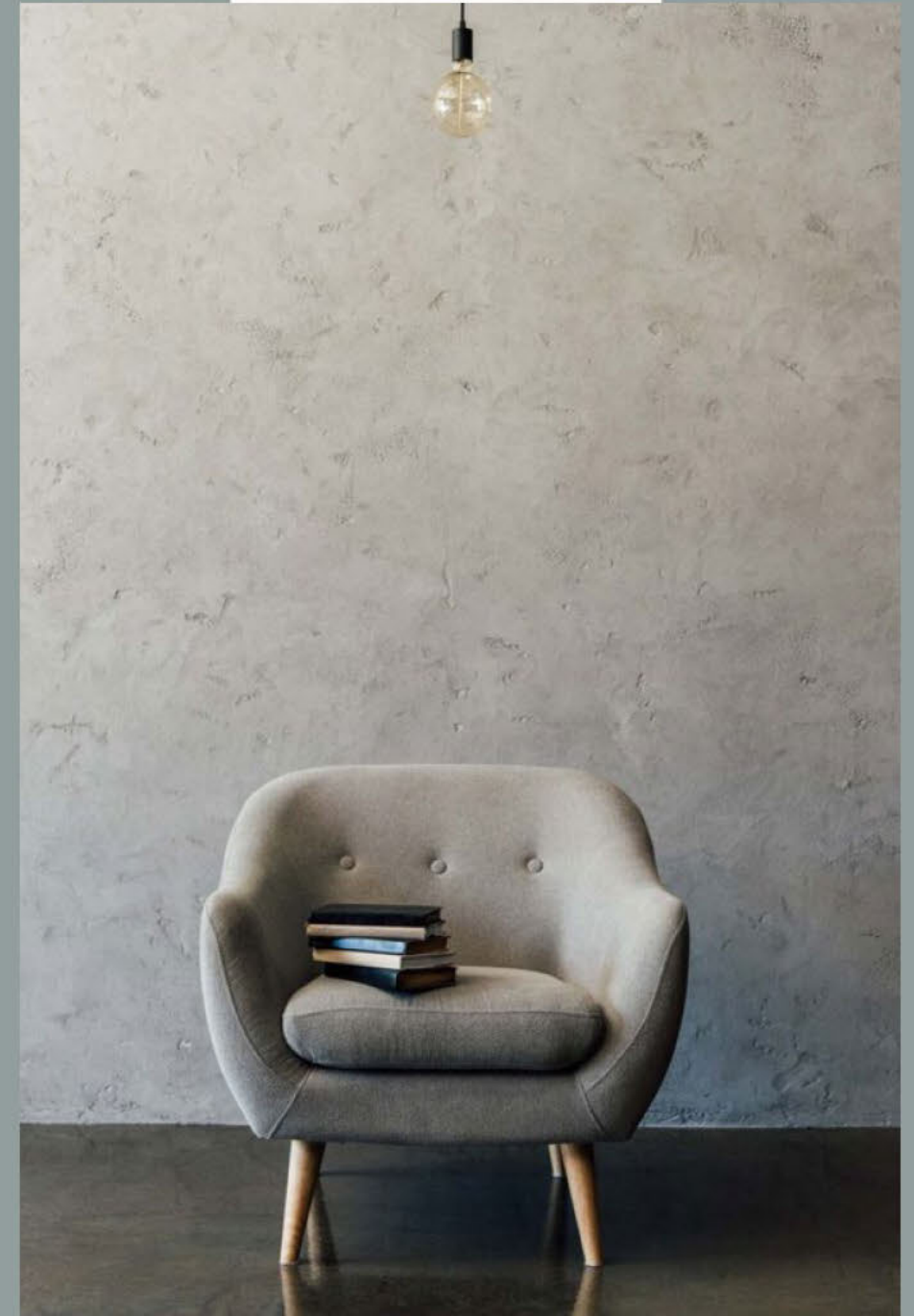


SML

February 5, 2025

Practical Tips for Regulatory Investigations

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Land Acknowledgment

- We acknowledge that our office is located on the traditional territory of many nations, including the Mississaugas of the Credit, the Anishnabeg and the Chippewa, and is now home to many diverse First Nations, Inuit and Métis peoples.
- We also acknowledge that Toronto is covered by Treaty 13 with the Mississaugas of the Credit.
- We encourage you to acknowledge the land where you are located and to reflect on ways in which you can support the process of reconciliation.

Agenda

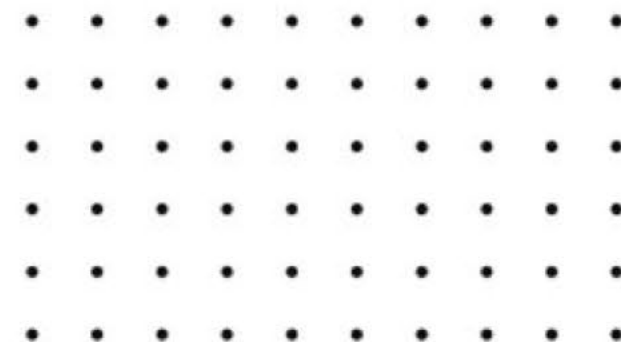
1. Statutory Powers
2. Documentary Evidence
3. Witness Interviews
4. Communications with the Registrant



Statutory Powers

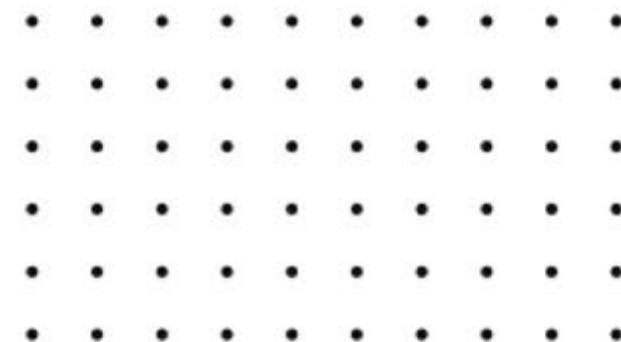
Statutory Powers

- Powers of investigation are accorded by statute
- Be familiar with the source and scope of your powers of investigation
 - Powers of entry – Where? When?
 - Powers to examine documents and things relevant to the investigation
 - Powers to take copies
 - Powers to take originals where copying impractical
 - Powers to make reasonable inquiries of any person



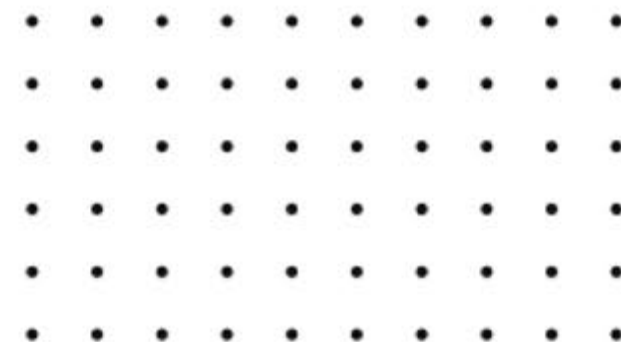
Statutory Powers

- Don't let other agencies force you into following their process if you have a statutory power that lets you obtain the information through your own process
- For example:
 - “You can't have that because it's confidential.”
 - “We can't give that to you. You have to make an FOI request.”
 - Note: special rules apply to obtaining documents from Crown disclosure/police files
- When in doubt, first consult with the regulator and/or their legal counsel to ensure there isn't another way



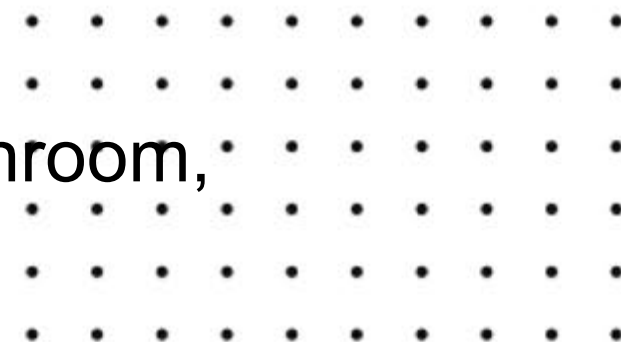
In writing vs. in person

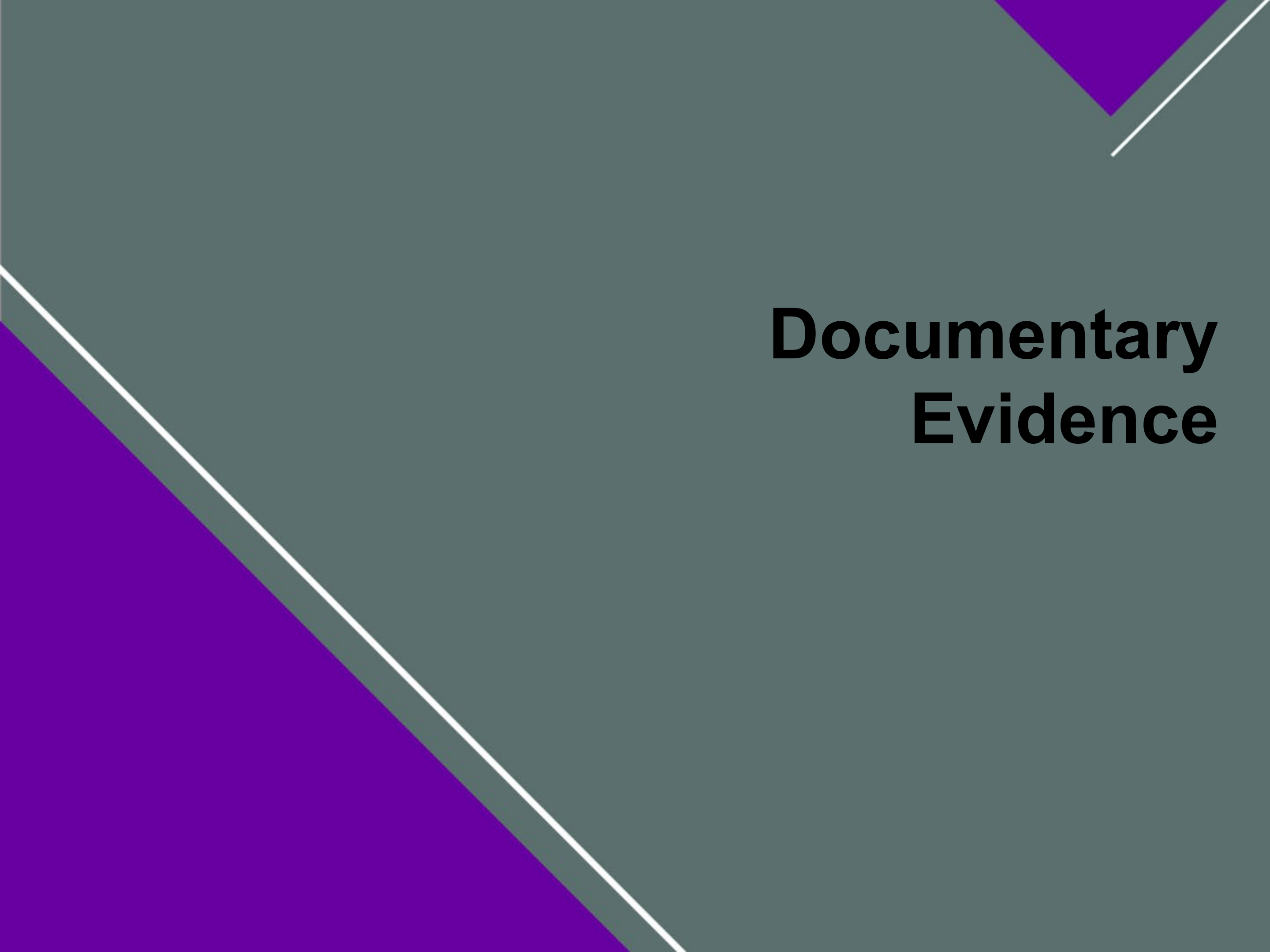
- Not everything can be done in writing. Avoiding over reliance / exclusive reliance on written correspondence
- In particular, attending in person at the Registrant's practice location to effect service and/or obtain documents
 - Process cannot be abusive
 - Attendance must be within your statutory authority
- Note: Carefully document the entire attendance
 - Dates
 - Times
 - Persons
 - Detailed description of events, in sequence



Ensure respect for *Charter* rights

- Be prepared to respond to arguments that your conduct in-person violated the registrant's *Charter* rights
 - Unreasonable search and seizure
 - Detention
 - Right to counsel
- Ask questions to determine the location of relevant information:
 - Filing cabinet
 - Electronic Records
 - Digital communications – email address(es), phone number(s), apps/DMs
- Be mindful of the registrant's rights to:
 - Right to contact a lawyer
 - Right to move freely about the premises, use the washroom, drink water, etc.

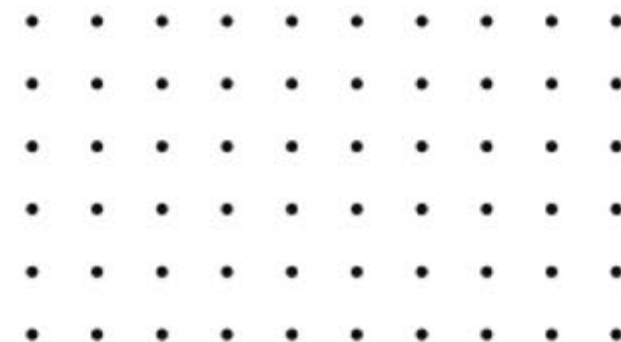




Documentary Evidence

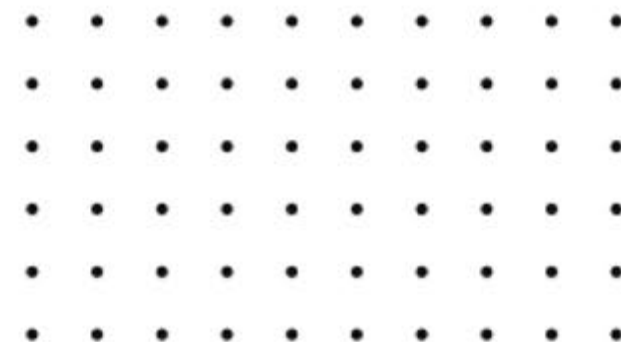
Existence of documentary evidence

- Are there sources of information independent of the witnesses that could assist in resolving the factual disputes?
- For example:
 - Did the witness say there were relevant payments? – Banking records
 - Did the witness say there were relevant phone calls? – Phone company records
 - NOTE: these are time-sensitive. Some providers can only go back 13 months.
 - Is this part of a dispute with the Registrant's employer? – Personnel/HR file
 - Are there relevant invoices, receipts, surveillance images? i.e. from a hotel/motel, restaurant, airline, car rental firm, etc.



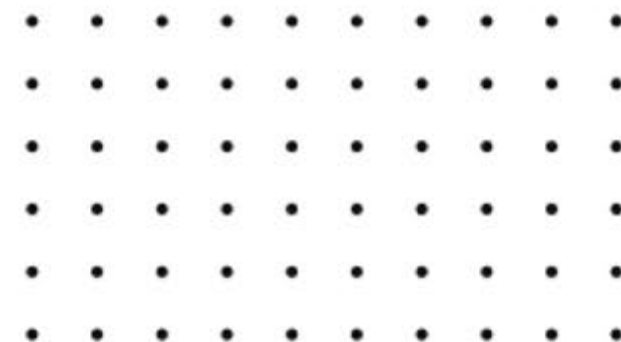
Preservation of documentary evidence

- Are there emails, text messages, direct messages (Instagram, Facebook), calendar entries, or handwritten notes to support an allegation?
- If so, timely preservation is key – get copies
 - preferably forensically (vs. screen shots)
 - Important to be able to see date and time stamps
- Do we have the Registrant's file / notes and records?
Always get the complete patient file from the Registrant as soon as possible.



Documenting sources of information

- i.e. printouts from a website, screen grabs, photographs, spreadsheets, etc.
 - Where did this document come from?
 - How did it come to be in the College's/investigator's possession?
 - Who authored/created it? When? How?
- Can be memorialized by memos to file



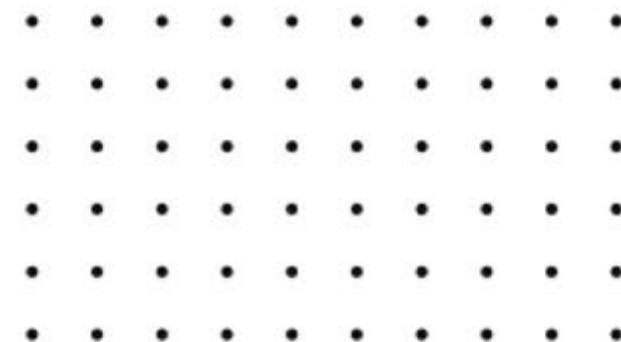
Text messages

- In particular with respect to text messages, how do we know the messages were sent and/or received by the people they are attributed to?
 - Contact name
 - Contact's phone number
 - What links that phone number to that person?



Preservation of as-sent copies

- Preserve everything – including attachments – exactly as they were sent – to everyone (complainant, registrant, etc.)
- Don't discard or not save attachments just because they happen to be duplicates of other documents in the file
 - the letter says that XXX attachment was enclosed, but it was not in fact enclosed – this happens sometimes
- “Prove it.”

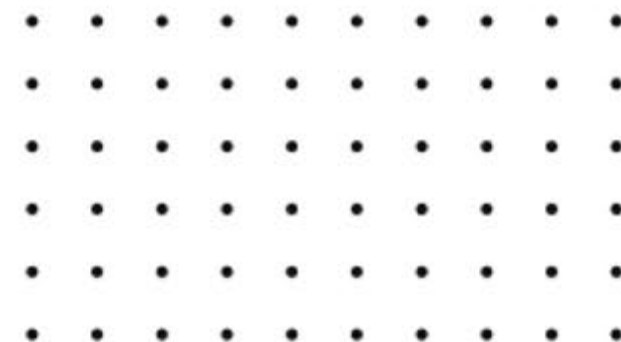




Witness Interviews

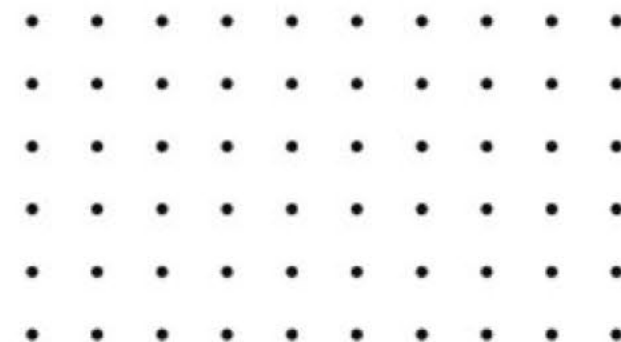
Sources of a personal knowledge

- How does this person know what they are telling me?
- Facts vs. Conclusions
- Did the witness actually see/hear/observe what they are telling me? (facts)
- Are these conclusions they are drawing?
- Is the witness telling me things they were told by others?
- Is there someone with better or more direct knowledge of the events?



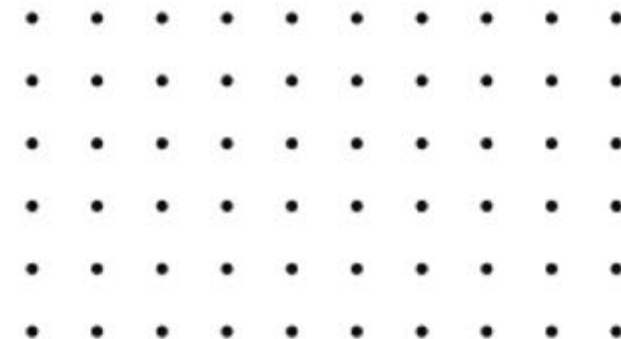
Details, details, details

- Ask the witness to describe the events in as much detail as possible
- “I came in, and we discussed **this and that**” – what, exactly?
- Especially in sexual misconduct cases, it is important to clarify what the touching felt like, how many hands were used, what degree of pressure, and specific location on the body
- Know your anatomy
- Consider the use of anatomically correct diagrams



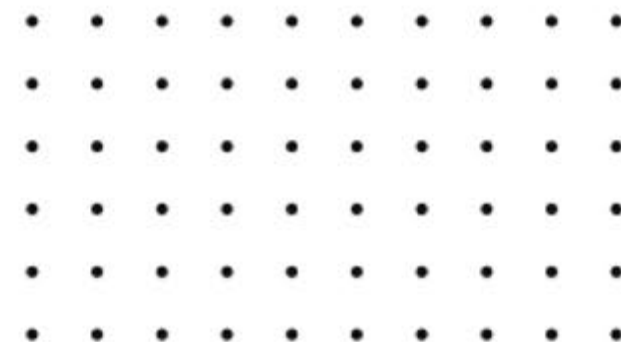
Audio Recordings vs. Memos

- Witness interviews can be recorded in various ways
- While audio recordings are likely not a legal requirement or warranted every time you speak to someone, they should be given serious and careful consideration
- Pros:
 - Accuracy
 - Efficiency
 - Facilitates cross-examination
- Note: audio recording requires compliance with applicable best practices



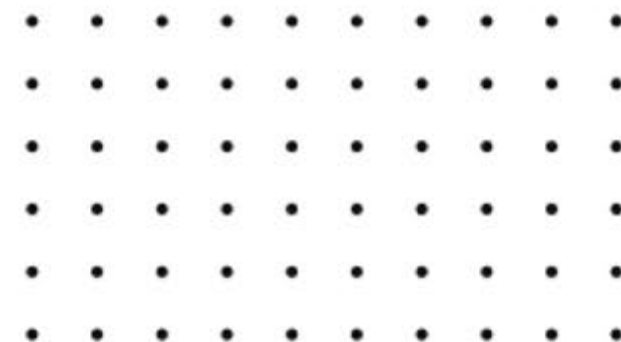
“I don’t recall”

- Beware “I don’t recall”
- This can mean:
 - I don’t remember one way or the other if that happened or not
 - OR
 - I’m saying I don’t recall something because it didn’t happen
- Clarify as necessary



Documents referred to

- Sometimes, during an interview, witnesses will make reference to documents in their possession
 - Q. “Did you work at ABC Clinic that day?”
 - A. “Let me just check my schedule for that day... Nope, I worked elsewhere that day.” Or, “Yes, my hours were from 8 am to 4 pm”.
- If the subject of the interview makes reference to a document, – don’t just take their word for it
- Immediately ask them to show you, and obtain a copy if it is in any way relevant to the matters under investigation



Third-party witnesses

- As a general rule, avoid asking other people what the complainant told them
- Avoid asking mandatory reporters (mental health professionals in particular) about the details of the complainant's treatment
- Don't ask the complainant to consent to the disclosure of records from the mandatory reporter
- Don't obtain records from the mandatory reporter

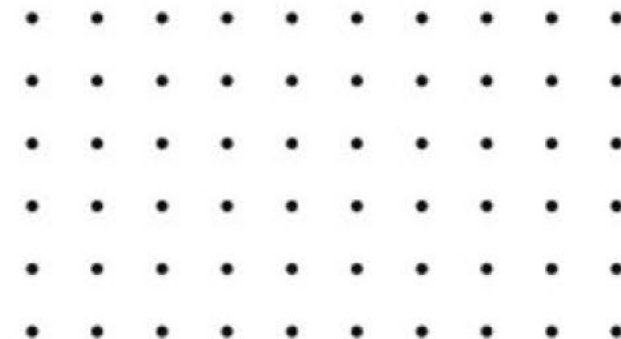




Communications with the Registrant

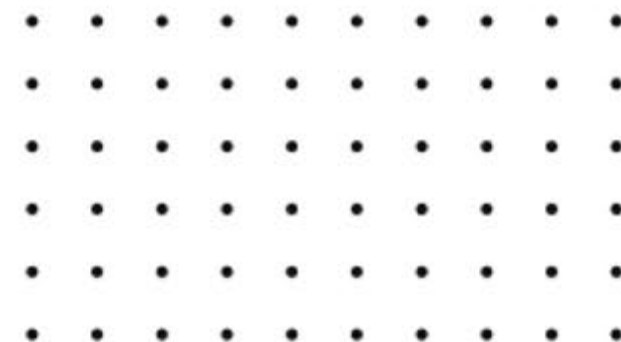
Service on the Registrant

- Registrants are entitled to notice, both as a matter of fairness and often under statute
- For example:
 - The receipt of a complaint
 - The receipt of a report
 - The matters in issue in an investigation
 - The date and time of certain meetings
- Does your enabling statute have a **presumption** of service?
 - s. 39, *Regulated Health Professions Act* – regular mail, or fax
- Avoid service practices that would defeat your statutory presumption



Evaluating the Registrant's response

- Has the Registrant addressed every issue the regulator wants them to?
- Are there material points on which they are silent?
- Beware the passive voice
 - “The report *was* signed...”
 - “The client *was* told...”
 - “Their consent *was* recorded...”
- Review each response carefully and determine if follow up to request specific clarification is warranted
 - “Further to your response dated XXX, please clarify the following points: ...”

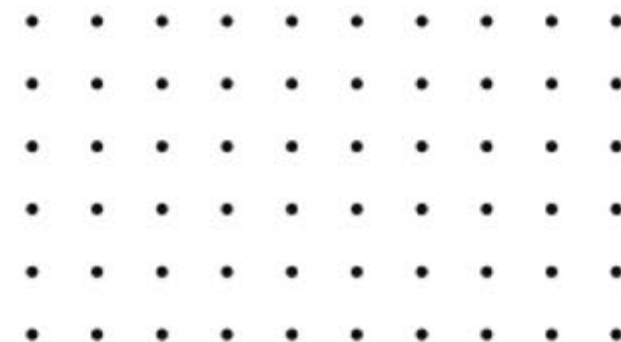


The background is a solid grey color. There are two purple shapes: a large triangle in the bottom-left corner and a smaller inverted triangle in the top-right corner. Two white lines are present: one diagonal line running from the top-left towards the bottom-right, and another shorter diagonal line in the top-right corner.

Final Thoughts

Importance of ongoing dialogue

- Investigators are encouraged to report back to the regulator as the investigation progresses, to provide updates and to seek investigative direction
- This can avoid delays, preserve memories while events are fresh, and potential spoliation of evidence generally





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THANK YOU

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