- Corroborating evidence
- Circumstantial evidence





# — Analysis Tips (Covered in Session 2)

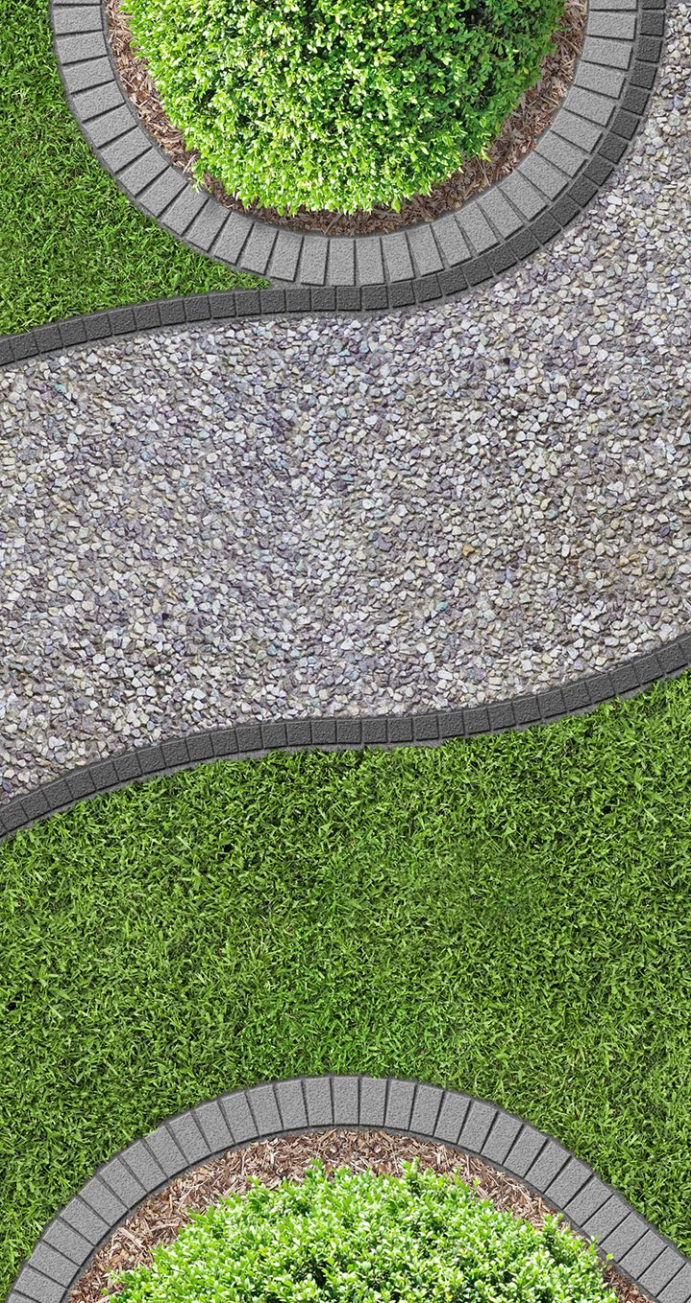
Resolve	Resolve KEY disputed facts
Resolve	Resolve credibility issues
Show	Show your work
Apply	Apply the correct standard of proof



# Other Best Practices

- Should be written 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.





# Other Best Practices

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



# How to Do a Technical Review of a Report

- Structure
- Technical analysis
- Completeness
- Tone – technical vs. persuasive
- Comments vs. redlines
- Application of attorney-client privilege
- Agree with outcome vs. understand the outcome



# Questions?





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