Day Two Agenda

01 Evidence Collection and Assessment

02 Practical Application of the Procedural Requirements

03 The Investigative Report and Record
Quick Review!

Evidence Collection and Assessment
Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary

Types of Evidence

Direct Evidence
- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence
- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence
- Evidence that differs from but strengthens or confirms what other evidence shows.
Testimony is Evidence

Non-Testimonial Evidence

- Text Messages
- Social Media Posts
- Social Media Communications
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
Evidence Collection

- Identify the items of evidence that you would like to obtain
- Develop an intentional strategy for obtaining that evidence
- Overcome barriers to evidence collection
- Considerations about collecting certain types of evidence

A Thorough Investigation

Is more than evidence collection
A Thorough Investigation Permits the Decision Maker to Assess

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight

Evaluating the Evidence

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tbody>
<tr>
<td>Is it relevant?</td>
<td>Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.</td>
</tr>
<tr>
<td>Is it authentic?</td>
<td>Is the item what it purports to be?</td>
</tr>
<tr>
<td>Is it credible/reliable?</td>
<td>Is the evidence worthy of belief?</td>
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<tr>
<td>What weight, if any, should it be given?</td>
<td>Weight is determined by the finder of fact!</td>
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Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

• unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
• if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“Questions and evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

“Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence and
(b) the fact is of consequence in determining the action.”
Assessing Relevance
Why Does it Matter?

Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.

Character Evidence

Polygraph evidence

Opinion Evidence Lay foundation for the opinion if opinion is relevant.

Assessing Authenticity
Investigating the products of the Investigation

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Investigate the authenticity if necessary.
Assessing Credibility and Reliability

No formula exists, but consider the following:

- Opportunity to view
- Ability to recall
- Motive to fabricate
- Plausibility
- Consistency
- Character, background, experience, and training
- Coaching
- Bias
The Practical Application of the Procedural Requirements
Procedural Requirements for Investigations

- Notice to both parties
- Equal opportunity to present evidence
- An advisor of choice
- Written notification of meetings, etc., and sufficient time to prepare
- Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing

Evidence Review

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

10 days to provide a written response
After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence. That report will be shared with the parties and they will have 10 more days to comment.

“Directly Related” and “Relevant Evidence”
Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance

- Subject to parties’ right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party’s right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage

At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.
Relevancy Standard

 Relevant Evidence
• “Evidence is relevant if:
  • (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  • (b) the fact is of consequence in determining the action.”

 Irrelevant Evidence
• Prior sexual history of complainant, with two exceptions
• Legally recognized and un-waived privilege.
• Records related to medical, psychiatric, psychological treatment
Redactions

Additional Requirements

- Share the report with the parties and their advisors
- In electronic format or hard copy
- At least 10 days prior to the hearing
The Purpose of the Report

To allow for advance Review

To allow for advance Preparation
  • By the Decision Maker
  • By the Parties

Reduce likelihood of bias in final outcome

Intended Recipients

- The Parties
- The Advisors
- The Decision Maker
- The Appeal Panel
Other Recipients?

- Friends of the parties
- Parents
- Law enforcement
- Attorneys
- Judges
- Media
- Social media

Essential Elements

- Intentionally organized to enhance comprehension
- Factually accurate
- Concise
- Without editorial or opinion
- Consistent format
Report and Record

Summary of the Evidence

Compilation of the Evidence

The Record

Compilation of the evidence organized intentionally and consistently

Divided into Appendices

Is attached to the report

Includes a procedural timeline
Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.)

Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.)

Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint

Appendix D: the procedural timeline

Structure of the Report

Overview of the Investigation
Statement of Jurisdiction
Identity of Investigators
Objective of the Investigation and the Investigation Report
Prohibited Conduct Alleged
Witnesses
Evidence Collected
Summary of Evidence
Conclusion
Questions?

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