

Power of the Pen: Creating Effective Documentation

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Session Overview



- **General Overview of Effective Documentation**
 - Importance
 - Characteristics
 - Attorney-Client Privilege
- **Specific Circumstances**
 - Discipline
 - Performance Evaluations
 - Interactive Process
 - Investigations



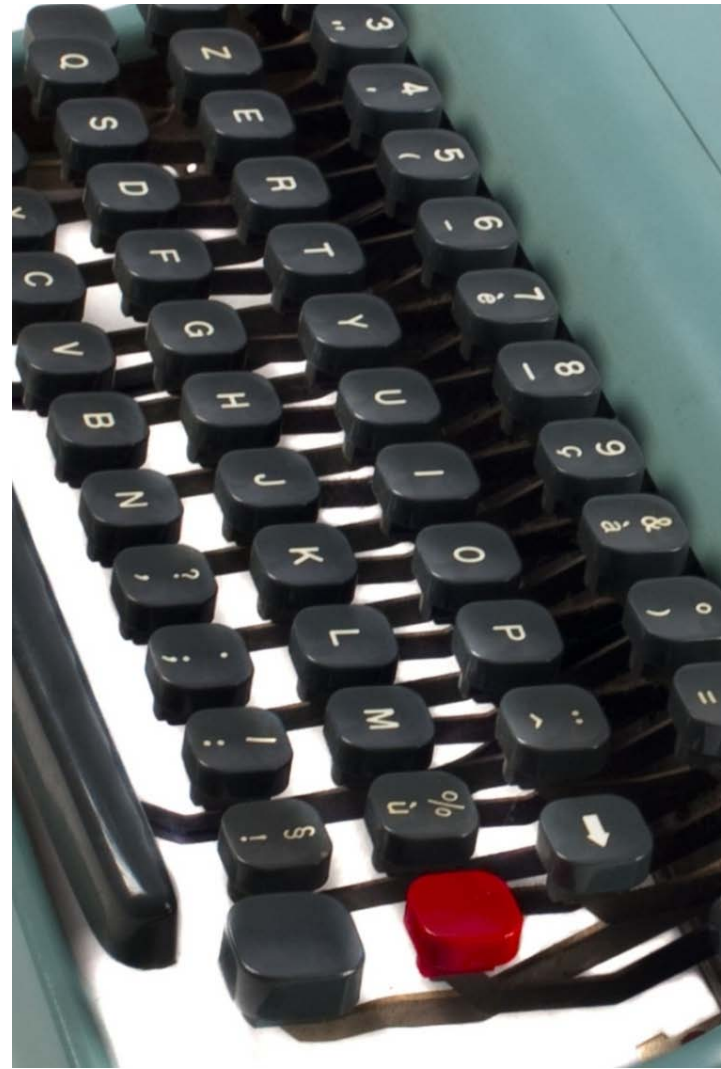
What is Effective Documentation?

Why is it Important?



Documentation = Evidence

- **Litigation**
- **Disciplinary Appeals**
- **Grievance Procedure**
- **Administrative Proceedings**



Importance of Effective Documentation

Evidence



**No Documentation =
No Evidence**

**Bad Documentation =
Bad Evidence**

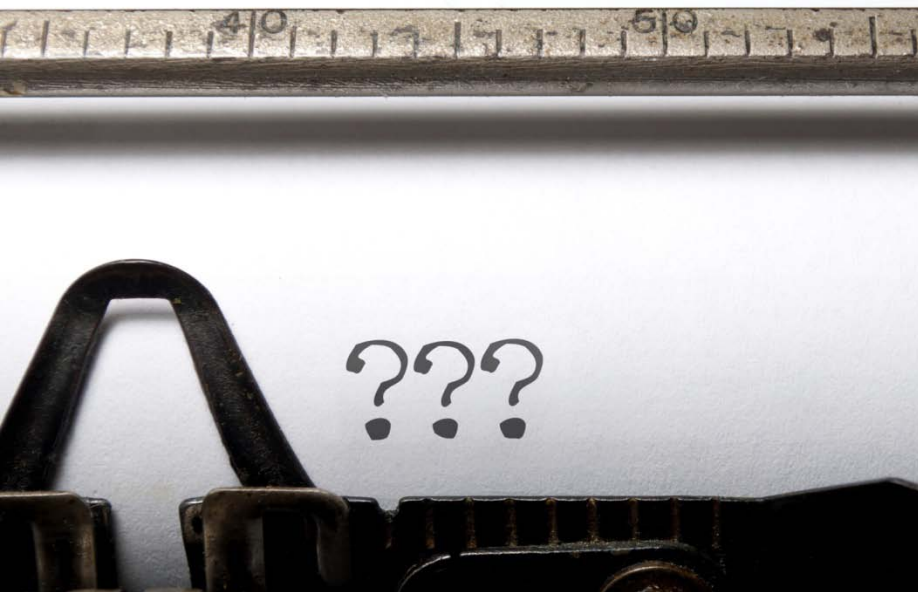
**Good Documentation =
Good Evidence**



Jurors Don't Like You

Jury Polls Show...

- 75% of jurors think employers do not strictly enforce their policies
- 73% think harassment is common at work
- 88% believe a supervisor who engages in harassment should be fired



Jurors Don't Like You

**Jurors Do Not
React Well To...**

- **Managers who overreact**
- **Employers who characterize workers as lazy or incompetent**
- **Actions that do not pass the “fairness” test**



Memory is Unreliable



- **Contemporaneously Created Documentation is the Best Record of an Event**
 - Memory Can Fail
 - Memories Can be Altered
 - It is More Credible than...
 - Verbal Testimony After the Fact
 - Written Testimony Created After the Fact



Historical Perspective



- Documents clarify past positions, past arguments, past practices, past decisions, past misconduct, past good conduct, rationale for decisions, etc.
- Documents provide essential context and background.



Documents Can Educate



- **What are the Agency's Rules/Policies?**
- **What is Expected of the Employee in His/Her Job?**
- **What is Acceptable and Unacceptable Behavior?**
- **What Direction was Given to the Employee?**
- **What are the Consequences to the Employee?**

Benefits Of Good Documentation



- **Visual aid at hearing or trial**
- **Ensure clear communication**
- **Employee signatures have impact**
- **Clarify patterns of conduct**
- **Build a record for future actions**
- **Survive subsequent legal challenges**
- **Avert disputes in the first place**
- **Well-documented decisions are more difficult to overturn**

Perils Of Poor Documentation



- Confuses the employee
- Limits flexibility and remedies
- Undermines employer's position, even in a strong case
- Risk of inconsistent outcomes
- Unintended or vague meanings have to be litigated
- Poor documentation may generate additional claims
- Erodes credibility with jury or judge

What is Effective Documentation?

What Does it

Look Like?



Know Your Audience



- **Will the Employee Understand it?**
- **How Does it Make You Look to...**
 - A Judge?
 - A Jury?
 - The Public?
 - The Employee?
- **Will the Document Make Sense to Someone Completely Unfamiliar with the Job?**
- **Will the Document Make Sense to You in the Future?**



Characteristics of Effective Documentation

The Basics

- **Accurate**
- **Factual and Objective**
- **Unbiased**
- **Professional tone**
- **Contains a date**
- **Identify the author**
- **Edit the document**



Characteristics of Effective Documentation

The Basics



- **Created contemporaneously with the event**
- **Cite/Attach policies**
- **Provide context**
- **Explain impact on Agency**
- **Outline consequences**
- **State expectations**



Characteristics Of Effective Documentation



- **Highlight Agency's legal or rule compliance**
- **Invite questions and clarify any misunderstandings**
- **Indicate whether confidential and treat as such**
- **Employee signature**
 - Or document employee's refusal to sign

Have a Good Foundation



- **Have a Note Taker at Meetings**
- **Usually Avoid Recording**
- **Use Email Appropriately**
- **Print Documents for File**
- **Use Your Calendar**
- **Create Log of Calls**
- **Transcribe Voicemails**

What is Effective Documentation?

What About
Attorney-Client
Privilege?



Attorney-Client Privilege

- Protects information communicated in confidence to the attorney and the legal advice received in return
- Protects communications between the attorney and client only

Evidence Code 954



Attorney-Client Privilege

Not Privileged



- The privilege does not protect underlying facts
- A pre-existing document not prepared in conjunction with the rendering of legal advice is likely not protected, even if in the attorney's custody and relevant to his/her advice
- Disclosure to third parties = Waiver of privilege



Attorney-Client Privilege

Best Practices to Protect Privilege



- Label privileged documents
- Be careful with emails
- Do not disclose contents to outsiders
- Do not file with publicly accessible records
- Restrict recipients, including meetings
- Educate employees to avoid unintentional breaches

Attorney-Client Privilege

Evidence



**Make effective use of
privilege to strategize**

BUT

**Be sure your agency
has sufficient non-
privileged
documentation to
prove its case**

Disciplinary Documentation



Why Is Documentation Important?

If You Don't Write It Down, It Might As Well Have Not Happened.



As one court put it:

“We are skeptical of undocumented accounts of employee misconduct.”

Abdulnour v. Campbell Soup Supply Co. (6th Cir. 2007)

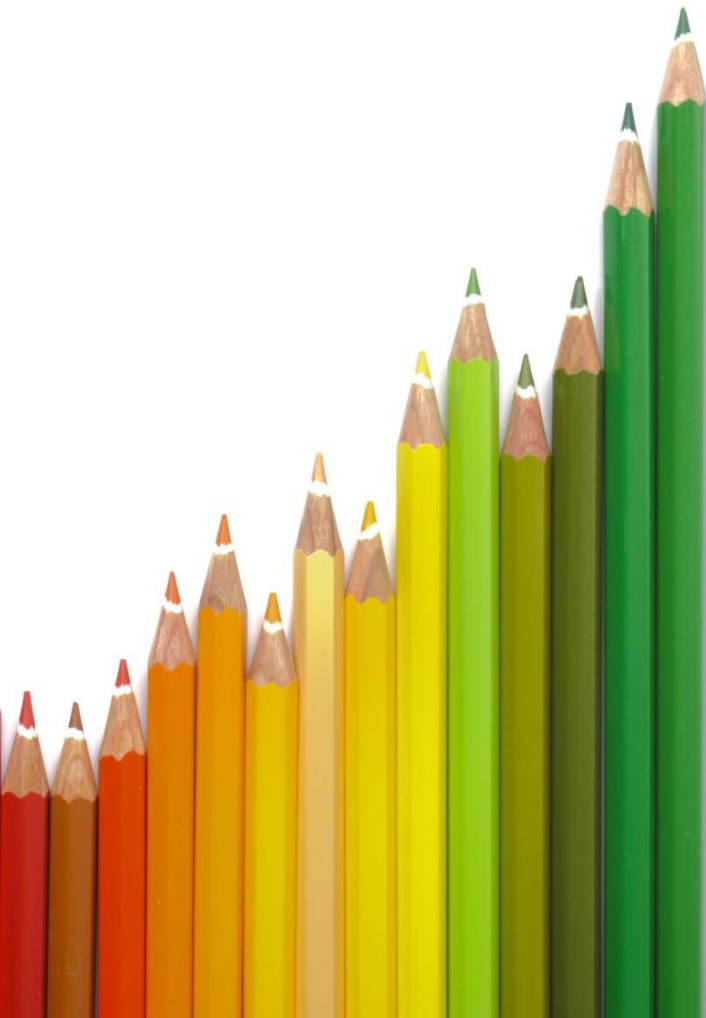
Disciplinary Documentation

**Discipline Without
Documentation =
High Risk**



- **Undocumented verbal warnings**
- **Discipline appears biased, inconsistent or unfair**
- **Discipline should be based on thorough, fair and well-documented investigation**

“Skelly” Documentation



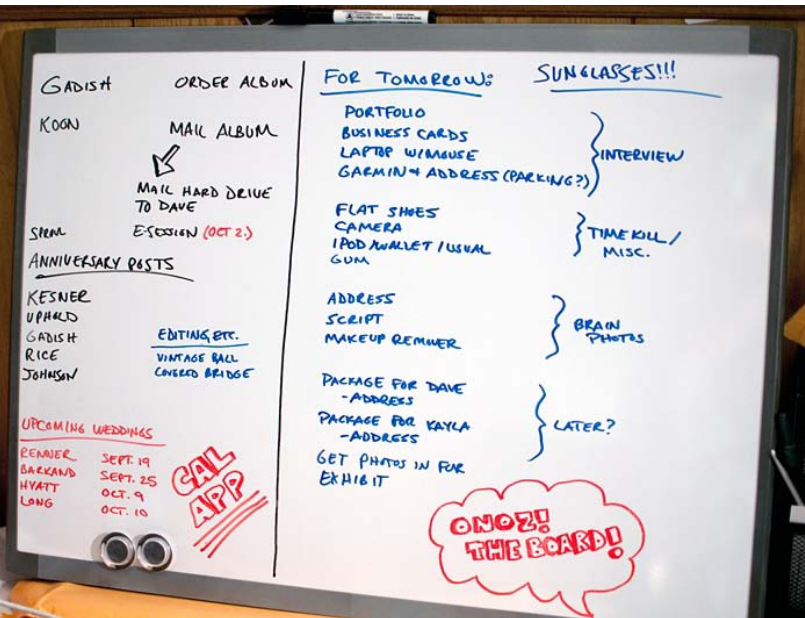
- **Notice of intent to discipline (“Skelly”) must include:**
 - Notice of and reasons for proposed action
 - Copy of charges and evidence
 - Opportunity to respond verbally or in writing
 - Anything else required by Agency rules
- **The Skelly documents are Exhibit A at trial – take the time to get them right**



Necessary Documentation

Must Establish Good Cause

- Did the employee's misconduct harm the public service?
- What is your past practice for similar misconduct?
- Likelihood of reoccurrence:
 - Prior warnings
 - Prior similar discipline



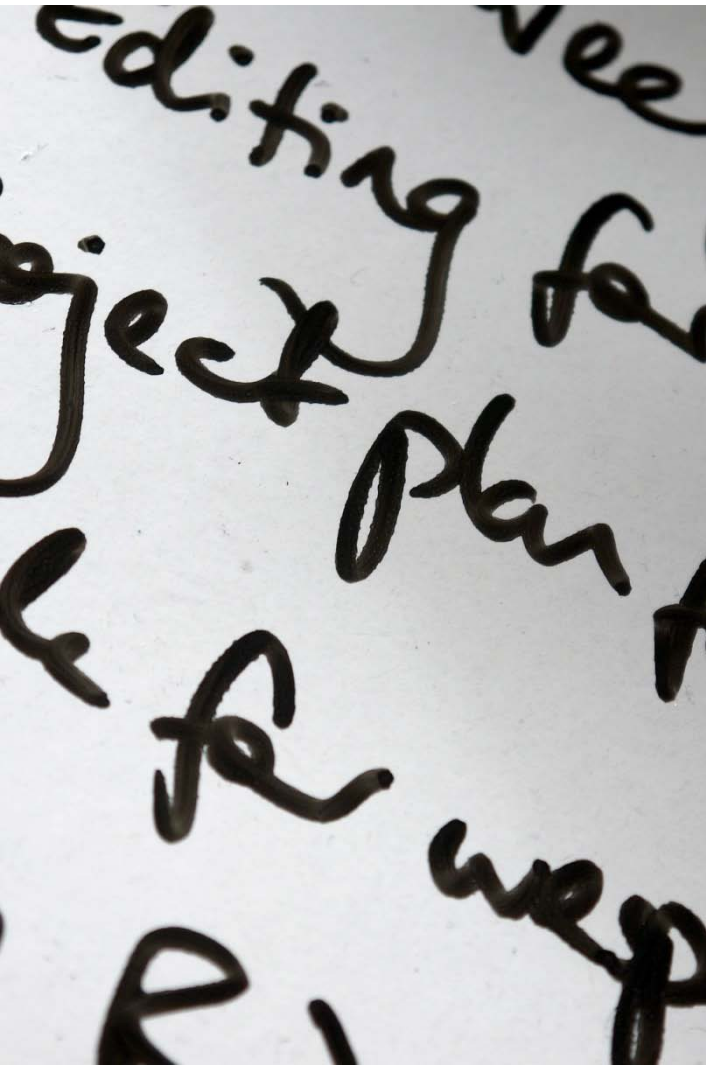
Necessary Documentation

Must Establish Good Cause



- Establish objective facts of violation of the statute, policy or rule
 - Investigate and document misconduct
 - Investigations should be conclusions of fact only
 - Investigators should be unbiased
 - The report is crucial

Documentation for At-Will Employees



- **At-Will Does Not Mean the Employee is Without Rights or Recourse**
- **Cannot Terminate for an Unlawful Reason**
- **Should You Document?**
 - **Should You Tell the Employee the Reason?**

Evaluation Documentation



Why Do Performance Evaluations?



- **Communicate expectations and set goals**
 - Formal and informal presentation
- **Track progress and trends**
- **Support future employment actions**
- **Opportunity to reward good performance**

Why Do Performance Evaluations?



- **Opportunity to demonstrate your commitment to your subordinate's development**
- **Valuable evidence if done well**
- **Counseling/progressive discipline**

Problematic Evaluations



- **Not completed**
- **Untimely**
- **Failure to follow up**
 - Failure to document the follow-up
- **Lack of Agency-wide consistency**
- **Lack of involvement from HR or legal counsel**



Problematic Evaluation Documentation



- **Over-inflated or inaccurate ratings**
- **Conclusory or subjective statements**
- **Statements not backed with effective documentation**
- **Insufficient examples of performance**
 - Include the entire evaluation period
 - Include both positive and negative



Discipline for Poor Performance

**Before You
Discipline, Ask
Yourself...**



- **Is Employee Performing Below Standards or has the Employee Engaged in Misconduct?**
- **Has the Employee Received Adequate Training?**
- **Have Concerns been Adequately Communicated?**

Discipline for Poor Performance

Keep Asking...



- **Do the Performance Issues Correlate to Job Duties in the Job Description?**
- **What do the Annual Reviews State?**
- **Will a Performance Improvement Plan be Useful?**

Discipline for Poor Performance

And Still Ask...

- **Is the Supervisor or Person Documenting Performance Impartial?**
- **Have you Followed Your Agency's Rules and Policies?**



Disability Documentation






Document the Interactive Process



A timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

2 CCR § 7239.6(j)



Interactive Process

**Document
Everything!**



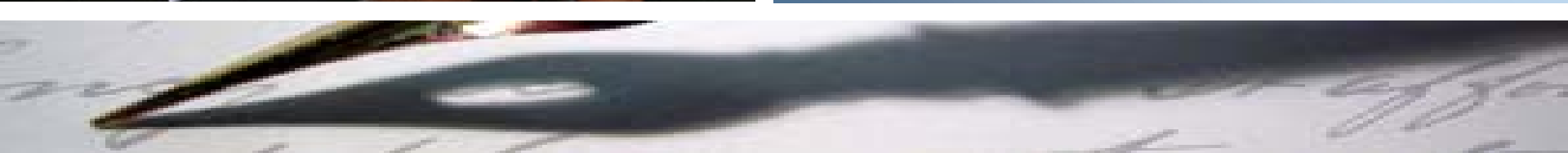
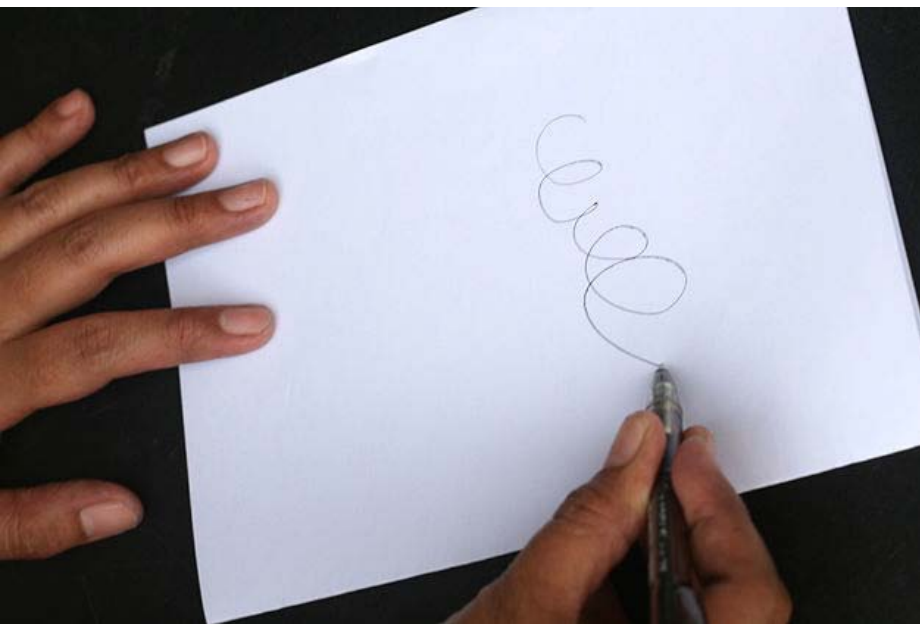
- Requests for Reasonable Accommodation
- Employer's Basis for Belief that Reasonable Accommodation May be Necessary
- Leaves of Absence Given
 - FMLA/CFRA
 - Paid
 - Unpaid



Interactive Process

**Document
Everything!**

- **Medical Restrictions**
- **Job Descriptions**
- **Job Function Analysis**
- **Analysis of Qualifications for Transfer**
- **Identification of Positions Available for Transfer**
- **Lack of Cooperation**



Interactive Process

**Document
Everything!**



- **Defenses:**
 - Danger to the employee
 - Danger to others
 - Undue hardship
 - Unreasonableness of requested accommodation
 - Lack of qualifications



Interactive Process Documentation



- **Written Communication to the Employee**
 - Detailing prior history
 - Requesting documentation or clarification
 - Requesting meetings
 - Summarizing meetings
 - Offering accommodation
 - Rejecting requests
 - Detailing hardship



Special Circumstances

Fitness for Duty

Any medical examination conducted by the employer's...health care provider must be job-related and consistent with business necessity. This means that the examination must be limited to determining the functional limitation(s) that require(s) reasonable accommodation.

2 CCR § 7294.0(d)(7)



Special Circumstances

Obtaining Medical Information



- Where the existence of a disability and/or the need for reasonable accommodation is not obvious, an employer may require an applicant or employee to obtain and provide reasonable medical documentation from a health care provider
- There are limits on what can be asked

2 CCR § 7294.0(d)(5)

Keep it in the Right File



Medical information and/or records obtained during the interactive process shall be maintained on separate forms, and in medical files separate from the employee's personnel file, and shall be kept confidential, except that:

- (1) supervisors and managers may be informed of restriction(s) on the work or duties of employees with disabilities and necessary reasonable accommodations; and**
- (2) first aid and safety personnel may be informed, where appropriate, that the condition may require emergency treatment; and**
- (3) government officials investigating compliance with this subchapter shall be provided relevant information on request.**

Investigation Documentation



Workplace Investigations

Duty to Investigate



- **Title VII of Civil Rights Act**
 - An employer should take all steps necessary to prevent sexual harassment from occurring. (29 CFR § 1604)
- **Fair Employment and Housing Act**
 - It is unlawful for an employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” (Govt. Code § 12940(k))
 - Harassment liability triggered when supervisors know or should have known of conduct and failed to prevent it. (Govt. Code § 12940(j)(2))



Harassment Investigations



- **Good faith investigation of harassment complaints may satisfy the prompt and adequate response standard, even if investigation turns up no evidence of harassment and a jury later concludes that it happened**
- **Insulates the employer from liability from wrongful termination when the investigation is reasonably prompt, fair, and thorough.**

Cotran v. Rollins (1998) 17 Cal. 4th 28.

Other Workplace Investigations

General Workplace Misconduct



- **Conduct that could lead to discipline, including:**
 - Alcohol or drug use
 - Violence or threats of violence
 - Dishonesty
 - Attendance
 - Insubordination
 - Falsification of records
 - Criminal conduct

Things to Document



- Document receipt of complaint
- Secure all documents and other evidence
- If using outside investigator, use a written contract with scope of work clearly identified
- Document any orders given to employees:
 - Administrative leave
 - Scheduling of interview
 - General Obligations in the Interview
 - Lybarger Warnings
 - POBRA/FOBRA Compliance

Documents Reviewed by Investigator



- **Complaint (if written)**
- **Relevant Policies**
- **Relevant Communications**
- **Relevant Personnel Files**
 - **Performance Evaluations**
 - **Disciplinary Notices**



The Investigation Report

Key Components

- Investigation process
- Scope of investigation
- Documents reviewed
- Summary of complaints and allegations
- Summary of respondent's response
- Summary of witness statements
- Findings of fact on what occurred
 - Credibility determinations



The Investigation Report

- Do not write anything you would NOT want a judge, jury, arbitrator or press to read
- Avoid conclusions of law and draw conclusions based upon whether the employer policies were violated
 - Clarify this scope with the investigator at start
- Do not place in personnel file



Relying on the Report



- **The Decisionmaker**
 - Reviews the Report
 - Designs and Implements Appropriate Remedial Action (if warranted based on the report's findings)

Relying on the Report

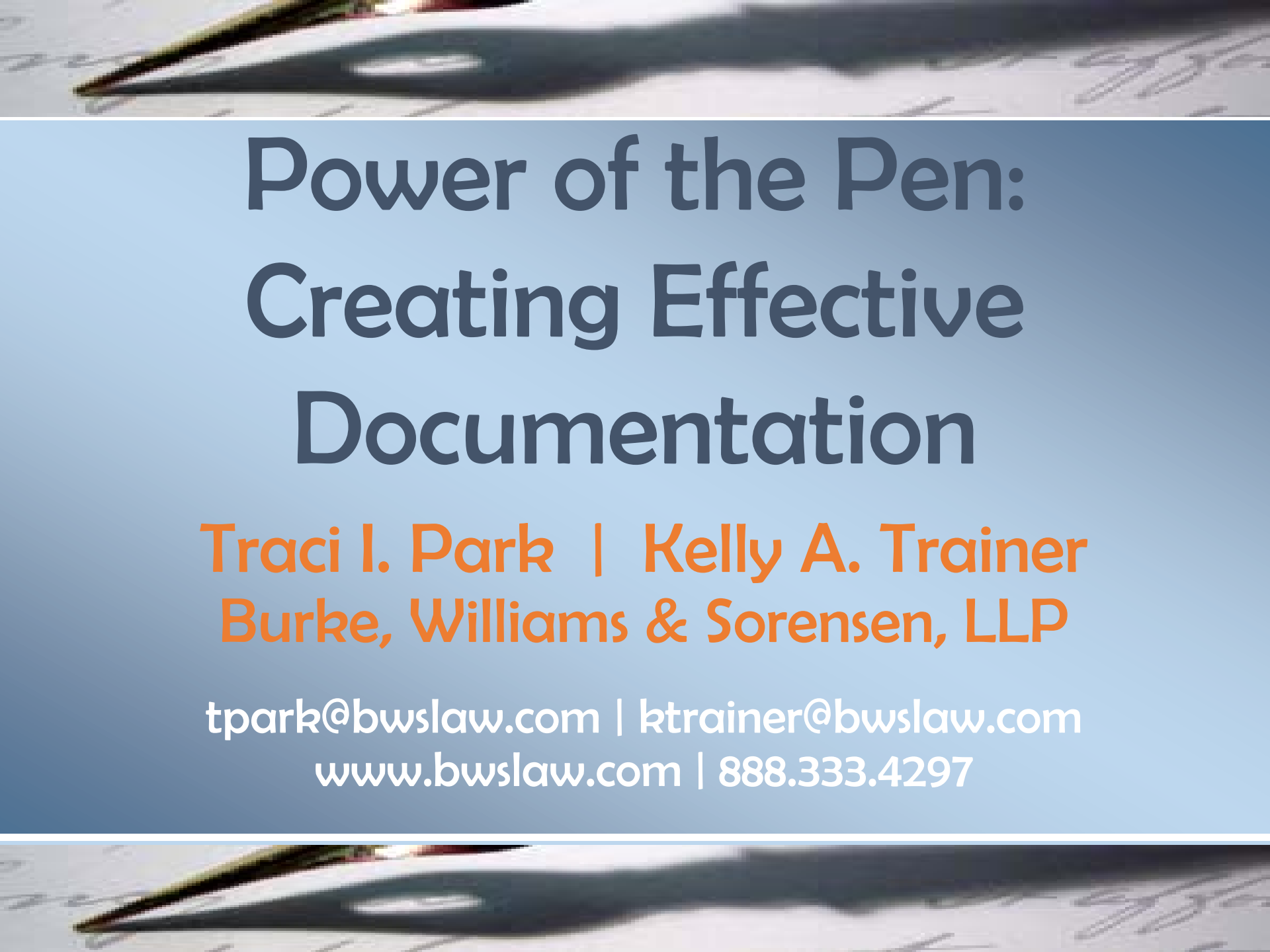
Disclosure

- **Disclose report if needed for Skelly**
 - Redact?
- **Communicate “outcome”**
- **Disclose “results” only to main parties**
- **Advise witnesses in writing investigation is over**
- **Do not disclose any disciplinary action**



Questions?





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