



Internal Investigations: Tips, Tools and Best Practices from the Trenches

Presented by:

Michelle Cannon, Partner
Lozano Smith

Ryan Davis, Vice President of Human Resources
Sierra Joint Community College District

ACHRO 2022 Fall Training Institute
October 27, 2022

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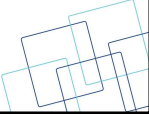
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Presenter

Michelle L. Cannon

AT LOZANO SMITH

Michelle L. Cannon is a Partner in Lozano Smith's Sacramento office and co-chairs the firm's Labor and Employment Practice Group. Ms. Cannon works closely with school districts, county offices of education and community colleges in all areas of education law. Ms. Cannon represents clients in all areas of education law, and has extensive experience in board governance, labor and personnel-related matters, and student issues. In her free time Ms. Cannon enjoys spending time with her family and their Golden Retriever in Tahoe.



CONNECT

mcannon@lozanosmith.com
916.329.7433

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Presenter

Ryan Davis

AT SIERRA JOINT COMMUNITY COLLEGE DISTRICT

Ryan Davis is the Vice President of Human Resources at the Sierra Joint Community College District.



CONNECT

rdavis23@sierracollege.edu
916.660.7101

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Why are Investigations Important?

1. MOST IMPORTANTLY – fostering an environment where students and staff are safe to share their concerns, and we can work to create better outcomes.

2. Legal Compliance

GOAL TODAY: Understand how an effective investigation is conducted.

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Objectives

- Understand When an Investigation Needs to Occur
- When to Hire Out and When to Conduct In-House
- Learn Steps to Conduct an Effective Investigation
 - Receiving and Assessing the Nature of a Complaint
 - Initiating a Formal Investigation
 - Conducting Interviews
 - Completing the Investigation and Issuing the Outcome


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Is an Investigation Necessary?

Let's review some real-life scenarios to help us understand when an investigation is necessary.



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Interactive Polling

1. Open a browser on your device
2. Go to: pollev.com/lozanosmith



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Student files a complaint with the Dean of the Math Department that their statistics instructor assigns too much homework which is impossible to complete. Do you need to investigate?



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A group of female students file a complaint against their male science professor alleging he treats them differently than their male classmates. Do you need to investigate?



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■ Julia, a cook in the on campus café, alleges that her supervisor, Sarah, keeps asking her to go out on dates and constantly asks questions about her love life. Julia says that Sarah stares at her body too. Do you need to investigate?

Yes

No

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■ An employee files a complaint against another employee and alleges "harassment, "retaliation," and a "hostile work environment." Do you need to investigate?

Yes

No

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A well-respected veteran instructor emails the President and complains that the new Dean of their department has repeatedly been rude to the instructor during meetings. The instructor believes the dean is unqualified for her role and attempting to overcome her inadequacies by trying to intimidate others

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Veteran instructor complaint: Do you need to investigate?

Yes No

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A family friend files a complaint after she discovers questionable text messages on the phone of a student, which appear to have been received from the student's school mentor. Do you need to investigate?

Yes No

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A student with a history of discipline problems tells her instructor that she ran into the new male custodian in the bathroom and he looked and smelled drunk. Do you need to investigate?

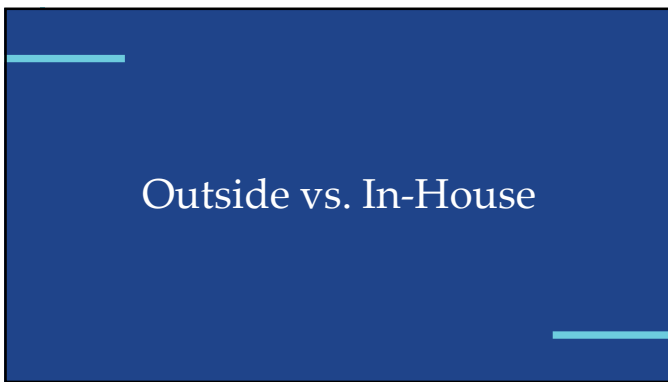
Yes No

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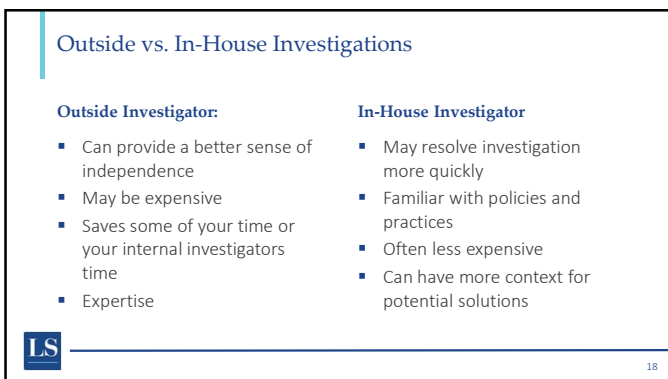
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Key Considerations For Outside Investigations

- Is the respondent/complainant in HR or in upper level management?
- Does an internal investigator have the bandwidth to take on this investigation?
- Would internal investigator need to potentially be involved in implementing disciplinary action after investigation?
- Is this a potentially high profile case which would benefit from a more independent investigation?
- Witness and interview coordination.
- Coordinating initial and concluding letters.
- Budget.

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Complaints

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What Constitutes a Complaint?

TYPES OF COMPLAINTS

▪ Student	▪ Verbal Reports
▪ Parent	▪ Written Complaints
▪ Employee	▪ Incident or observation
▪ Member of Public	

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The District is Responsible For...

- Appropriately *investigating* and *responding* to complaints in a *prompt* and *thorough* manner
- Implementing *appropriate* measures to immediately stop harmful conduct
- Determining if reporting obligations are triggered



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Receiving a Complaint

Formal v. Informal Complaints

- “Don’t tell anyone, but...”
- “Student X is a bully. He threw me against a vending machine today.”
- “My professor gave me an unfair grade because she hates me.”



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Policies That May Be Triggered

- BP/AP: 3410: Nondiscrimination
- BP/AP 3430: Prohibition of Harassment
- BP/AP 4231: Grade Changes
- BP/AP 5530: Students’ Rights and Grievances
- BP/AP: 7700 Whistleblower Protection
- Title IX Policies




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Starting the Investigation Checklist

- Investigate *promptly*
- Supportive measures?
- Police involvement?
- Preserve evidence
- Other considerations?



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Title IX




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Title IX--The Plain Language

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 et seq.



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What Does Title IX Cover?

1. Education Programs or Activities

2. Sports

3. Employment

4. Equal Access to Facilities

5. Admissions and Recruitment

6. Sexual Harassment*

(34 C.F.R. Part 106)

*Different definition under Title IX



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New Definitions

Sexual Harassment

▪ Unwelcome conduct which is severe, pervasive, and objectively offensive to a reasonable person.

Formal Complaint

▪ A document filed by a **complainant** or signed by the **Title IX Coordinator** alleging sexual harassment against a respondent, and requesting that the recipient (District) investigate the allegation

Complainant

▪ An individual who is alleged to be the **victim of the conduct** that could constitute sexual harassment

Respondent


▪ An individual who has been reported to be the **perpetrator of conduct** that could constitute sexual harassment

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Responsibilities of Employees: TITLE IX



▪ Report to the District's Title IX Coordinator, as well as any additional designated individuals (academic administrators), any known claims of potential sexual harassment.

▪ All employees should be trained on how to identify potential sexual harassment issues and report it.

▪ **This does not relieve an employee of their mandated reporter duties if potential abuse involving a minor.**

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Investigation Scope

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Scope of the Investigation



- Clearly define allegations
- Avoid “scope creep”
- This step helps to outline or organize the whole investigation



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Notices

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Initiating an Investigation

Notice to both the complainant and the respondent




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Notice Should Include Specific Information Concerning:

- Identify complaint process/policy
- Confidentiality
- Retaliation
- If appropriate, Administrative Leave



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Conducting Interviews

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Understand the Scope of the Investigation

What are the allegations?

- Prepare clear and concise “yes or no” questions that the investigation will answer.
- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)

Practice Tip: Have someone else review your allegations before proceeding. This will save you time in the long run.



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Interview Witnesses

- Develop a witness list:
 - Start with the complaint and complainant – Who is listed as a witness?
 - Ask each witness who may have relevant information.
 - Ask the respondent to provide their list of those with information.
- Consider potential conflicts of interest.
- Consider location, timing, and order.
- If possible, have a witness to the interview.
- Never interview more than one person at the same time!



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Initial Discussion With Complainant

- Ask open-ended questions
- Get complaint in writing or confirm allegations in writing if not already received
- Review policy against retaliation
- Do not promise confidentiality
- Determine whether the matter can be resolved informally
- Listen and “hear” the concern



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Confidentiality & Preserving the Integrity of the Investigation

- Confidentiality cannot be promised to a witness. Reassure witnesses that you will maintain confidentiality to the extent possible.
- Witnesses themselves should maintain confidentiality to the extent necessary to protect the integrity of the investigation (excluding discussions with their union representative or lawyer).
- Explain that the integrity of the investigation requires witnesses to maintain confidentiality.



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Interview Questions

- Funnel approach: Start broad and go narrow.
- Don't ask compound questions!
- Be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness. If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, always ask:
 - Is there anything else you think I should know?
 - Is there anyone else you think I should speak with?



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Common Questions and Issues

- What if the witness is underage?
- What if the witness is biased or lies?
- Do all witnesses get a union representative or support person?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?



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Tone and Demeanor

■ Calm

■ Listen

■ Aware of positioning

■ Use correct or mirroring terminology



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Example Questions

(1) "On April 2, you had an argument with Student B, right?"

(2) "Did you have a conversation with Student B with on April 2?" [If answer is yes] "Tell me about the conversation."

(3) "Tell me how that made you feel."

(4) "That must have made you feel scared, didn't it?"

(5) "What time did you arrive?" and "How long did you stay there?"

(6) "What was your thought process at that time?"

(7) "What time did you arrive, and who else was there?"


(8) "Why didn't you just say 'No'?"

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Lybarger/Spielbauer Warning /Rights



■ Fifth Amendment Protection Against Self-Incrimination

■ Spielbauer/Lybarger Warning – Public employees may be compelled to answer potentially incriminating questions about their job performance as long as they are not required to waive their constitutional protections.

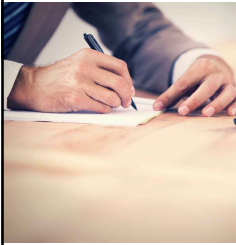
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Recording the Interview

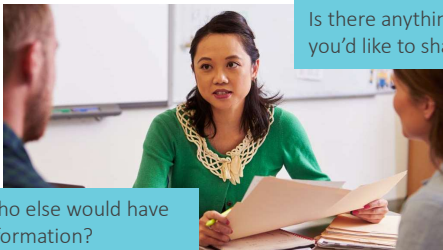


- Take detailed notes or have a second administrator or confidential employee involved to take notes.
- Avoid audio recordings
- Consider signed witness statement summaries.



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Ending the Interview



Is there anything else you'd like to share?

Who else would have information?



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Common Mistakes

- Telling complainants or respondents conclusions too early.
- Not using open-ended questions.
- Failing to communicate with complainant, respondent.
- Not following up on leads.



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Written Statements

A wisely-developed witness statement ultimately saves time, preserves stronger evidence, and can help provide leverage with the wrongdoer at an earlier stage in the proceedings.

Bad Example

"I was in class last week when Mr. X threatened Sam. I think Sam was calling Mr. X out to throw down right there. When Mr. X pushed their chair back and stood up, it scared everyone."

Good Example

"Last Monday at the end of 3rd period, Sam walked up to Mr. X's desk and said loudly, 'Why did you give me an F?' Mr. X. stood up to talk to Sam, who is very tall. When Mr. X stood up, their chair rolled back into a metal filing cabinet and it made a loud 'boom' sound that surprised me a lot."



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Trauma Sensitivity and Avoiding Bias

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How Trauma May Impact the Investigation...

- Trauma victims often don't remember events in chronological order
- Trauma victims may not be able to recall extensive detail
- The trauma victim's conduct immediately after the traumatic event occurs might not be reasonable



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Trauma-Informed Approach

- Do NOT Victim-Blame
- Choose a comfortable setting that is not triggering
- Build rapport
- Ask difficult questions with care - explain why you're asking the question
- Allow the witness to freely speak and then ask follow-up questions



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Cultural Competence

- The process by which individuals and systems respond respectfully and effectively to people of all cultures, languages, classes, races, ethnic backgrounds, religions, and other factors in a manner that recognizes, affirms, and value worth of individuals, families, and communities.

- National Association of Social Workers (NASAW) 2007



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Implicit Bias

- An implicit bias is an unconscious bias towards or against certain groups of people.
- It is often based on social stereotypes that have led to an association between a group and a trait.
- Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment.
- Many (if not most) of the people treating others differently are unaware of doing so.



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Confirmation Bias

- Confirmation bias, or the selective collection of evidence, is our subconscious tendency to seek and interpret information and other evidence in ways that affirm our existing beliefs, ideas, expectations, and/or hypotheses.
- Therefore, confirmation bias is both affected by and feeds our implicit biases.



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Suggestions to Counteracting Bias

- Actively consider an alternative hypothesis or why a favored hypothesis could be wrong.
- The process of writing might challenge the investigator to assess a decision more carefully.
- Have findings peer-reviewed.
- Good investigative skills and practices
 - In a study of the impact of interviewing skills on reducing confirmation bias, the authors conclude that interviewers who ask open-ended non-leading questions (who were dubbed "good interviewers") showed less confirmation bias than those who asked fewer open questions ("poor" interviewers).

Powell, Martine B., Hughes-Scholes, Carolyn H., and Sharman, Stefanie J., Skill in Interviewing Reduces Confirmation Bias, J. Investigative Psychology and Offender Profiling, (2012).



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Reviewing and Preserving Evidence

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Documentation & Evidence

TYPES OF EVIDENCE

Emails

Phone records

Attendance records

Travel logs

Security records

Computer records/files

Internet usage and websites visited

Voicemail messages

Pictures

Audio/Video

Credit Card Receipts

Observing Locations

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Investigation Report

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Investigation Report

Basics: dates, titles and relationships

Role: finder of fact

Deliberative Issues: "Preliminary Draft" and "For Legal Counsel" Labels

Provide written overview of process

Make findings by answering the allegation question and explain the conclusion

Optional: Prepare Executive Summary

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Factual Findings v. Legal Conclusions

- Don't focus your investigation on whether an employee or student committed, for example, "sexual harassment" or violated some other law; instead, focus on what you determined the employee or student did or did not do.
- Also, consider if the conduct was inappropriate, unprofessional, and/or in violation of District policies or standards.
 - **Example:**
 - **Factual Findings:** "Ms. Ross massaged Mr. Smith's shoulders on two occasions, and the conduct was unwelcome. Such conduct was unprofessional and in violation of the District's sexual harassment policies" vs.
 - **Legal Conclusions:** "Ms. Ross sexually harassed Mr. Smith."



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Credibility Determinations

1. Demeanor;
2. Inherent plausibility;
3. Motive to lie;
4. Corroboration, or lack thereof;
5. Past record of conduct;
6. Opportunity and capacity to observe/actual knowledge;
7. Consistent or inconsistent statements;
8. Reputation for veracity or deceit; and
9. Bias.



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Legal Framework

Preponderance of the
Evidence
(Standard for Investigations)



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Content of Investigation Report



- Refer back to policy for contents of report
- Provide written overview of process
- Timelines, witnesses, documents
- Think about your audience
- Proofread!



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Confidentiality of Investigation Report

It is important to consider who may have access to investigative notes, statements and reports.



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Providing Updates

Complainants should be updated on the status of investigation into their complaint.

- Updates should include estimated timeframes.
- Updates should not include the likely outcome.
- If you need more time, don't wait to ask or inform Complainant.
- Coordinate with your Director or HR.

What about Respondents and Witnesses?



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Questions



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Michelle L. Cannon
Partner

Tel: 916.329.7433
mcannon@lozanosmith.com

Or any of the attorneys in one of our 8 offices.





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For more information, questions and comments about the presentation, please feel free to contact:

Ryan C. Davis
Sierra Joint Community College District
Vice President of Human Resources

Tel: 916.660.7101
rdavis23@sierracollege.edu



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