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# Being an Effective Title IX Advisor: From Investigation to Hearing

Massachusetts Association of Community Colleges

November 2021

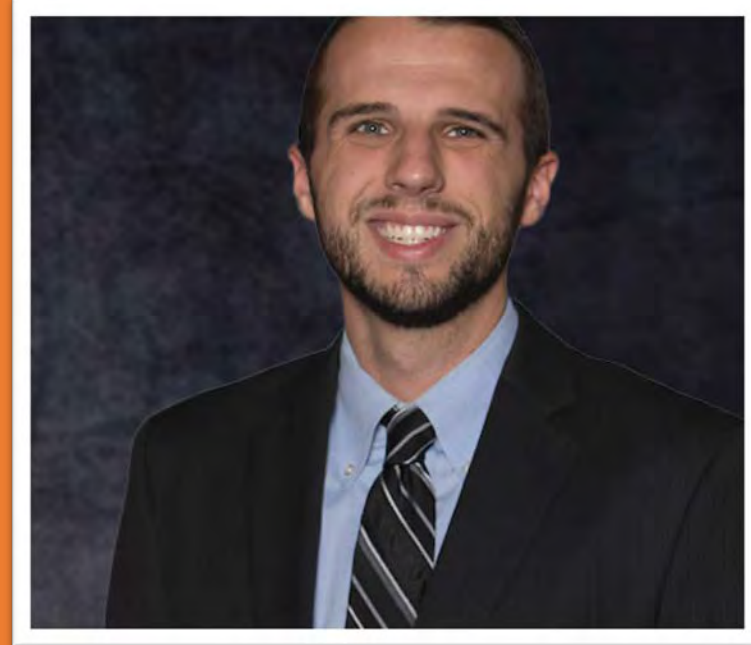
# Your Facilitators

**Martha Compton**  
(she/her/hers)



**Director of Strategic  
Partnerships & Client  
Relations**

**Kevin Lineberger, J.D.**  
(he/him/his)



**Solutions  
Specialist**



## Vision

We exist to help create safe and equitable work and educational environments.



## Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



## Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity

# Today's Agenda

01

Overview of Title IX and Its Hearing Requirements

04

What's My Role?

02

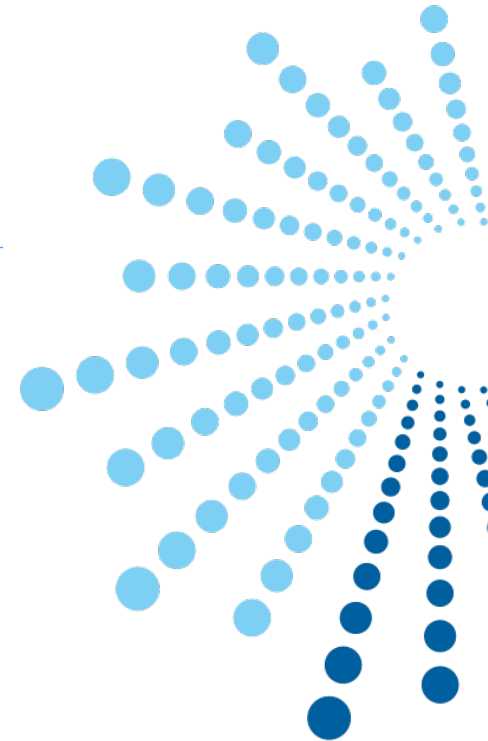
Live Hearing Format and Logistics

05

Practical Application

03

Who Will Be There?





# Overview of Title IX and Its Hearing Requirements

01

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## Title IX of the Education Amendments Act of 1972

"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 (1972).

# On May 19, 2020 . . .

The Department of Education promulgated regulations that went into effect August 14, 2020.



These regulations limited the scope of Title IX to a very specific set of cases that must meet a new definition of sexual harassment and jurisdictional requirements.



If a case meets all the required elements, then it will proceed under the Title IX grievance process, which includes a live hearing.

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# Overview of the Title IX Requirements as of August 14, 2020

## Type of Conduct Covered

- Hostile Environment Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence Based on Sex
- Stalking Based on Sex



## Places of Conduct Covered

- Campus Program, Activity, Building, and
- In the United States



## Required Identity

- Complainant is a member of the community, and
- Control over Respondent



## Title IX Procedures

Required Response:

Title IX Procedures Including a Live Hearing



# Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



# 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



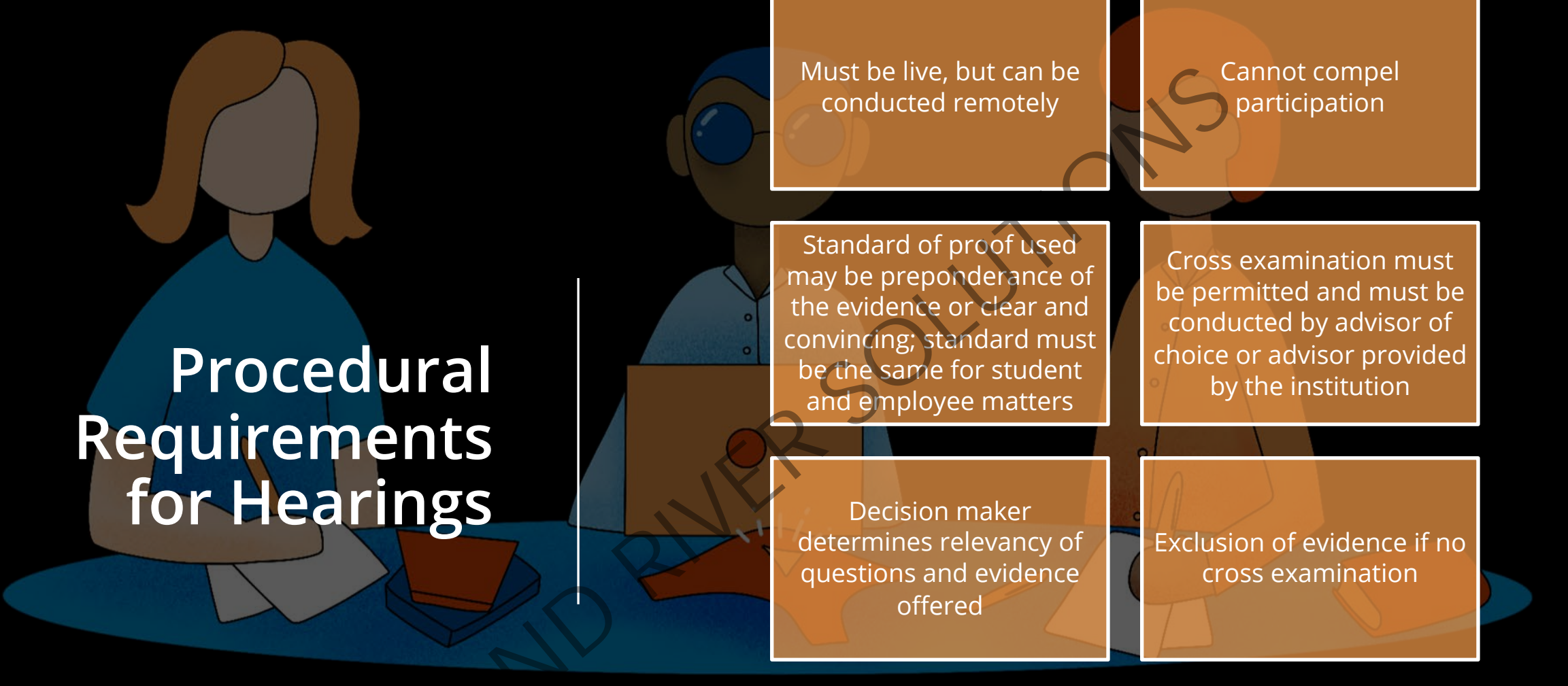
Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report



Report summarizing relevant evidence and 10 day review of report prior to hearing



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# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation

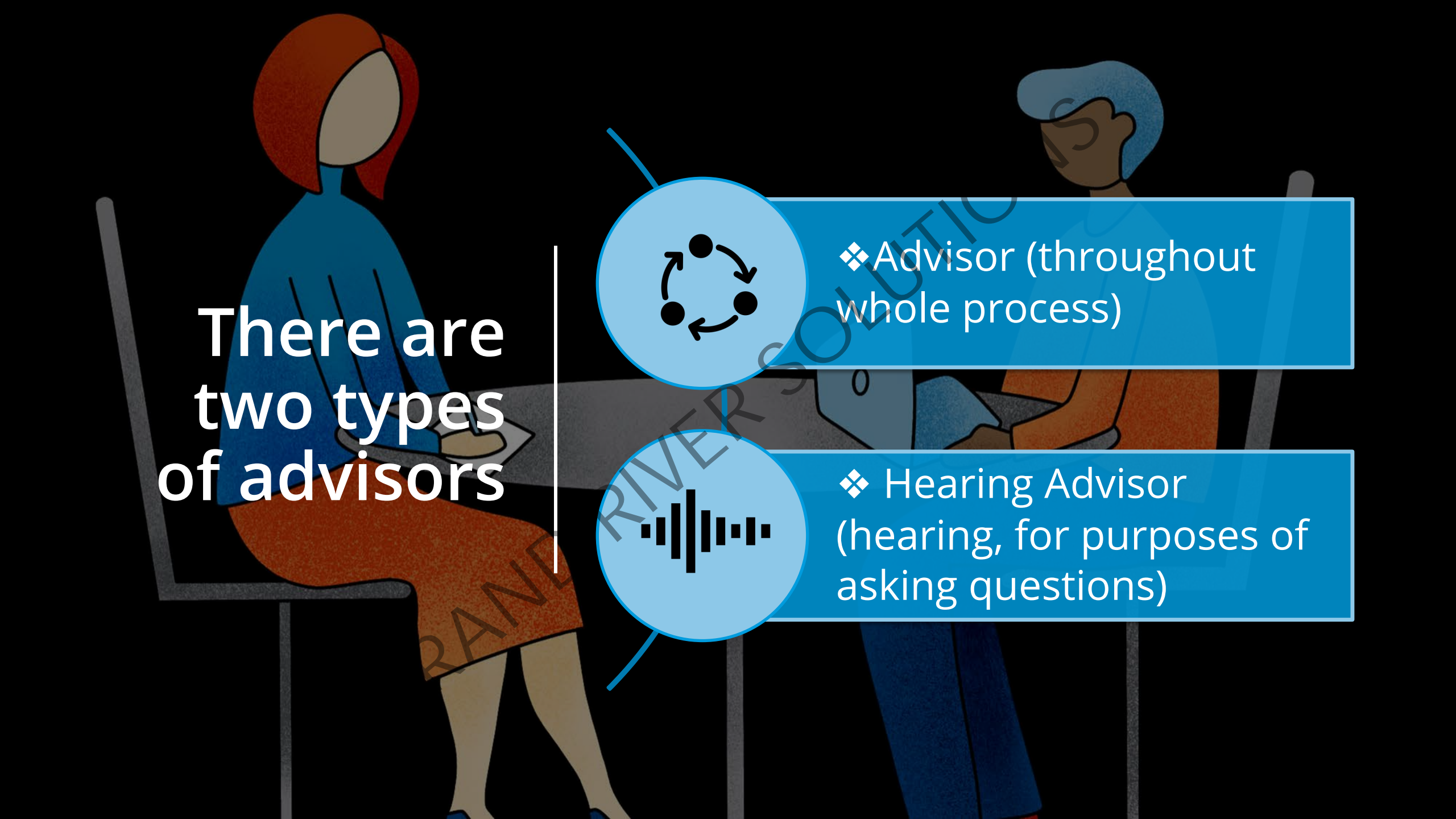
Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or advisor provided by the institution

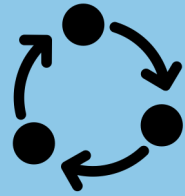
Decision maker determines relevancy of questions and evidence offered

Exclusion of evidence if no cross examination

Written decision must be issued that includes finding and sanction



# There are two types of advisors



❖ Advisor (throughout whole process)



❖ Hearing Advisor (hearing, for purposes of asking questions)

# Advisor of Choice



Parties are entitled to an advisor of choice

The advisor of choice can be anyone

This advisor may accompany the party to any interviews/meetings and the hearing

The advisor will conduct cross examination of the other party and witnesses at the hearing

If a party does not have an advisor, the institution must provide one for the purposes of cross examination



“

## Hearing Advisor

“Such advisors need not be provided with specialized training or be attorneys because the essential function of such an advisor provided by the recipient is not to “represent” a party but rather to relay the party’s cross-examination questions that the party wishes to have asked of other parties or witnesses so that parties never personally question or confront each other during a live hearing.” 85 Fed.

Reg. 30562 (May 19, 2020).

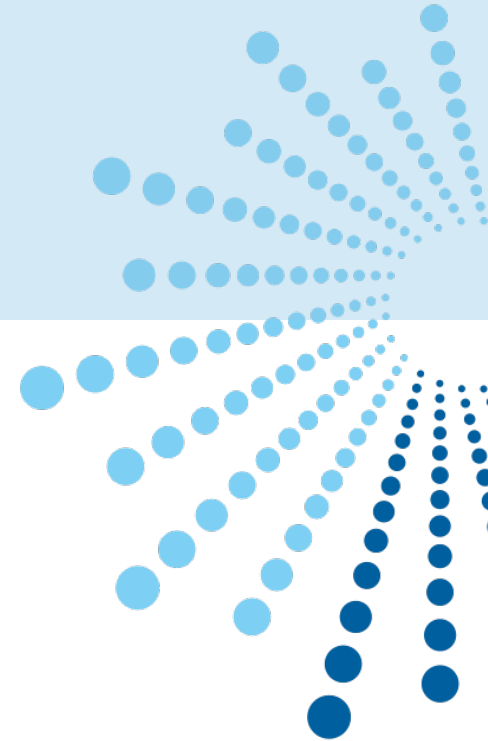
”



# Live Hearing Format and Logistics

02

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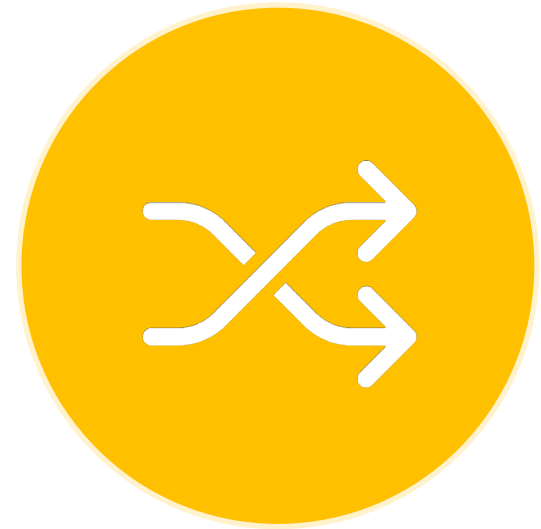
# Live Hearings Required



In person



Remote



Hybrid

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# Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



All hearings must be recorded.

Audio-Visual  
Audio Only



Participants must be able to communicate during the hearing

The parties with the decision maker(s)  
The parties with their advisors



# Who Will Be There?

Hearing participants and their roles

03

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# Hearing Participants

**Complainant**

the person bringing the complaint

**Respondent**

the person against whom the complaint has been filed

**Advisor**

will conduct cross examination; role varies depending on school

**Investigator**

summarizes the investigation, answers questions

**Witnesses**

present in the room only when answering questions

**Hearing Coordinator/Officer**

coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants

**Decision-Maker**

makes decision as to whether policy was violated

**Hearing Administrator**

assists with the logistical coordination of the people, the space, technology, etc.



# What's My Role?

The role of the advisor

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After you are assigned a case...



Review the policy



Review the materials provided, if any

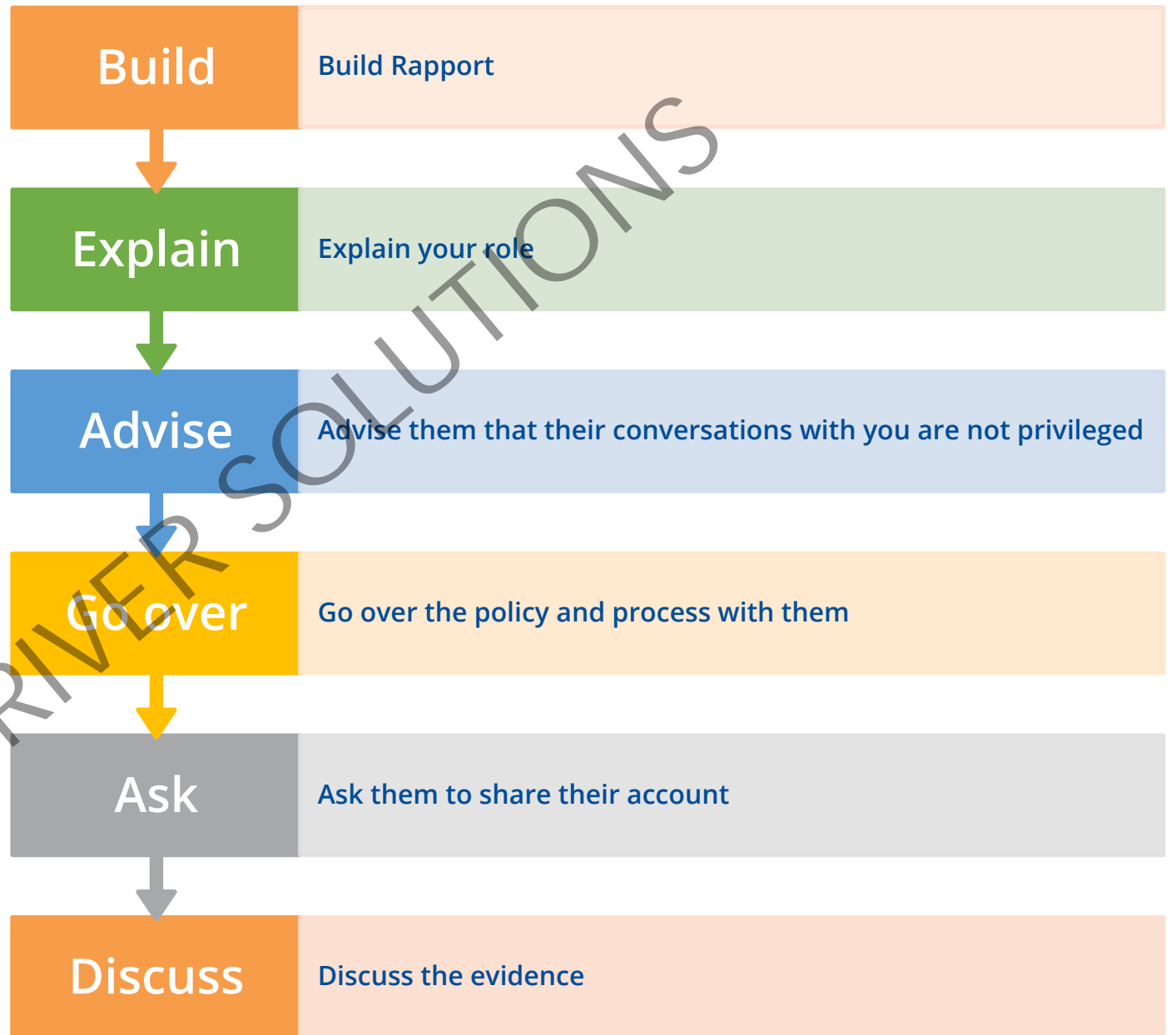


Reach out to your advisee



Schedule a meeting

# Meeting with your advisee





# Make the Party Aware that ...

You are under no obligation to keep the information confidential

- There is no attorney client relationship nor any other recognized privilege between you and the party
- You are not under an obligation to keep what the party tells you confidential

Were this matter go to a court of law, and you were asked to testify, you would have to do so, truthfully

Do this at the outset

# During the Investigation

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- Assist in the identification of witnesses
- Assist in the identification of evidence
- Assist in providing the investigator with information
- Assist in preparation for investigative interviews
- Accompany advisee to investigative interviews
- Advise during the interview
- Assist with document/evidence review and response
- Assist with review of the report and development of the response







# Pre-Hearing Preparation

## Do Your Homework



# Exactly, What Type of Homework?

- Review applicable policy language/provisions
- Familiarize yourself with investigative report
- Understand the ins and outs of the report
- What is the timeline of events
- Think about what areas you may want to highlight or expand upon
- What type of questions you will ask
- Who are the key witnesses
- Consult with your advisee
- Anticipate questions of others
- Consider impact of your decisions and develop a strategy

# Identify the Claims, What Needs to be Proven

- Why are we here?
- What are the elements for the charge?
- What are the definitions of those elements?
  - Consent?
  - Incapacitation?

# What do I Want to Show?



Credibility?



Clarification on timeline?



The thought process?



Inconsistencies?

# Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

# During the Hearing

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# Advise your advisee



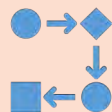
Communicating during the hearing



On matters of evidence



Policy



Process



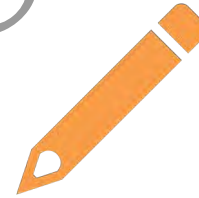
# Opening Statements



Assist advisee in developing their opening statement



Highlight evidence that the party wants the decision maker to focus on



Consider writing it out in advance



Cannot provide an opening on behalf of an absent party

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# Testimony of the Parties & Witnesses

## Suggested Order

01

The Decision Maker will determine the order of testimony

02

The Decision Maker will question first

03

Cross examination will occur next

04

Follow up by the Decision Maker

# Cross Examination

Who does it?

Must be conducted by the advisor

If party does not appear or does not participate, advisor can appear and cross

If party does not have an advisor, institution must provide one

# Cross Examination Permissible Questions

When a post-secondary institution holds a live hearing, is the questioning limited to certain subjects?

“The Rule requires that schools provide the opportunity for cross-examination, and that party advisors must be permitted to ask all relevant questions (including follow-up questions), and only relevant questions.”\*



# Cross Examination

## Relevant Questions

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.”

# Cross Examination Impermissible Questions

Questions that seek to illicit irrelevant information

- Complainant's prior sexual history
- Information protected by an un-waived legal privilege
- Medical treatment and care

Duplicative questions

Information that is not relevant

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# VRLC v. Cardona

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

VICTIM RIGHTS LAW CENTER,  
EQUAL RIGHTS ADVOCATES,  
LEGAL VOICE,  
CHICAGO ALLIANCE AGAINST  
SEXUAL EXPLOITATION,  
JANE DOE,  
an individual by and through  
her mother and next friend  
Melissa White,  
NANCY DOE,  
MARY DOE,

Plaintiffs,

v.

MIGUEL CARDONA,  
in his official capacity as  
Secretary of Education,  
SUZANNE GOLDBERG,  
in her official capacity as  
Acting Assistant Secretary for  
Civil Rights,  
UNITED STATES DEPARTMENT  
OF EDUCATION,

Defendants.

CIVIL ACTION  
NO. 20-11104-WGY

YOUNG, D.J.

August 10, 2021

ORDER

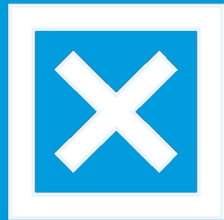
Administrative Procedure Act ("APA"). Accordingly, section 106.45(b)(6)(i)'s prohibition was vacated as well as remanded on July 28, as is the usual course in successful APA challenges.

Victim Rights Law Center v. Cardona, 120-cv-11104-WGY, at \*1 (D. Mass. Aug. 10, 2021).



# Cross Examination

Impact of Not Submitting to Cross Examination under the Exclusionary Rule.



Exclusion of all statements of that party or witness



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# Cross Examination

## Exceptions to the Exclusionary Rule



Statements that consist of or are made in the course of the prohibited conduct



When cross examination is waived or not conducted



# Under the Exclusionary Rule, when Has a Party Submitted to Cross Examination?



The party or witness has answered all questions deemed relevant on cross



A party or witness appears for cross, but the advisor does not ask any relevant questions



A party or witness refuses to answer one relevant question posed by advisor



A party or witness only answers the decision maker's questions and refuses to answer questions on cross

# To Cross or Not to Cross

## Special Considerations

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WILL SUBMITTING TO CROSS  
EXAMINATION SERVE THE PARTY'S  
INTERESTS?



WILL CONDUCTING CROSS  
EXAMINATION SERVE THE PARTY'S  
INTERESTS?

# Preparing For Cross



Review and evaluate the evidence



Identify your narrative, or the version of events that you want to illustrate



Identify the facts at issue and the findings of fact that you want the decision maker to make



Plan to highlight the evidence that support the narrative and the findings of fact that you want the decision maker to make



Prepare an outline of topics to explore

# Cross Examination

## Common Approaches

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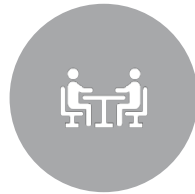
1. Obtain/Highlight helpful information
2. If a witness does not have information that is helpful, ask questions that illustrate that they are unimportant.
3. Highlight bias/lack of bias
4. Highlight credibility and reliability/lack of credibility or reliability
5. Discounting

# Conducting Cross

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Be efficient.



Do not rehash everything the witness has already said.



Highlight the portions of their testimony that support your narrative.



Listen.



Be prepared to go down a road that you hadn't considered or anticipated exploring.

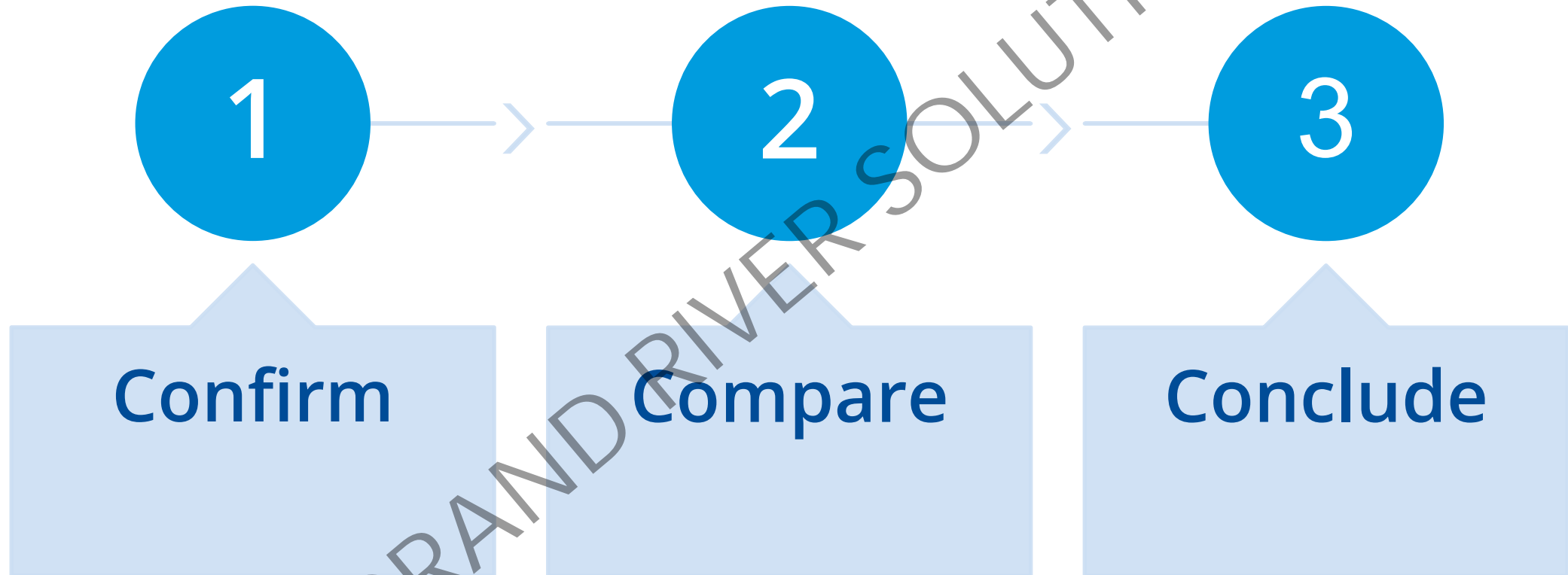


Take your time. Be thoughtful. Ask for breaks if you need it.

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# Questioning

## How to Discount



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# Discounting Example

## Statement A:

During her interview with the investigator, Witness Y stated that she overheard Respondent and Complainant fighting inside of Complainant's bedroom. She stated that Complainant came out of the room crying and that their face was red and swollen. She stated that Respondent followed Complainant out of the room "looking angry" and grabbed Complainant by the arm "aggressively" and pulled them back into the room. The fighting then continued.

## Statement B:

At the hearing, Witness Y tells the decision maker that while she heard loud voices, it might not have been fighting. She also stated that the parties came out of the room together, that Complainant looked upset, that Respondent looked concerned, and that they "calmly" went back in the room together.

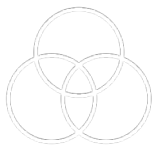


# Confirm

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- Witness Y, earlier today you were asked about what you heard and saw on the night in question...
- And you indicated that you heard loud voices, but that you are not sure if it was fighting, is that correct?
- You also said that the parties came out together and then went back into the room, is that what you saw?
- And you are sure of this?





# Compare

- Witness Y, this isn't the first time you shared your observations of Complainant and Respondent that night, is it?
- Did you talk to the investigator about this?
- And that statement was provided just two days after the incident, correct?
- Do you recall what you said to the investigator?
- Did you tell the investigator the truth when you were interviewed?





# Conclude

- Witness Y, when you spoke to the investigator, you indicated that you heard fighting, correct?
- And that Complainant came out of the room crying, isn't that right?
- And that Respondent came out looking angry, correct?
- You also stated that you saw Respondent grab Complainant and drag them back into the room, isn't that true?
- Since speaking with the investigator, you and Complainant have had a falling out, haven't you?

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# Cross Examination:

Don't rehash  
everything a  
witness has said

Do focus on the  
information that  
is helpful

Don't call folks  
liars or attack  
them

Do raise concerns  
about credibility  
and reliability

Don't rant, rave,  
loose your temper

Do make your  
points through  
pointed and calm  
questioning

# Observe and Listen

Be open to adjusting plans or strategy based on information presented at the hearing.

Make note of any issues that you think may be appropriate for appeal.

# Cross Examination

## Role of the Decision Maker

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The decision maker will determine whether a question posed during cross examination is relevant and permissible.

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When the decision maker determines that a question is relevant, the party/witness may answer it.

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When the decision maker determines that a question is irrelevant, they must state their reason.

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence





# Lessons Learned



Advisors arguing relevancy?



Asking an ill-advised question?



Case by case

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# Closing Statements: Advisor's Role

Assist advisee  
in developing  
their closing  
statement

Highlight  
evidence that  
the party  
wants the  
decision maker  
to focus on

Bullet points

May not  
provide a  
closing on  
behalf of an  
absent party

# Remember, the hearing is not a legal proceeding...

Not making complex legal arguments

Are not treating parties with hostility

Rules of evidence outside of Title IX regulations do not apply

Not looking for the “gotcha” moment

# After the Hearing



**DEBRIEF?**



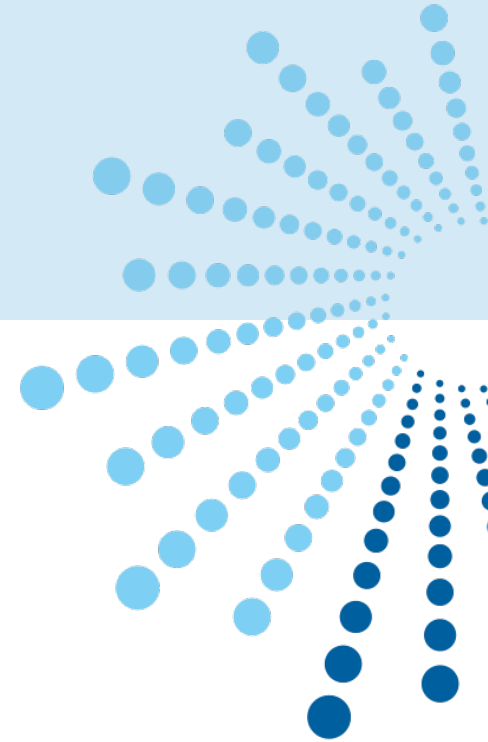
**THE APPEAL**



# Practical Application

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The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that they were at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that that Respondent was the one who filled their cups. Complainant stated that she "got drunk fast" and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked.

# Witness 1

Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and so didn't want to get "too messed up." Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as "a disaster." She also reported that Respondent was "practically carrying her" and so she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, "I'm just going to put her to bed."

She didn't see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator.

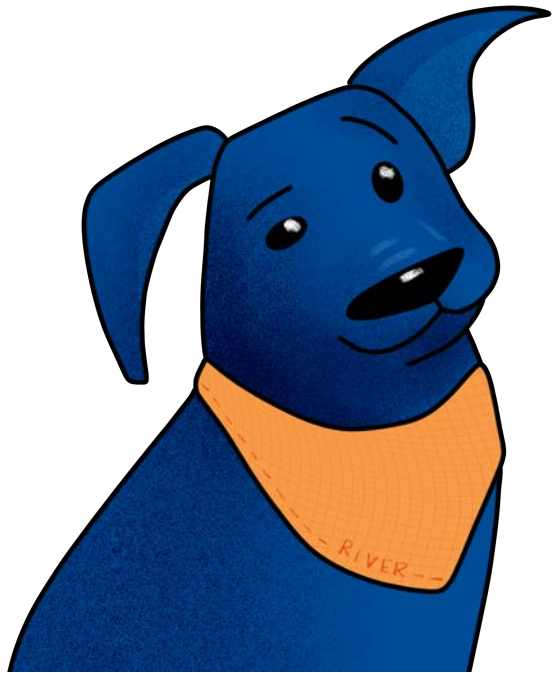


# Witness 2

Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant "was hot" and Witness 3 "looked drunk enough to be a good time." Witness 2 said that Complainant was fine and didn't appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn't have been too messed up. When asked who was filling the cups, he said that he wasn't sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn't see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant's cup and that Complainant was all over Respondent the entire night.

# Questions?



Leave Us Feedback:



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# Save the Date!

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## Title IX & Bias Series

*Register for free!*

**December 8, 2021**

*Reducing Bias in Sanctioning* with Jody Shipper & Tibusay Hernandez

## Upcoming Trainings

**January 28, 2022**

*Diversity Foundations: Bias Awareness and Mitigation*

**February 10, 2022**

*Inclusive Search Practices: Culture Add vs. Culture Fit Recruitment*

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