

**MASU**

**ADVISOR TRAINING**

**JANUARY 27, 2021**

# Agenda (1 of 2)

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## MORNING

- Title IX Fundamentals
  - The Big Picture: Where Do You Fit In?
  - What Allegations May Be Covered?
- What Does A Hearing Look Like?
  - Role of the advisor/decision maker
- Live Cross-Examination: Theory and Practice
- Relevancy Determinations
- Relevancy Hypotheticals
- Tips for Advocating for Your Party

# Agenda (2 of 2)

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## AFTERNOON

- Facilitated discussion and preparation for live cross-examination
- Breakout: Live cross-examination
- Full-group capstone discussion

## BREAKS

- 10:30, 12, 1:45

# Presentation Rules

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- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

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# **The Big Picture: Where Do You Fit In?**



# The Policy

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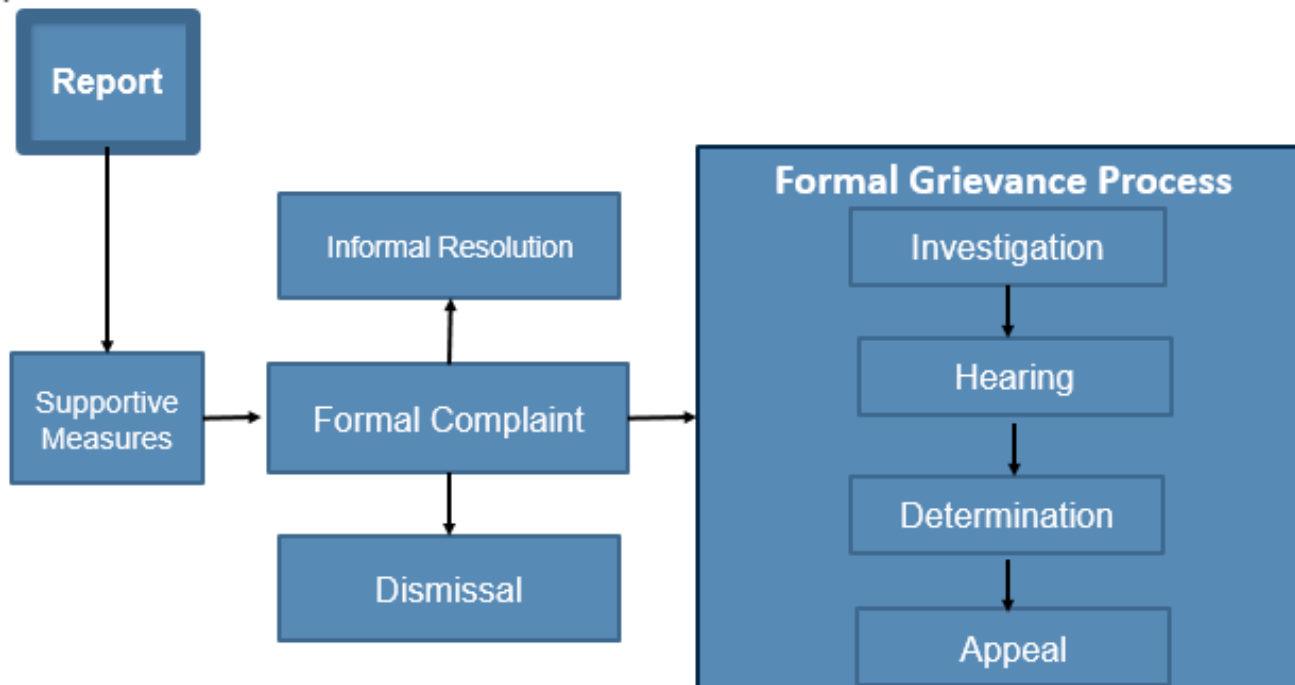


- Your Title IX sexual harassment policy governs the process we will be discussing today.

# Advisors Must be Included in Hearing



## Hearing Process



# Foundations

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- Respondent is presumed not responsible for a violation
- The decision as to whether a Respondent is responsible for a violation will be based on a preponderance of the evidence
- Both parties have access to supportive measures
- Retaliation is prohibited



# Before You Are Appointed

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- Complainant makes a report to the University
  - University offers supportive measures
- Complainant (or TIXC) files a Formal Complaint
- Respondent receives notice of Formal Complaint
  - University offers supportive measures
- Informal resolution may be tried

# Before You Are Appointed - 2

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- Investigation is conducted
- Parties review evidence and investigation report and provide feedback
- Determination is made as to whether Sexual Harassment may have occurred, or whether the case should be “dismissed” from this process and handled through another University process

# What You May Receive - 1

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- Investigative Report
  - Contains:
    - Summary of alleged conduct in violation of the Policy, including a description of the impact or effect alleged to have been caused
    - A summary of the response to the allegations
    - A summary of facts found during the investigation
    - Analysis of the application of this Policy to facts found in the Investigation
  - Does not contain:
    - Findings of fact or conclusions

# What You May Receive - 2

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- Relevant evidence relating to the case
- Responses of the parties to the evidence and the report (if they submitted responses)
- Contact information for your party (complainant or respondent)
- Applicable policy language
- Other relevant communications about the hearing

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# **What Allegations May Be Covered?**

# Your Policy

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Your Title IX Sexual Harassment Policy prohibits “Sexual Harassment” as defined by the Policy and sets forth the procedures for Sexual Harassment cases.

# Sexual Harassment



- **Sexual harassment**: Conduct on the basis of sex, occurring in the United States, that satisfies one or more of the following:
  - [**Quid pro quo**] An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
  - [**Unwelcome conduct**] Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or
  - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

# Sexual Harassment: *Quid Pro Quo*

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- Only applies to employee to student
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”



# Sexual Harassment: Davis/Gebser

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- The second prong: severe, persistent, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

# Severe

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- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

# Pervasive

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- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

# Objectively Offensive

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Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes

## Sexual Assault:

- Sex Offenses, Forcible (e.g. without consent)
  - Forcible Rape (vaginal intercourse)
  - Forcible Sodomy (oral or anal intercourse)
  - Sexual Assault with an Object
- Sex Offenses, Non-forcible
  - Incest
  - Statutory Rape

# A Word on Consent

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Consent and Incapacitation are defined by your Policy.  
Read the definitions for every case!

If something looks like consent, it isn't valid if the complainant is:

- Mentally or physically incapacitated
- If force (expressed or implied), duress, intimidation, threats, or deception are used to obtain consent

If someone is incapacitated, the respondent does not violate the policy unless they knew or should have known of the incapacitation.

# Evidence of Consent?

## 1 of 2

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- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

# Evidence of Consent?

## 2 of 2

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- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?



# Evidence of Incapacitation?

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- Create a timeline:
  - Alcohol/drugs consumed
  - Food consumed
  - Texts, videos, and photos that give an indication of Complainant's intoxication level
  - Witness observations of Complainant's intoxication level
  - Vomiting, slurred speech, emotional volatility, combativeness, stumbling, etc.
  - Which of these things did Respondent observe?
- Loss of memory does not automatically equal incapacitation

# Clery Crimes: Dating Violence



## Dating Violence:

Violence, on the basis of sex, committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant.

The existence of such relationship shall be determined based on the complainant's statement, and with consideration of the **length** of the relationship, the **type** of the relationship, and the **frequency of interaction** between the persons involved in the relationship.

Includes **sexual or physical abuse, or the threat** of such abuse.

# Clery Crimes: Domestic Violence



## Domestic Violence:

- Violence, on the basis of sex, committed by:
  - a current or former spouse or intimate partner of the complainant,
  - A person with whom the complainant shares a child in common
  - A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner
  - Common-law spouse
  - By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of Michigan

# Clery Crimes: Stalking

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## Stalking:

- Engaging in a course of conduct, on the basis of sex, directed at a specific person, that:
  - Would cause a reasonable person to fear for the person's safety or the safety of others, or
  - Caused substantial emotional distress

# Stalking: Course of Conduct

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## “Course of Conduct”

- **Two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

# Stalking: Reasonable Person

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“Reasonable person”

A reasonable person under similar circumstances and with similar identities to the victim.

# Stalking: Substantial Emotional Distress

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“Substantial emotional distress”

Significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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# **What Does a Hearing *Look* Like?**



# Overview of the Process: Hearings – 1 of 2

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- Hearing chair discusses the reasons for the hearing and decorum rules
- Opening statement by each party
- Decision maker asks questions of complainant
- Respondent's advisor asks questions of complainant
- Decision maker asks questions of respondent
- Complainant's advisor asks questions of respondent

# Overview of the Process: Hearings – 2 of 2

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- Each witness is called individually
- Decision maker can ask questions of each witness, followed by each party's advisor asking questions
- Witnesses only come into the hearing for their testimony
- Closing statement by each party
- Decision maker deliberates privately; issues decision in 10 business days

# The Decision-Maker's Role

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1. Make relevancy determinations...before any and all questions at the live cross-examination hearing can be answered
2. Run an orderly and truth-seeking live cross-examination hearing
3. Write a decision: apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing

# The Advisor's Role

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1. Ask relevant cross-examination questions of the other party and all witnesses
2. Help the decision-maker understand the disputed facts from your party's perspective
3. If possible, call into credibility the evidence that your party disputes
4. Maintain confidentiality of hearing

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# **LIVE CROSS-EXAMINATION: Theory and Practice**

# Cross Examination

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Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

# Live Cross-Examination: Theory 1 of 2

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- Essential for truth seeking (30313)
- Provides opportunity of both parties to **test “consistency, accuracy, memory, and credibility”** so that the decision-maker can better assess whether a [party’s] narrative should be believed” (30315)

# Live Cross-Examination: Theory 2 of 2

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- Provides parties with the opportunity to “direct the decision-maker’s attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” in the other party’s statements. (30330)
- Promotes transparency and equal access (30389)



# Live Cross-Examination: How it should look

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“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

# Live Cross-Examination: Regulations 1 of 2

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In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

# Live Cross-Examination: Regulations 2 of 2

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- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

# Cross Tools: What are the goals of cross-examination?



- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment of witness*** being questioned.
- Minimize the other party's case by ***impeachment of other witnesses*** through the witnesses being questioned.
- Reduce **confusion and seek truth.**

# Cross Tools: Impeachment 1 of 5



- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

# Cross Tools: Impeachment 2 of 5



- Perception and Recall
  - What is the witness's perception of the facts?
    - Has Time impacted recall or ability to remember clearly?
    - How many times has the witnesses talked to the other party about this case?
    - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
  - Is the expert limited by the information provided to inform the expert report?
  - Does the witness form a conclusion without knowing certain information?

# Cross Tools: Impeachment 3 of 5



- Example: Intoxication level information from witness.
  - You did not see the consumption, or keep track of how long the party was consuming alcohol?
  - You did not measure the alcohol poured by \_\_\_\_\_ or the party?
  - Your statements are based on information provided by others? the other party?
  - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: The person is not speaking from personal knowledge.

# Cross Tools: Impeachment 4 of 5



- Inconsistency in statements
  - If a fact was very important, why is the hearing the first time it has come up?
  - What possible reasons might the witness have for changing their testimony?
  - Did a witness receive coaching from the party or others between making one statement and another?
  - Has the witness's perspective or motive changed between statements?
  - Does changing this fact help the other party's case?



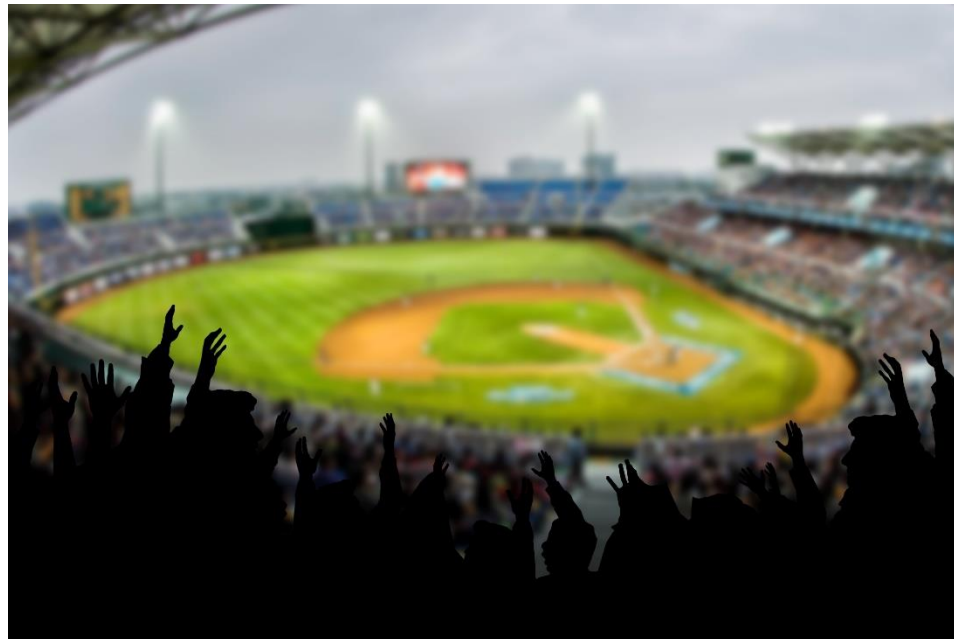
# Cross Tools: Impeachment 5 of 5



- Lack of Corroborating Evidence
  - Example: Missing receipts...
    - You testified that you were drinking with the Complainant on the night of the incident?
    - You testified that you paid for the alcohol?
    - You paid with your credit card?
    - But you did not provide the receipt to the investigator?
    - You didn't even provide access to your credit card statement?

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# **ISSUES OF RELEVANCY: Not Rules of Evidence**



# Relevancy 1 of 2



- Per 34 C.F.R. 106. 45(b)(6)(i):
  - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

# Relevancy 2 of 2

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Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

# What is Relevant? 1 of 3



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” (30343)

# What is Relevant? 2 of 3

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## Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
  - **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)

# What is Relevant? 3 of 3

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Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

# Relevancy



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)



# Relevancy: Not Relevant

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The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

# Relevancy: Policy's Rape Shield for Complainants

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- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant **UNLESS**
  - Offered to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent

# Relevancy: Rape Shield Law - Respondents

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- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

# Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

# Relevancy: Legally Privileged Information 1 of 2

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Section 106.45(b)(1)(x):

A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

# Relevancy: Legally Privileged Information 2 of 2

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Other typical privileges recognized:

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

# Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

# Relevancy: No Reliance on Prior Statements

When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any statement of that party or witness in reaching a determination”





# Relevancy: No Reliance on Prior Statements - Theory

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If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement,** which is why the decision-maker cannot consider that party's statement.

(30349)

# Relevancy: When Parties or Witnesses Do Not Participate

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The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

# Relevancy: No Reliance on Prior Statements – SANE and Police Reports

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- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

# Issues of Relevancy



“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

**BUT**

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

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# **Relevancy Determinations**

# Relevancy Determination Hypotheticals 1 of 2

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Is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

# Relevancy Determination

## Hypotheticals 2 of 2

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For each practice hypothetical, ask yourself:

**Is this question relevant or seeking relevant information?**

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

# Relevancy Determination Hypotheticals Disclaimer

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*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*



# Hypo Background

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For purposes of our hypotheticals, Cassie is the Complainant and Roger is the Respondent.

Roger is accused of sexually assaulting Cassie while Cassie was incapacitated due to alcohol.

# Practice Hypothetical #1

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“Cassie, you texted Roger the week before this incident, telling Roger that you wanted to have sex with him, didn’t you?”

# Practice Hypothetical #2

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“Cassie, isn’t it true you usually have sex with others while intoxicated?”

# Practice Hypothetical #3

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“Roger, did your attorney tell you not to answer that question?”

# Practice Hypothetical #4

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“Roger, did your counselor tell you that you have anger issues?”

# Practice Hypothetical #5

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“Cassie, you didn’t see who was allegedly sexually assaulting you during the alleged sexual assault, did you?”

# Practice Hypothetical #6

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“Cassie, are you choosing not to answer my questions because you lied to investigators?”

# Practice Hypothetical #7

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“Roger, you’re not answering my questions because you don’t want criminal implications, right?”



# Practice Hypothetical #8

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“Cassie, isn’t it true you asked Roger to put on a condom before what you now claim is a sexual assault?”

# Practice Hypothetical #9

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“Roger, have you tested positive for sexually-transmitted diseases?”

# Practice Hypothetical #10

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“Roger, isn’t it true you texted Cassie the next day to see if Cassie was mad at you?”

# Practice Hypothetical #11

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“Cassie, if you were as drunk you just stated you were, you can’t even be sure whether you had sex with Roger or, say, another person from the party, can you?”

# Practice Hypothetical #12

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“Cassie, did a doctor diagnose you with anxiety?”

# Practice Hypothetical #13

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“Roger, isn’t it true you tried to kill yourself the next day because you knew you did something wrong?”

# Practice Hypothetical #14

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“Cassie, you could be wrong about that timeline, right?”

# Practice Hypothetical #15

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“Roger, this isn’t the only Title IX complaint against you right now, is it?”



# Practice Hypothetical #16

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“Roger, didn’t the police question you for three hours about your assault of Cassie?”

# Practice Hypothetical #17

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“Cassie, your witness didn’t even show up today, right?”

# Practice Hypothetical #18

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“Roger, you’re even paying for a criminal defense attorney instead of a free advisor, right?”

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# **Tips for Advocating for Your Party**

# Advocating for your party in the Hearing 1 of 8

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## Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

# Advocating for your party in the Hearing 2 of 8

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## Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

# Advocating for your party in the Hearing 3 of 8

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## Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

# Advocating for your party in the Hearing 4 of 8

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## Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant



# Advocating for your party in the Hearing 5 of 8

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## Preparation

- Consider a script
  - List your questions you plan to ask for your party for each other party and witness AND be prepared to answer why each is relevant
  - Have a list of relevancy definitions to refer to if they come up
    - Rape shield law and two exceptions
    - Privileged information in your jurisdiction
    - Language on treatment records

# Advocating for your party in the Hearing 6 of 8

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## The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

# Advocating for your party in the Hearing 7 of 8

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## The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

# Advocating for your party in the Hearing 8 of 8

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## Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

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# **Afternoon Hypothetical**

# The Parties

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Complainant – Cassie Coulter

Respondent – Roger Reynolds

Setting – A COVID-illicit party at Roger’s campus apartment

Issues:

- Did Cassie consent to touching and sex?
- Was Cassie capable of consenting (incapacitation?), and if not, did Respondent know or should he have known?

# Your Task

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Prepare for hearing!

- Review the packet
- Identify disputed information
  - How can you discredit evidence against your party?
  - How can you bolster evidence for your party?
  - What is the story you are trying to help the Decision-Maker understand?
- Prepare your questions/topics

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# **LIVE CROSS-EXAMINATION: Facilitated Discussion**



# Group think (slide 1)



*Start with Elements of Policy Violation...*

**Sexual Assault** (Report, page 3):

1. Was there *Penetration? Touching for purposes of sexual gratification?*
  - *Is there a dispute here? If so, where?*
2. Was Complainant able to give consent?
  - Here, C says Incapacitated. See defn., p. 4. What evidence?
  - R says C was not Incapacitated. What evidence?
  - *Also, even if C was Incapacitated, did R know/should have known? What Evidence?*

# Group think (slide 2)

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## Evidence of Incapacitation

- what do we know about alcohol/drug use? What does R know?*
- *physical manifestation of impairment?*

From C? Texts?

From R?

From Felicia?

From Sam?

From Todd?

From Gus?

From Xavier?

# Group think (slide 3)



Sexual Assault (Report, page 3):

3. Did C Consent to Sexual Intercourse/Sexual Contact?

- Freely, voluntarily, and with understanding?
- Affirmative agmt through clear actions or words?

*What Evidence?* Verbal? Nonverbal?

- Issues: C's memory gaps

Who can corroborate the evidence?

Are these witnesses biased? (relationship, motivation to lie, etc.)

How credible is the witnesses? Can we trust their information?

# Remember → Relevancy: Not Relevant

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The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

# Relevancy: Regulations' Rape Shield Law-Complainants

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- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
  - its use is to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

# Cross Tools: Impeachment 1 of 5



- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

# Cross Tools: Impeachment 2 of 5



- Perception and Recall
  - What is the witness's perception of the facts?
    - Has Time impacted recall or ability to remember clearly?
    - How many times has the witnesses talked to the other party about this case?
    - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
  - Is the expert limited by the information provided to inform the expert report?
  - Does the witness form a conclusion without knowing certain information?

# Cross Tools: Impeachment 3 of 5



- Example: Intoxication level information from witness.
  - You did not see the consumption, or keep track of how long the party was consuming alcohol?
  - You did not measure the alcohol poured by \_\_\_\_\_ or the party?
  - Your statements are based on information provided by others? the other party?
  - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: The person is not speaking from personal knowledge.



# Cross Tools: Impeachment 4 of 5



- Inconsistency in statements
  - If a fact was very important, why is the hearing the first time it has come up?
  - What possible reasons might the witness have for changing their testimony?
  - Did a witness receive coaching from the party or others between making one statement and another?
  - Has the witness's perspective or motive changed between statements?
  - Does changing this fact help the other party's case?

# Cross Tools: Impeachment 5 of 5



- Lack of Corroborating Evidence
  - Example: Missing receipts...
    - You testified that you were drinking with the Complainant on the night of the incident?
    - You testified that you paid for the alcohol?
    - You paid with your credit card?
    - But you did not provide the receipt to the investigator?
    - You didn't even provide access to your credit card statement?

# In this scenario

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- What are the goals of the complainant's advisor?
- What are the goals of the respondent's advisor?
- What are the primary concerns of the decision-maker?

# **Live Cross Examination Hearing Breakouts**

# **Post-Breakout Discussion/Capstone**

**Questions?**