

Storyboard - The Internal Investigation Module

1. Topic 1: Opening

1.1 *The Internal Investigation*



1.2 Internal Investigation

// INTERNAL INVESTIGATION



Interviewing witnesses is a key tool for gathering information during an internal investigation.

Heather Newburg is the complainant. She filed an internal complaint with the organization's Employee Dispute Resolution program just before she filed her EEOC charge.

Pat Ames of Rosser's interviewed her as part of the internal investigation.

- ❖ Click the icon to view the interview and then discuss with your classmates your observations of Pat's interview in the discussion forum.
- ❖ When you've completed the activity, return to this module and click Next.



1.3 Get the Facts

// GET THE FACTS

It is important to start your investigation of the facts right away. Even if you had all the time in the world, the quality of your investigation may depend on getting to the evidence while it is available, relatively fresh, and untainted.

A well thought-out investigation plan is critical for conducting a thorough internal investigation. It's time to build on your preliminary efforts to develop a plan for getting all the information you need.



1.4 Module Objectives

// OBJECTIVES

At the end of the module, you will be able to:

	Develop Plan	Develop an investigation plan that's flexible enough to change as the case develops.
	Review Documents	Properly review and handle documents that are pertinent to the case.
	Identify Techniques	Identify the 2 most valuable techniques for making interviews more productive.
	Select Techniques	Select other techniques that "fit" with your personal style and the particulars of the case.
	List Elements	List the elements that interview documentation should include.
	Assess Mediation	Assess when mediation may be a reasonable approach to resolution of a charge.

1.5 Develop an Investigation Plan

// DEVELOP AN INVESTIGATION PLAN

It's important to start your investigation right away. A good first step is to prepare an investigation plan.

You have already made an initial assessment of the charge and thought through the issues to identify any problem areas. You may have spoken with the EEOC field investigator to find out what the charging party really wants. Now it's time to develop a plan for getting all the information you will need.

Keep in mind as you develop your plan that it must be flexible so it can change as the case changes. Think of the plan as a working document.



1.6 Develop Investigation Plan / Step 1

// DEVELOP INVESTIGATION PLAN - STEP 1

Identify the Issues

For each action or practice complained of in the charge, what factual issues do you need to explore?

- ❖ Review each allegation and identify what theory of discrimination the charging party appears to be alleging.
- ❖ Consider damages the charging party is likely to claim when identifying issues to investigate.
- ❖ Try to anticipate any credibility issues that are likely to arise.

1.7 Example of Identifying Issues

// EXAMPLE OF IDENTIFYING ISSUES



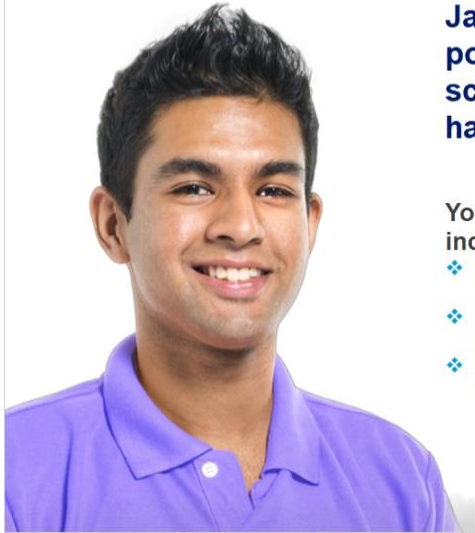
Sarah Giroux alleges that she was disciplined more severely than a male employee, Peter Hiro, for a minor infraction of an organizational rule.

Your list of factual issues to investigate might look like:

- ❖ Nature and extent of the discipline imposed against Sarah
- ❖ Nature and extent of the discipline imposed against Peter
- ❖ Circumstances around each employee's infractions
- ❖ Other employees who had been disciplined as severely for an infraction of the rule in question
- ❖ Legitimate, nondiscriminatory business reasons for the difference in treatment if Sarah was disciplined more severely

1.8 Example of Identifying Issues

// EXAMPLE OF IDENTIFYING ISSUES



Javier Solas alleges that a organizational policy to hire only candidates with a high school diploma for a delivery driver position has disparate impact against minorities.

Your list of factual issues to investigate might include:

- ❖ Does the organization use the alleged policy, and if so, was Javier affected by it?
- ❖ Is the allegation of disparate impact supported by valid statistical evidence?
- ❖ If yes, is the policy nevertheless job-related and consistent with business necessity?

1.9 Develop Investigation Plan | Step 2

// DEVELOP INVESTIGATION PLAN - STEP 2

Identify Information
Sources

Next, go back through your list of factual issues and identify potential sources of information bearing on each issue.

The sources will vary depending on the nature of the case.
Ask yourself a few questions...

1.10 Identify Potential Sources of Information

// IDENTIFY POTENTIAL SOURCES OF INFORMATION



- ❖ Who made the employment decisions or established the policies/practices involved in the charge?
- ❖ What basis might the decision-makers have had for those decisions, policies, or procedures?
- ❖ Have there been other charges relating to the same decisions, policies, or procedures?
- ❖ Have there been other charges or complaints involving the same managers and/or employees?

1.11 Identify Potential Sources of Information

// IDENTIFY POTENTIAL SOURCES OF INFORMATION

The answers to the questions will help lead you to your best internal sources of information.

Records and Documents

Physical Evidence

Witnesses

Click each role to view a description.

Tab 3 (Slide Layer)

// IDENTIFY POTENTIAL SOURCES OF INFORMATION

The answers to the questions will help lead you to your best internal sources of information.

Records and Documents	Witnesses May include anyone who may have personal knowledge of events relating to any of the factual issues raised by the charge and/or the organization's probable defenses, such as: ❖ Any person who participated in the challenged personnel decision ❖ Any person alleged to have engaged in harassment or the inappropriate behavior ❖ Coworkers who may have witnessed an incident or may have other relevant information
Physical Evidence	
Witnesses	

Tab 1 (Slide Layer)

// IDENTIFY POTENTIAL SOURCES OF INFORMATION

The answers to the questions will help lead you to your best internal sources of information.

Records and Documents	Records and Documents May include: ❖ Personnel files of persons involved ❖ Payroll records ❖ Written organization policy statements ❖ Electronic records (computer files, email and voice mail messages) ❖ Records of prior related complaints
Physical Evidence	
Witnesses	

Tab 2 (Slide Layer)

// IDENTIFY POTENTIAL SOURCES OF INFORMATION

The answers to the questions will help lead you to your best internal sources of information.

Records and Documents

Physical Evidence

Witnesses

Physical Evidence

May Include:

- ❖ Samples of the charging party's work supporting a discharge for poor job performance
- ❖ Inspection of the site of any alleged incident, such as the location in which harassment is alleged to have occurred

1.12 Remember...

// REMEMBER...



At this stage you are merely identifying *potential* sources of information. It may not be necessary for you to contact all of these sources. However, make your list as comprehensive as possible now.

1.13 Develop Investigation Plan / Step 3

// DEVELOP INVESTIGATION PLAN - STEP 3

Set Investigation Schedule

Complete your investigation as promptly as possible. If you're working against a deadline, set an overall time frame that also allows enough time to prepare your response to the EEOC and obtain the necessary approvals.



1.14 Sequence of Investigation

// SEQUENCE OF INVESTIGATION



The sequence you decide to follow in exploring each of the potential sources of information is as important as the time schedule you establish.

1

Start with documents and physical evidence. It helps you focus on issues so that you can prepare for your witness interviews.

2

Then plan the best sequence for interviewing witnesses. Bear in mind you may need to go back to certain witnesses.

1.15 Develop an Investigation Plan

// DEVELOP AN INVESTIGATION PLAN



You're the EEO Compliance Officer for Rossers. Now that you have some initial information about the case, you need to develop a plan for investigating the Heather Newburg charge.

- ❖ In your Participant Guide, locate the "Developing an Internal Investigation Plan" activity.
- ❖ You'll start developing an investigation plan by answering a few questions.
- ❖ When you have completed the activity, return to this module.

1.16 Investigation Plan Summary

// INVESTIGATION PLAN SUMMARY

Identify Issues

Identify Sources

Set Schedule

Select each step to view the description



Investigation Plan Checklist

Tab 1 (Slide Layer)

// INVESTIGATION PLAN SUMMARY

Identify Issues	1 Step 1 The first step when developing an investigation plan is to identify the key issues. Go through each allegation in the charge and determine what factual issues you need to explore. Considering the theory of discrimination for each allegation may be helpful in identifying the factual issues to investigate.
Identify Sources	
Set Schedule	

 Investigation Plan Checklist

Tab 2 (Slide Layer)

// INVESTIGATION PLAN SUMMARY

Identify Issues	2 Step 2 The second step is to identify potential sources of information bearing on each factual issue identified in step one. Use the four questions you learned earlier to help lead you to the best documents, other physical evidence, and witnesses. The sources will vary depending on the nature of the case.
Identify Sources	
Set Schedule	

 Investigation Plan Checklist

Tab 3 (Slide Layer)

// INVESTIGATION PLAN SUMMARY

Identify Issues

Identify Sources

Set Schedule

3

Step 3

The third step is to set up a schedule for the investigation. Identify the deadline date on a calendar and work backwards, assigning each phase a period of time. Remember to examine documents and physical evidence first so you are better prepared for witness interviews.



Investigation Plan Checklist

1.17 Document Review

// DOCUMENT REVIEW



You have obtained the documents that you identified as potential sources of information.

They may include:

- ❖ Files routinely kept by the organization
- ❖ Records from particular meetings or proceedings

1.18 What to Look For

// WHAT TO LOOK FOR

Ideally, you will look for and find documents that support a legitimate, nondiscriminatory business reason for the personnel action being challenged in the charge.



Select each image to view an explanation.

Tab 1 (Slide Layer)

// WHAT TO LOOK FOR

Ideally, you will look for and find documents that support a legitimate, nondiscriminatory business reason for the personnel action being challenged in the charge.



Missing Document?

If your experience indicates that there should be a document where there is none, try to determine why or why not. Is it attributable to poor documentation procedures, like no record was ever made? Is it possible, even likely, that the document was destroyed. If so, by whom, when and why?

Select each image to view an explanation.

Tab 2 (Slide Layer)

// WHAT TO LOOK FOR

Ideally, you will look for and find documents that support a legitimate, nondiscriminatory business reason for the personnel action being challenged in the charge.



Too much paper?

If you find more paper than seems necessary under the circumstances, consider whether the charging party could claim that minor incidents or infractions were blown out of proportion; or that it was over-documented because the supervisor was “out to get” him or her.

Select each image to view an explanation.

1.19 Treat Documents as Evidence

// TREAT DOCUMENTS AS EVIDENCE

Any document regarding any issue raised in the case can become evidence.

- ❖ Never destroy a document
- ❖ Don't write on or otherwise alter documents
- ❖ Follow a systematic procedure for identifying original documents
- ❖ Maintain structural integrity of collections
- ❖ Make copies only as needed
- ❖ Be cautious when reviewing medical records



1.20 Interviewing Witnesses

// INTERVIEWING WITNESSES



Witness interviews are generally the most critical step in an investigation. There is no single “right way” to interview witnesses.

Successful techniques vary depending on the interviewer, the witness, and the subject matter.

Two valuable techniques:

- ❖ Careful planning in advance
- ❖ Attentive listening during the interview

1.21 Interviewing Witnesses

// INTERVIEWING WITNESSES

Advance Preparation

- ❖ Select a time and place that allows the witness to speak freely and privately
- ❖ Plan your questions in advance
- ❖ Have documents tabbed to locate relevant portions
- ❖ Consider having someone else in the room
 - Hostile witnesses
 - Delicate issues, like sexual harassment
 - High-level management witnesses
 - For note-taking



Witness Interview Checklist

1.22 Interviewing Witnesses

// INTERVIEWING WITNESSES

Listening Skills

No matter how carefully you have prepared for an interview, matters you did not anticipate come to light. Listen carefully, and follow up on the matters as they arise.

- ❖ Cover all the questions you prepared, but be flexible so you can chase down points that come up in the interview.
- ❖ Watch for statements and subtle clues that may lead to important information, and follow the clues.
- ❖ Cover every point the witness might be asked by an EEOC investigator or attorney so you know how the witness will answer.

1.23 Interviewing Witnesses

// INTERVIEWING WITNESSES

Other Suggested Techniques

Preparing in advance and using listening skills when interviewing witnesses are essential techniques for productive witness interviews.



Witness Interview Techniques

Select the paperclip to open, download and print a list of 22 suggested techniques for interviewing witnesses.

1.24 Suggested Techniques

// SUGGESTED TECHNIQUES

 Set the tone

 Get Specifics

 Ask probing questions

 Separate facts

 Be persistent

Select each one to view a brief description.

Tab 1 (Slide Layer)

// SUGGESTED TECHNIQUES

 Set the tone

 Get Specifics

 Ask probing questions

 Separate facts

 Be persistent

Select each one to view a brief description.

Set the tone

Help make your witness feel more comfortable by setting a calm and professional tone. Introduce yourself. Explain the reason for the investigation, your role in the process, and what can be expected to happen as the case proceeds. Explain that the organization's interest at this point is to get all the facts and that the witness can be most helpful by telling you whatever he or she knows. If someone is in the room with you, explain that person's role ("We work together." or "He'll be taking notes.").

Tab 2 (Slide Layer)

// SUGGESTED TECHNIQUES

 Set the tone

 Get Specifics

 Ask probing questions

 Separate facts

 Be persistent

Select each one to view a brief description.

Get specifics

That means, get dates, times, places, persons present, sources of information, etc. Don't move too quickly from point to point. Investigation is the process of systematically gathering and comparing information from a variety of different sources. Details that appear insignificant at first glance often lead to the discovery of highly relevant evidence.

Tab 3 (Slide Layer)

// SUGGESTED TECHNIQUES

 Set the tone

 Get Specifics

 Ask probing questions

 Separate facts

 Be persistent

Select each one to view a brief description.

Ask probing questions

Use open-ended questions, ones that can give you a real answer, not just "yes" or "no." Then ask more pointed questions to jog the witness' mind or force them to be more specific. When you spot discrepancies in what a witness tells you, follow-up to see if there is a satisfactory explanation.

Tab 4 (Slide Layer)

// SUGGESTED TECHNIQUES

 Set the tone

 Get Specifics

 Ask probing questions

 Separate facts

 Be persistent

Select each one to view a brief description.

Separate facts

That is, separate facts from assumptions. Be alert to determine which statements are based on a witness's own personal knowledge and observations and which are not. When you hear an assumption, opinion, guess, or hearsay, try to get to the basis for each statement.

Tab 5 (Slide Layer)

// SUGGESTED TECHNIQUES

 Set the tone

 Get Specifics

 Ask probing questions

 Separate facts

 Be persistent

Select each one to view a brief description.

Be persistent

Don't settle for statements that don't make sense. They may signal fundamental weaknesses in the witness's testimony. Make an effort to tie up loose ends, even if that requires you to come back to the witness several times with "just one more question."

1.25 Special Considerations

// SPECIAL CONSIDERATIONS

Charging Party



- ❖ Can be problematic, especially if he/she still works for the organization.
- ❖ May misconstrue something said in interview, which could lead to a new charge or amendment to an existing charge.
- ❖ Best to work through the EEOC or the charging party's attorney.

Other Employees



- ❖ Make clear that the organization respects the right of the charging party to file a charge.
- ❖ Explain that the purpose of the interview is to gather facts.
- ❖ State that you want the truth, favorable or unfavorable to the organization.
- ❖ If employee is reluctant to talk with you about the charge, seek legal counsel.

1.26 Concluding the Interview

// CONCLUDING THE INTERVIEW

- ❖ Encourage the witness to report any additional information
- ❖ Remind the witness of the importance of confidentiality
- ❖ Remind the witness of the organization's policy against retaliation
- ❖ Explain the remaining procedures, but be noncommittal about the outcome of the investigation
- ❖ Thank the witness for his/her time



1.27 Examine a Witness Interview

// EXAMINE A WITNESS INTERVIEW



Now that you know more about effective witness interview techniques, let's critique Pat Ames' interview of Rossers Store Manager, Brian Parks.

- ❖ In your Participant Guide, locate the "Examine Brian Parks Interview" activity.
- ❖ Identify and discuss with your colleagues the techniques Pat used to gather information.
- ❖ When you have completed the activity, return to this module.

For your planning purposes: This activity includes viewing several video clips that, together, are about 45 minutes in length.

1.28 Document the Interview

// DOCUMENT THE INTERVIEW



You should document witness interviews. Discrimination charges often take many months or even years to resolve, and witnesses may forget details or leave the organization before the case is over.

Check your organization's policy on documenting witness interviews or consult legal counsel. The organization may have to disclose to the EEOC and/or attorneys for the charging party any documentation you prepare.

1.29 Tips for Documenting Interviews

// TIPS FOR DOCUMENTING INTERVIEWS



Your documentation should include:

- ❖ A listing of the preliminary matters you covered with the witness
- ❖ The date, time, place, and names of all persons present
- ❖ Notes that are true, correct, and complete

Label any written statement of the witness or notes from the interview as "confidential." Place it in your investigation files, and limit access to only those who "need to know."

1.30 Evaluate Investigation Results

// EVALUATE INVESTIGATION RESULTS

After completing the internal investigation, review the information, documents, and records you've collected.

Quality of the evidence

Sources of the evidence

Reasonable inferences

Overall consistency

1.31 Determine the Company's Position

// DETERMINE THE ORGANIZATION'S POSITION



A realistic assessment of the organization's position provides you with a basis for deciding whether the organization should defend itself against the charge or attempt to settle the case.

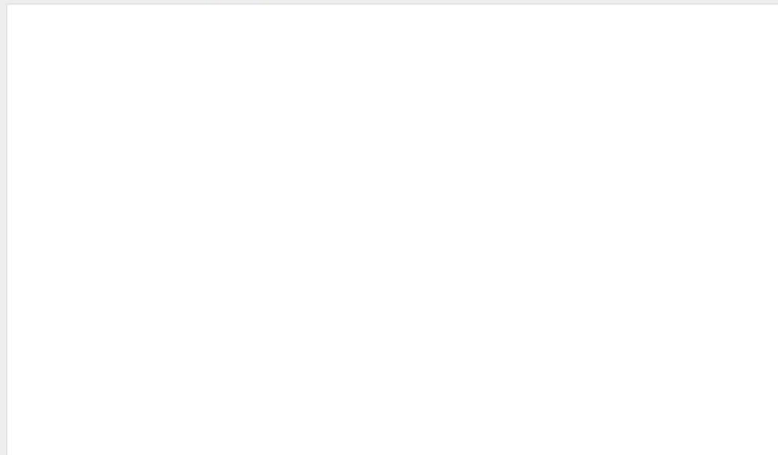
The
“fight or settle”
decision

1.32 Determine the Company's Position

// DETERMINE THE COMPANY'S POSITION

- ? Are we right?
- ? Can we win?
- ? What's the organization's exposure?
- ? What's the public relations impact?
- ? What will it cost to defend?
- ? What's the effect on other employees?

Select each category to view a description.



Tab 1 (Slide Layer)

// DETERMINE THE COMPANY'S POSITION

?

Are we right?

?

Can we win?

?

What's the organization's exposure?

?

What's the public relations impact?

?

?

Select each category to view a description.

Are we right?

In many cases, your investigation will reveal that the organization indeed is in the right, and your decision will be to go ahead and defend the case. In others, you may determine that the organization is in the wrong, and that settlement is the best option. Occasionally, the answer to this question is a matter of degree. For example, the investigation may reveal that the treatment of the charging party was not illegal, but it was unfair or improper. To the extent that the investigation shows that the organization did something wrong, consult legal counsel. You may want to take prompt, corrective action, even if the organization may be able to win the case in court.

Tab 2 (Slide Layer)

// DETERMINE THE COMPANY'S POSITION

?

Are we right?

?

Can we win?

?

What's the organization's exposure?

?

What's the public relations impact?

?

?

Select each category to view a description.

Can we win?

Sometimes it may be difficult to mount a successful defense against a charge, even if the organization is completely right. Charging parties have the right to a jury in most discrimination cases if they go to trial. Juries can be more influenced by sympathies and impressions than by legal rules and facts. The organization may have acted entirely for legitimate business reasons. But can it document them convincingly? Will a jury understand the business aspects of the decision? Will they find the organization's witnesses credible? Does the action the organization took appear to be fair and impartial?

Tab 3 (Slide Layer)

// DETERMINE THE COMPANY'S POSITION

?

Are we right?

?

Can we win?

?

What's the organization's exposure?

?

What's the public relations impact?

?

What will it cost to defend?

?

What's the effect on other employees?

Select each category to view a description.

What's the organization's exposure?

What remedies – monetary and otherwise – is a court likely to impose if the organization litigates and loses the case? Consider not only backpay, compensatory and punitive damages, costs and attorneys' fees, but also the possibility of an order directing reinstatement of the charging party, changes in seniority rights, modification of existing organization policies, posting of notices, etc.

Tab 4 (Slide Layer)

// DETERMINE THE COMPANY'S POSITION

?

Are we right?

?

Can we win?

?

What's the organization's exposure?

?

What's the public relations impact?

?

What will it cost to defend?

?

What's the effect on other employees?

Select each category to view a description.

What's the public relations impact?

Public relations factors may cut either way in a organization's decision whether to fight or settle a charge of discrimination. In some circumstances, settling might be preferable to taking a case to court and risking adverse publicity. In other instances, settlement might pose the greater danger because it could be perceived as an admission of wrongdoing by the organization.

Tab 5 (Slide Layer)

// DETERMINE THE COMPANY'S POSITION

?

Are we right?

?

Can we win?

?

What's the organization's exposure?

?

?

?

Select each category to view a description.

What will it cost to defend?

Sometimes it just isn't worth what it would cost to fight a charge, even though the organization is confident that it could win. The potential costs of fighting include not only attorneys' fees and other litigation costs, but the loss of countless hours of productive time on the part of managers, staff members, and employee witnesses involved in the case. Even if the organization wins the case, it generally will not be entitled to reimbursement for any of these costs.

Tab 6 (Slide Layer)

// DETERMINE THE COMPANY'S POSITION

?

Are we right?

?

Can we win?

?

What's the organization's exposure?

?

?

?

Select each category to view a description.

What's the effect on other employees?

A organization justifiably may be concerned that if it settles one charge, even for a "nuisance value" payment, word of the settlement may encourage other individuals to file charges against it, perceiving that the organization is an "easy mark."

Some companies take the position that they will defend, rather than settle, any case in which they are convinced that their action was right. This, they think, sends a message to employees and others that the organization will not allow itself to be a victim of "blackmail" charges.

1.33 Determine the Company's Position

// DETERMINE THE COMPANY'S POSITION



At this point, you do not need to make a final decision about settlement of the case. There may be many opportunities to revisit the “fight or settle” decision as the case proceeds.

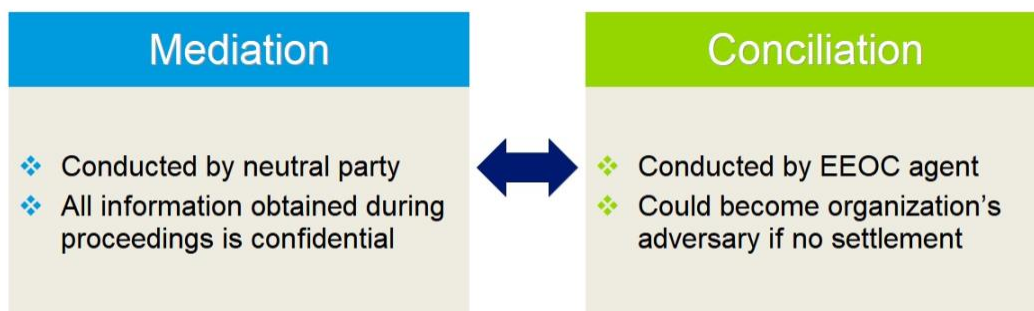
But this initial evaluation of the strength of the case and what is at stake should provide you with a good basis for deciding how to respond to the charge.

1.34 Mediation

// MEDIATION

Mediation is a process in which a trained neutral helps disputing parties to negotiate a mutually acceptable agreement.

Access to EEOC mediation requires both the charging party and the organization to be willing to participate.



1.35 Benefits of Mediation

// BENEFITS OF MEDIATION



- ❖ Potential for early resolution
- ❖ Parties retain control over outcome
- ❖ Confidentiality
- ❖ Firewall restrictions prohibit sharing information with the EEOC investigative or legal staff
- ❖ Information is exchanged

1.36 Universal Agreements to Mediate (UAM)

// UNIVERSAL AGREEMENTS TO MEDIATE (UAM)

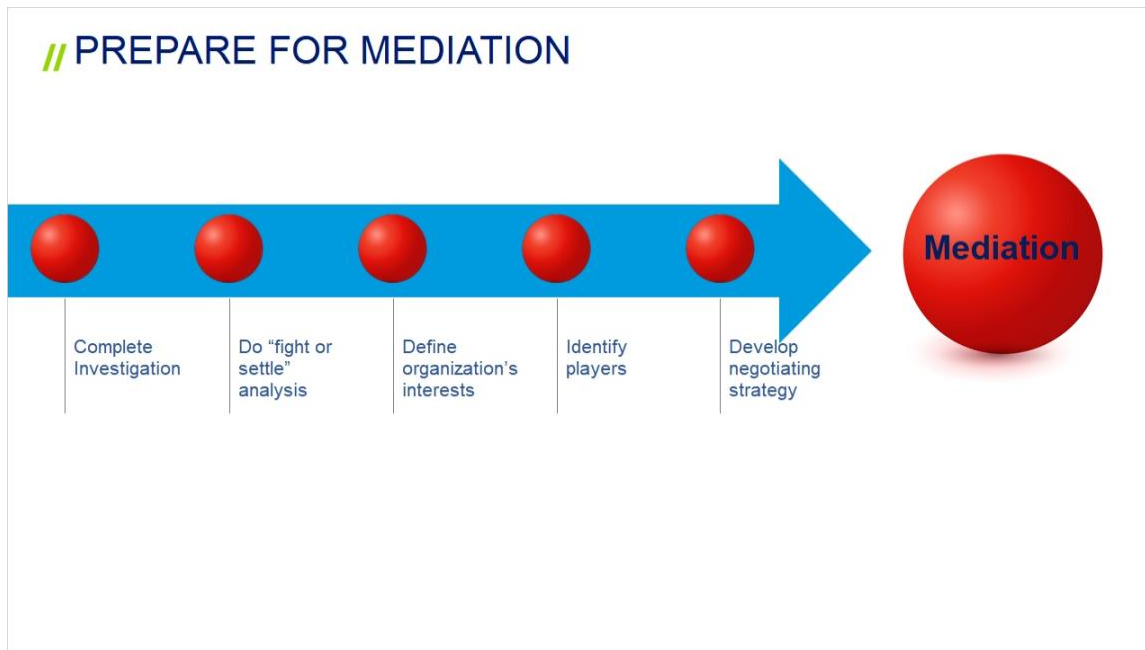


A UAM is an agreement between the EEOC and an organization to consider mediating all eligible charges filed against the organization before EEOC's investigation or litigation.

- ❖ Establishes an organization's willingness to mediate all cases eligible for mediation
- ❖ Allows any party to opt out of mediation on a case-by-case basis
- ❖ Establishes appropriate points of contact for both the organization and the EEOC
- ❖ Expedites scheduling

Click here for [more information about UAMs](#)

1.37 Prepare for Mediation



1.38 Summary

// SUMMARY

During this module you covered a lot of ground. You learned how to prepare an investigation plan, conduct an internal investigation into a charge of discrimination, and assess evidence to arrive at a decision to either defend against the charge or settle the case.

After developing an investigation plan, start reviewing documentation and gathering evidence, including the process of interviewing witnesses and documenting each interview. After reviewing all the evidence, the organization makes a decision to either defend against the charge or settle. Either way, mediation is an option.

A decision to defend against the charge will require the organization to communicate its decision and key findings from the internal investigation to the EEOC. Your role as impartial investigator is largely done now. Prepare for a new role!

1.39 Key Take-Aways

// KEY TAKE-AWAYS



- ❖ Start your investigation plan right away. Set deadlines, but keep the plan flexible.
- ❖ Treat all documentation as evidence.
- ❖ The two most valuable witness interview techniques are advance planning and attentive listening.
- ❖ Use witness interview techniques that fit both your own style and the particulars of the case.
- ❖ Weigh both favorable and unfavorable evidence when making the “fight or settle” decision.
- ❖ Consider mediation when it’s appropriate in order to resolve a case and when the charging party agrees to mediate.

1.40 Congratulations

// CONGRATULATIONS

You have completed the “The Internal Investigation” module.

Close this module by clicking the red X in the top right corner of the window and proceed to the “The EEOC’s Investigation” module.

