

GRAND RIVER | SOLUTIONS

# Hearings in a Post Regulatory World

Day One

Jessica Brown & Adam Wolkoff  
April 2023

# Meet Your Facilitators



**Jessica Brown**

*She/Her/Hers*

Senior Solutions Specialist



**Adam Wolkoff**

*He/Him/His*

Senior Solution Specialist

# About Us

## 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

# Agenda

1

**Title IX Requirements for Hearings**

2

**Process Participants**

3

**Pre-Hearing Tasks**

4

**The Hearing**

5

**After The Hearing**

6

**Practical Application**

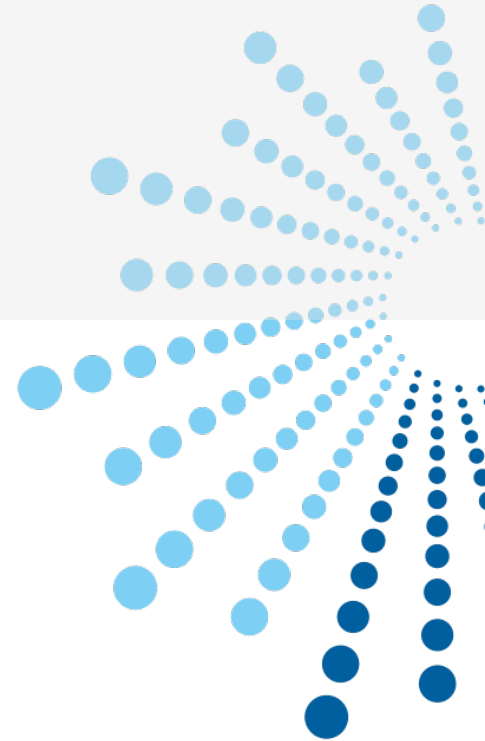




# Title IX Requirements For Hearings

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."

# Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) 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 recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

# AND... Only Covered, IF:

## Place of Conduct

- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

## Required Identity

- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent

# 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

# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

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 provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction



# The Requirement of Impartiality

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# Section 106.45(b)(1)(iii)

**The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, or facilitator of informal resolution not to have a conflict of interest or bias:**

- For or against complaints or respondents generally, or
- An individual complainant or respondent

## Section 106.45(b)(1)(iii)

“

Title IX Coordinator, investigator, **decision maker**, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

”

# 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.



Participants must be able to communicate during the hearing

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

# Purpose of the Hearing

1

Review and  
Assess  
Evidence

2

Make Findings  
of Fact

3

Determine  
Responsibility/  
Findings of  
Responsibility

4

Determine  
Sanction and  
Remedy

# Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!



Trauma-informed practices provide tools/techniques for engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Hearing



Format of Questions



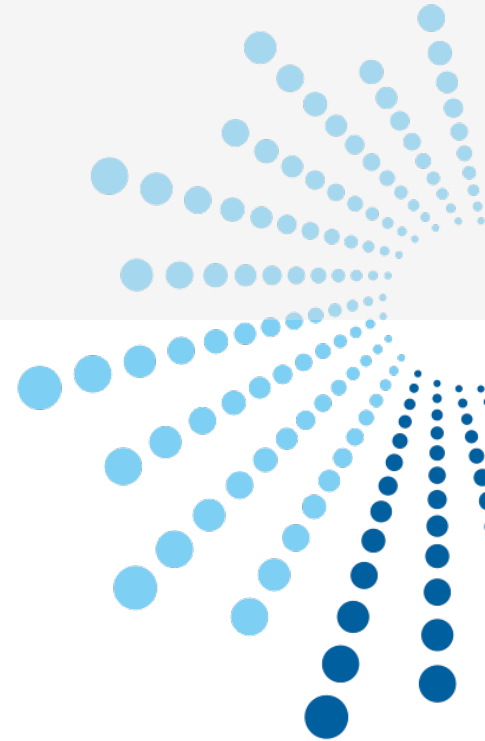
Approach to Clarification



# Process Participants

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# The Participants

## The Parties

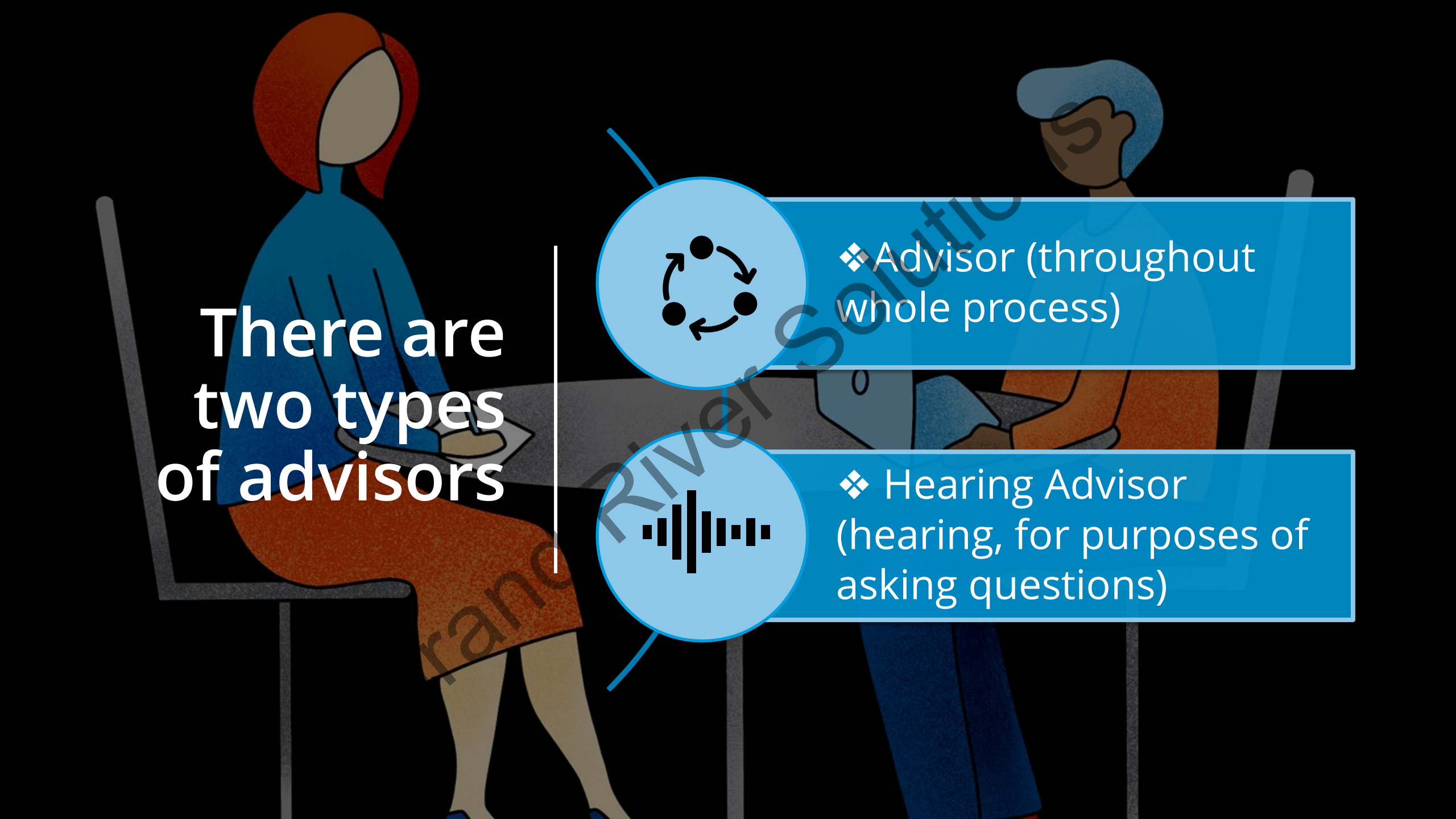
Complainant	Respondent
<p>An individual who is alleged to be the victim of conduct that could constitute sexual harassment.</p>	<p>An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>

# The Participants

## The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.





There are  
two types  
of advisors



❖ Advisor (throughout whole process)

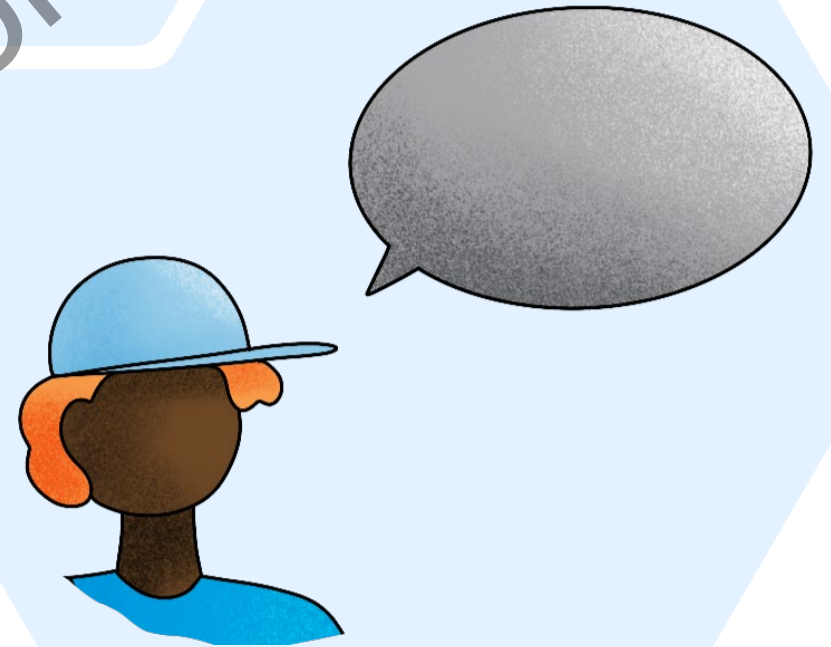


❖ Hearing Advisor (hearing, for purposes of asking questions)

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings

# The Participants

## Advisors





# The Participants

## Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



# The Participants

## The Hearing Facilitator/Coordinator

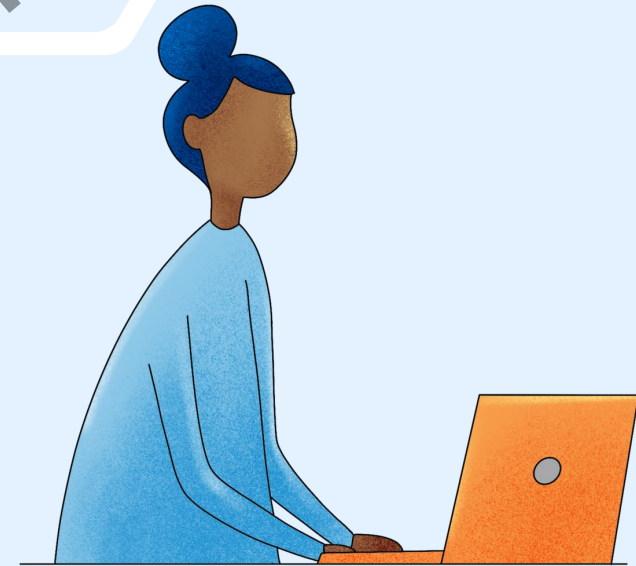
- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required



# The Participants

## The Decision Maker

- One person
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome



# The Participants

## The Decision-Makers

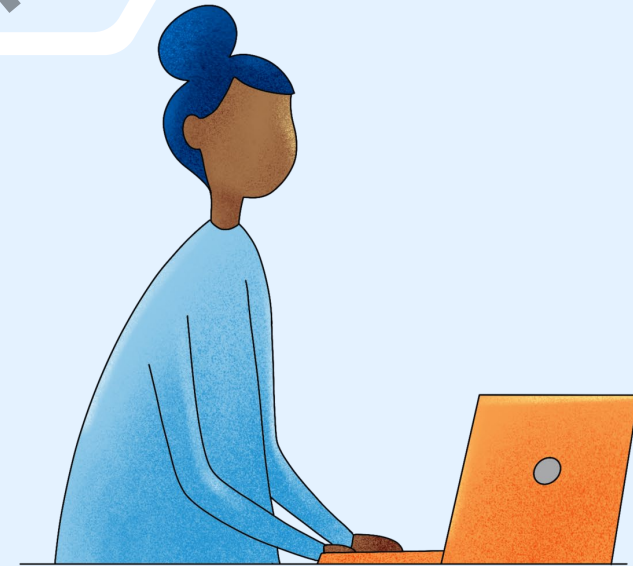
- A panel
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate



# The Participants

## The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome

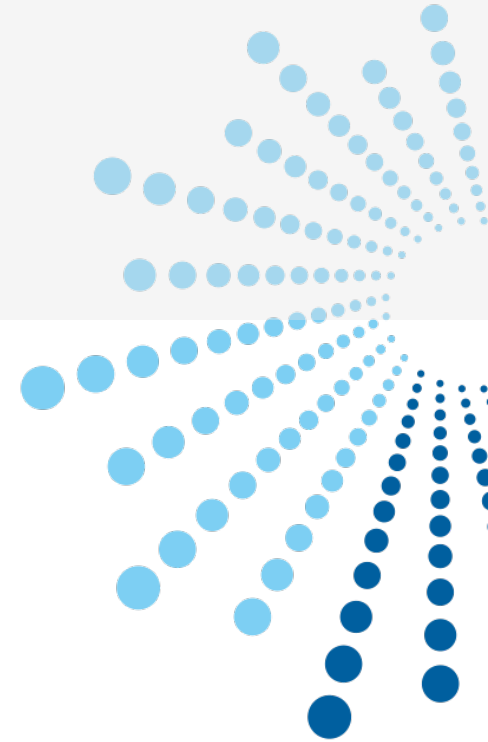




# Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing

03





# Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Cross Examination/Questioning Format & Expectations

# Decision Maker



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



May convene a pre-hearing meeting



Anticipate challenges or issues



Prepare the script

# Hearing Panel as a Whole



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own

# Hearing Panel Chair



Compile questions on behalf of the Panel



May convene a pre-hearing meeting



Review questions submitted by the parties



Anticipate challenges or issues



Become familiar with the script

# Common Areas of Exploration



Credibility?



Clarification on timeline?



Thought process?



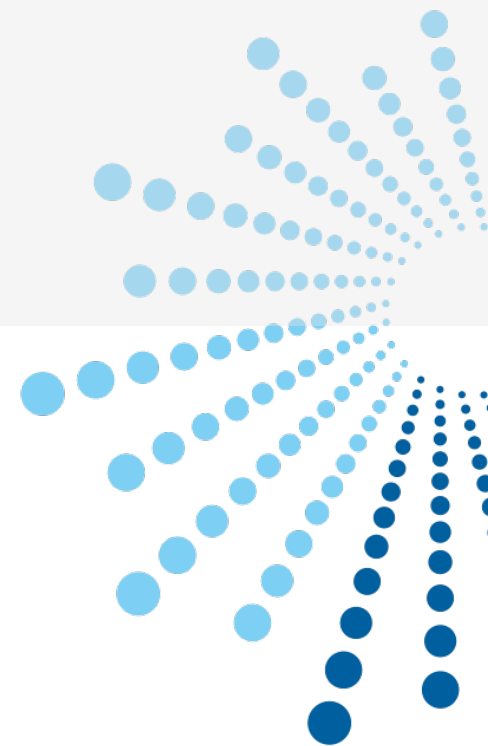
Inconsistencies?



04

## The Hearing

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# Order of the Proceedings

01

Introductions  
and instructions  
by the Chair;  
Opening  
Statements

02

Presentation by  
Investigator

03

Presentation of  
information and  
questioning of  
the parties and  
witnesses

04

Closing  
Statements

05

Deliberation &  
Determination

# Opening Introductions and Instructions by the Chair



The University has a script for this portion of the proceedings, and it should be used.  
Introduction of the participants.  
Overview of the procedures.  
Overall goal: manage expectations.  
Be prepared to answer questions.





# Opening Statements

*Optional: Not required by the regulations; institution may choose to allow.*

- Prior to questioning beginning during the hearing, each party may be given the opportunity to make an opening statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Both parties should give opening statement before either is questioned.
- Typically, the complainant goes first.



# Presentation of Information

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A man in a brown jacket is shouting into a megaphone, looking upwards. The image is semi-transparent and serves as a background for the text.

# Presentation of Information & Questioning of the Parties

01

The Hearing Panel will question Complainant first

02

Cross examination of Complainant will occur next

03

Follow up by the Hearing Panel

04

The Hearing Panel will question Respondent second

05

Cross examination of Respondent will occur next

06

Follow up by the Hearing Panel

# Questioning of the Witnesses

01

The Chair will determine the order of questioning of witnesses

02

The Hearing Panel will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

Follow up by the Hearing Panel

# Closing Statements

Prior to the conclusion of the hearing, each party will have the opportunity to make a closing statement.

- Prior to the conclusion of the hearing, each party will have the opportunity to make a closing statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker .
- Not time to introduce new information or evidence.



# General Questioning Guidelines

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## Format of Questioning



The Hearing Panel or the advisor will remain seated during questioning



Questions will be posed orally



Questions must be relevant

# What constitutes a relevant question?

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.”



# When is evidence relevant?

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



Information  
protected by an  
un-waived legal  
privilege

Medical treatment  
and care

Unduly  
repetitious or  
duplicative  
questions

Information that  
otherwise  
irrelevant

Complainant's  
prior sexual  
history, with  
limited  
exceptions.

Irrelevant and  
Impermissible  
Questions

# When Questioning....



Be efficient.



Explore areas where additional information or clarity is needed.



Listen to the answers.



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



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

# 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?

Did you speak with any one about your testimony today prior to this hearing?

# Common Areas of Where Clarity or Additional Information is Needed

Credibility

Reliability

Timelines

Inconsistencies

Details about the  
alleged  
misconduct

Facts related to  
the elements of  
the alleged policy  
violation

Relevancy of  
Certain Items of  
Evidence

Factual Basis for  
Opinions

# Questioning to Assess Reliability

Inherent plausibility

Logic

Corroboration

Other indicia of reliability

# Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

opportunity to view

ability to recall

motive to fabricate

plausibility

consistency

character, background, experience, and training

coaching

# Credibility Versus Reliability

## Reliability

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

## Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.





# Opinion Evidence

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When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

# Is it authentic?



Never assume  
that an item of  
evidence is  
authentic.



**QUESTION THE  
PERSON WHO  
OFFERED THE  
EVIDENCE**



**REQUEST  
ORIGINALS**



**OBTAIN  
ORIGINALS FROM  
THE SOURCE**



**HAVE OTHERS  
REVIEW AND  
COMMENT ON  
AUTHENTICITY**



**ARE THERE  
OTHER RECORDS  
THAT WOULD  
CORROBORATE?**

# What are the “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

# How to Ask the Hard Questions

## Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

## Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

# Special Considerations for Questioning the Investigator

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.



# Special Considerations for Panels

If a panel, decide in advance who will take the lead on questioning

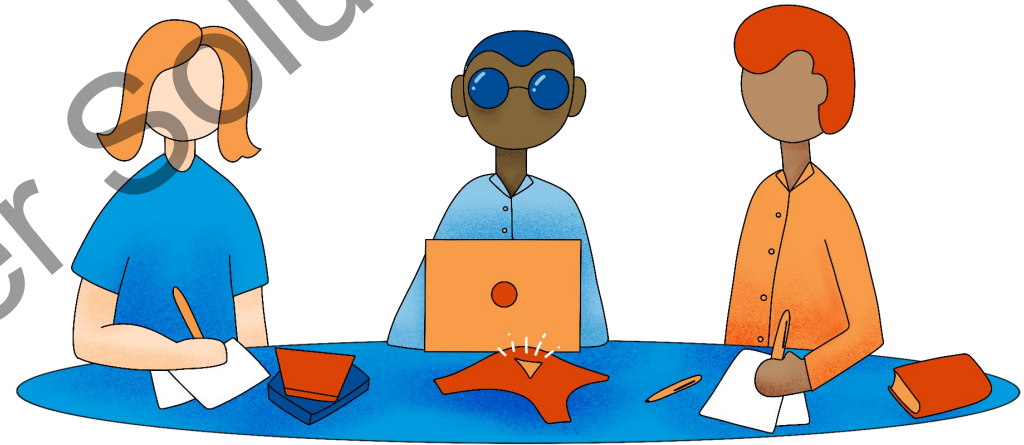
Go topic by topic

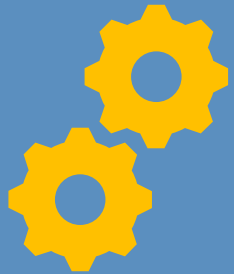
Ask other panelists if they have questions before moving on

Do not speak over each other

Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel





# The Decision Maker's Role in Advisor Questioning

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# 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



# The Role of the Decision Maker During Questioning by the Advisors

After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.

# When Assessing Relevance, the Decision Maker Can:

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Ask the person who posed the question why their question is relevant

---

Take a break

---

Ask their own questions of the party/witness

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Review the hearing record

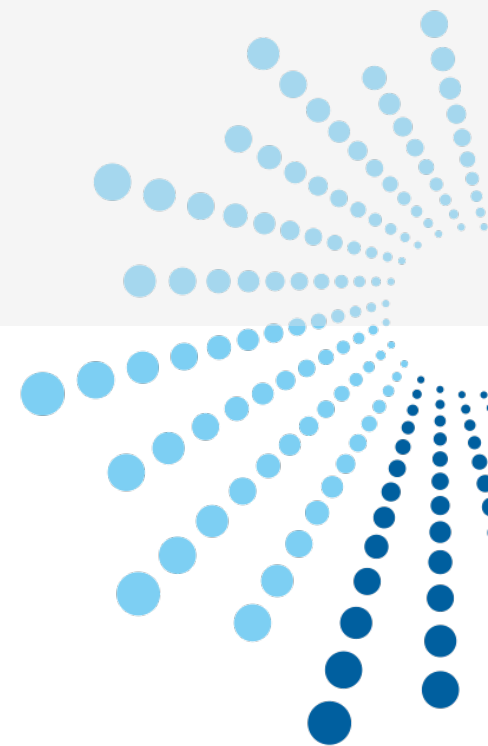
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## After the Hearing

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# Deliberations

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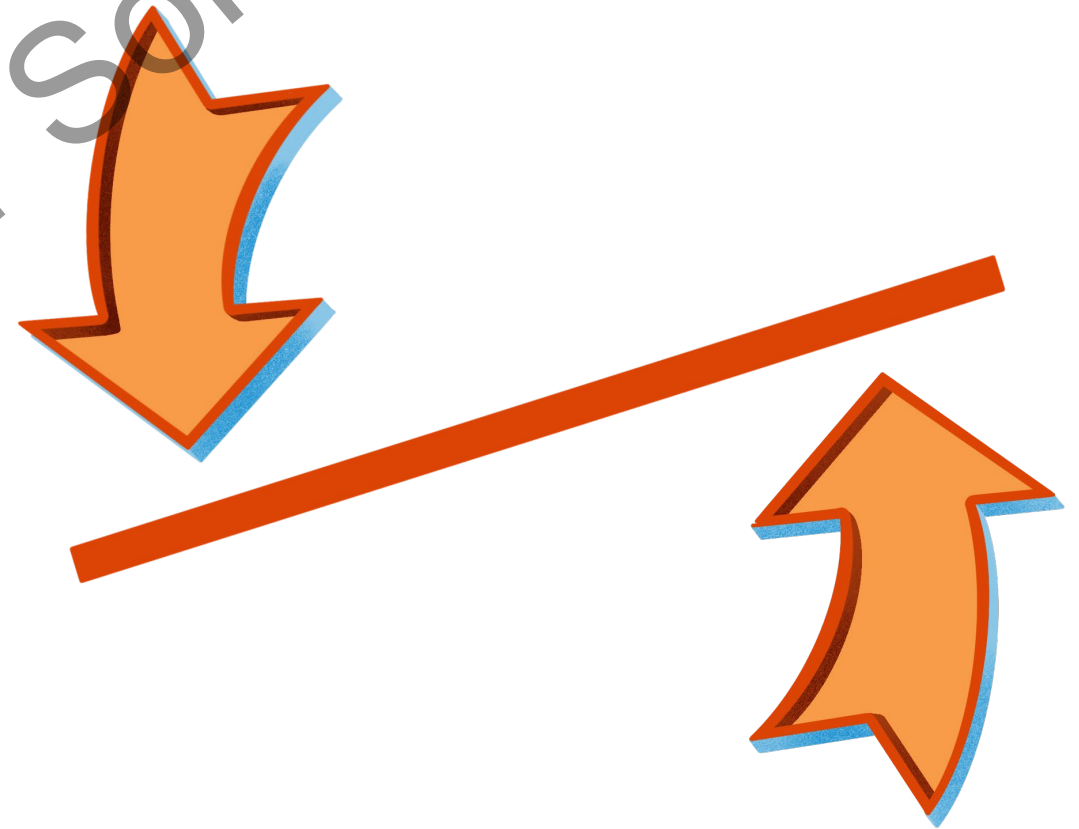


# Preponderance of the Evidence

- Standard of proof by which determinations of responsibility are made
- "More likely than not"
- It does not mean that an allegation must be found to be 100% true or accurate
- A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

# Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



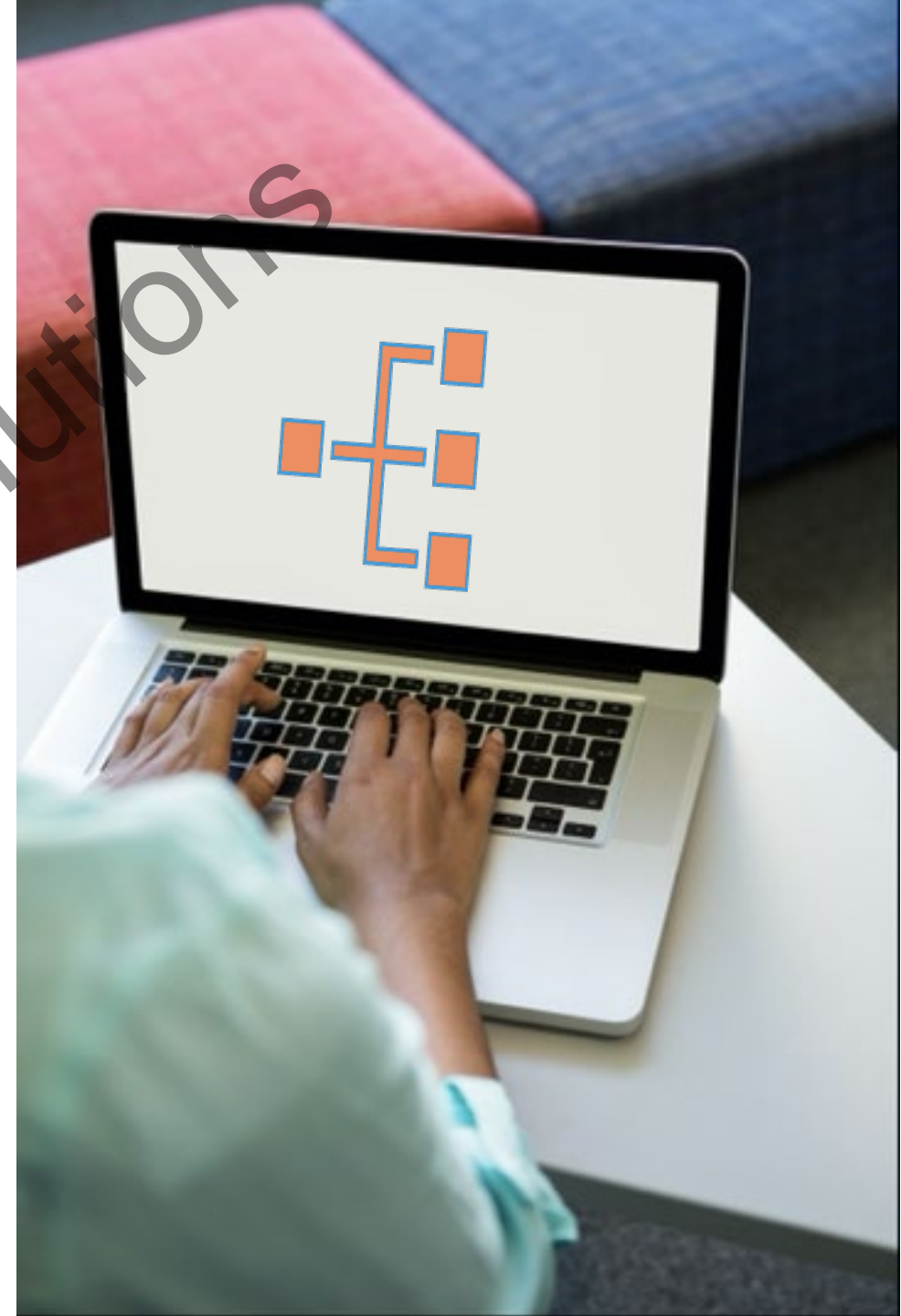


# Findings of Fact

- **A "finding of fact"**
  - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
  - Based on available evidence and information
  - Determined by a preponderance of evidence standard
  - Determined by the fact finder(s)
- **For example...**
  - Complainant reports that they and Respondent ate ice cream prior to the incident
  - Respondent says that they did not eat ice cream
  - Witness 1 produces a timestamped photo of Respondent eating ice cream
- **Next steps?**

# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate





# Allegation: Fondling




## Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ Forcibly and/or without the consent of the Complainant,
  - ❑ including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**

# Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.	Respondent acknowledges and admits this element in their statement with investigators.  "We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."	Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.

# Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p>  <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p> 

# Did You Also Analyze...?

(if required by policy)

- ☐ On campus?
- ☐ Program or Activity?
- ☐ In a building owned/controlled by a recognized student organization?
- ☐ Substantial control over respondent and context?
- ☐ Complainant was attempting to access program/activity?

# Goals of Sanctions/Discipline

---

End the harassment, prevent its recurrence, remedy the harm

---

What steps would be reasonably calculated to end harassment and prevent recurrence?



Prevention

A hand holding a blue marker is shown writing the word "Prevention" in a cursive, handwritten style. The word is enclosed within a red oval that is being drawn by the same hand. The background is white.

# Goals of Sanctions/Discipline

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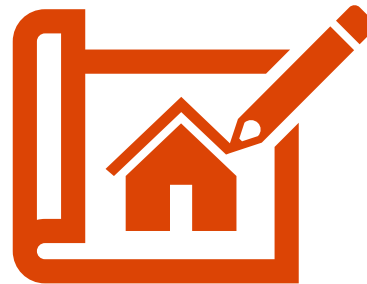
# Sanctioning



State law



System policy



Learning  
environment



Measures  
available

# The Sanction Does Not Undo the Finding



No lesser sanction if  
you disagree with  
findings



Sanctioning officer  
must assume findings  
are correct



# Determining the Proper Sanction

- 
- Consistency
  - Foreseeability of repeated conduct
  - Past conduct
  - Does bias creep in?
  - Remorse?
  - Victim impact?

# Aggravating Circumstances

Premeditation

Predation

Physical violence

Repeated violation

Multiple policy  
violations in one  
incident

Harm to others,  
impact on  
complainant  
and/or community

Did the behavior  
continue after  
intervention?

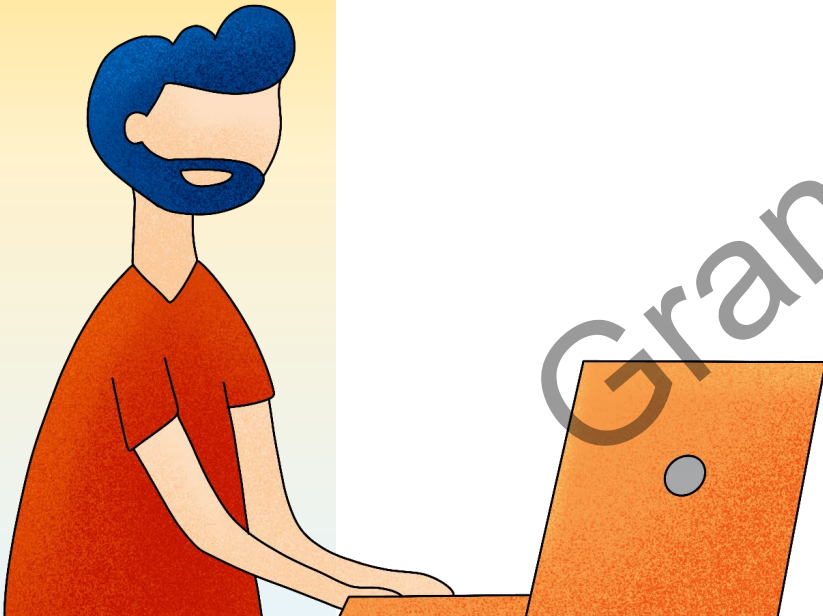
Effort to conceal or  
hide the incident?

Refusal to attend  
past trainings

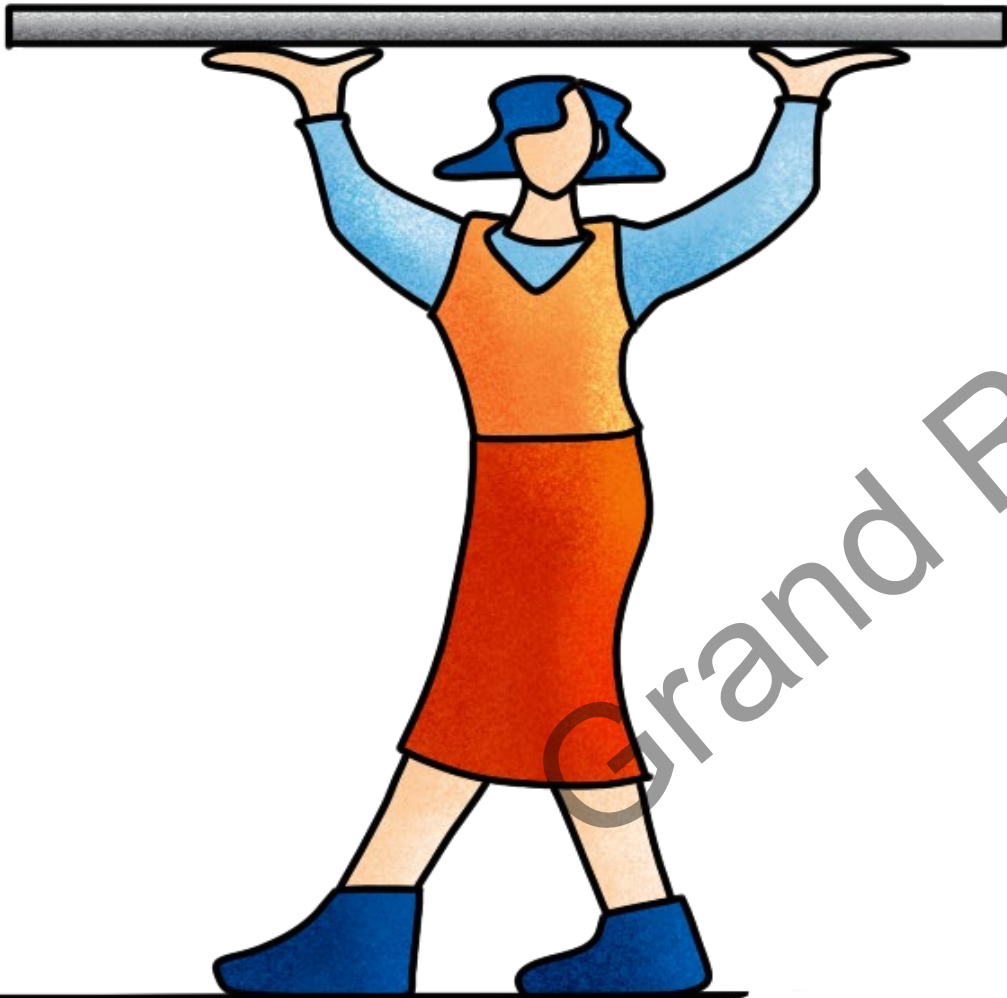
Past failures to  
comply with  
directives

# Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



# The Final Determination Should **STAND** On Its Own



**S**

Simple and Easy to Comprehend

**T**

Transparent/Clear

**A**

Accurate

**N**

Neutral/Unbiased

**D**

Draw Attention to Significant Evidence and Issues



# Advisor's Role Post-Hearing

- May meet with their advisee to review decision and respond to procedural questions.
- Institutionally-appointed advisors typically do not advise nor assist the party in developing an appeal.

• Advisor of choice may assist in advising party whether or not to appeal and in the drafting of an appeal.

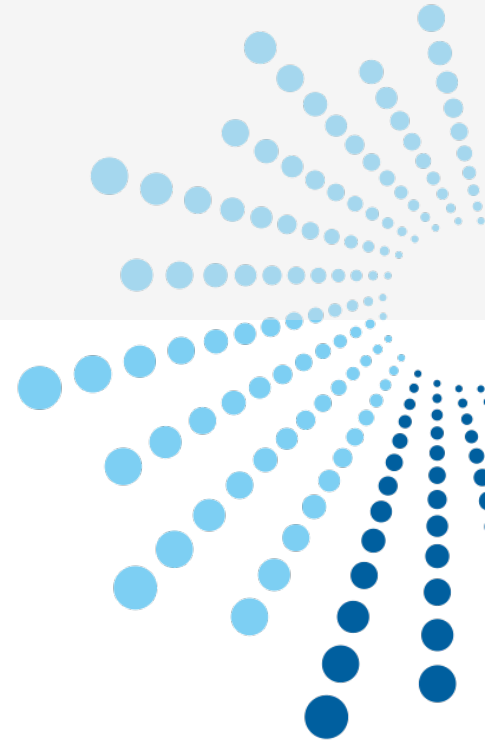




06

# Practical Application

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# Scenario 1

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- **Can the HP hear from Witness 7 at the hearing?**



## Scenario 2A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?**





## Scenario 2B

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

- **Must the Hearing Panel find Respondent not responsible because of the findings in the report?**

# Case Study

“

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 she was 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 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 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.

# Witness 3

Witness 3 was Complainant's best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the "drunkest she had ever seen her." Witness 3 stated that Complainant was slurring her words, couldn't stand on her own, and was really loud, which is not like her. Witness 3 stated that that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn't that out of it, because she had a high tolerance and drank a lot all the time.



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# Title IX Hearings in a Post Regulatory World

Day 2

Jessica Brown & Adam  
Wolkoff

April 2023

# Meet Your Facilitators



**Jessica Brown**

*She/Her/Hers*

Senior Solutions Specialist



**Adam Wolkoff**

*He/Him/His*

Senior Solution Specialist

# Overview of Day Two

*Let's Practice!*

- ☐ Pre-Hearing Preparation
- ☐ Testimony and Cross Examination



# Pre-Hearing

# The investigation is complete!

## Rapid Fire #1

It is time to schedule the hearing...

Using the chat box:

**share your “To Do” List for coordinating the hearing.**



# Rapid Fire Recap

Arranging for space

Arranging technology

Scheduling pre-hearing meetings with parties & advisors

Scheduling prehearing meetings of the panel

Providing report and record to panel and parties

Scheduling the hearing

Accommodations

Call for written submissions

Conflict checks

Other considerations?

You and your team did a great job scheduling the hearing and arranging all the logistics!

## Rapid Fire #2

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

***Use the chat box to share what you plan to discuss/think about during the prehearing meeting.***



# Rapid Fire Recap

Development of introductory comments

Initial discussion of the evidence

Areas for further exploration

List of questions for the parties and the witnesses

Anticipation of potential issues

Logistics

Review of any written submissions by the parties

Other considerations?

# Break Out!

#1

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Group 1: Questions for Complainant, Witnesses  
Dylan, Nick, Caitlyn
- Group 2: Questions for Respondent, Witnesses  
Bob, Stevie, Kayla

# Report Out

- **Group 1:** Questions for Complainant, Witnesses Dylan, Nick, Caitlyn
- **Group 2:** Questions for Respondent, Witness Bob, Stevie, Kayla



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



# The Hearing

# Break Out!

## #2

Say hi!

Select a member of your group to take notes and to report out to the whole group

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Group 1: Questions for Complainant, Witnesses Dylan, Nick, Caitlyn
- Group 2: Questions for Respondent, Witnesses Bob, Stevie, Kayla



# Report Out

Grand River Solutions



### These questions are submitted by Complainant for Respondent

1. How many drinks did you have at Kayla's before going to TKE?
2. How big were those drinks?
3. Who mixed those drinks?
4. Were you drunk when you got to TKE?
5. How often do you go to parties?
6. How often do you get drunk at parties?
7. Why didn't you stay with your friends when you got to TKE?
8. When you got to TKE, did you intend to have sex with Angel that night?
9. What else do you remember from that night?
10. Did you play darts?
11. Isn't it true that you were easily able to throw darts and hit the bullseye that night?
12. When Angel was "hugging" you, as you called it, he was actually just holding on to you for support because he could not stand up, isn't that right?
13. How many times did he fall on to you when the two of you were on the couch?
14. Who got up first from the couch?
15. Isn't it true that you got up first and pulled Angel to his feet?
16. You told the investigator the two of you were drunk sloppy kissing? It seems you are admitting that Angel was drunk, isn't that correct?
17. Given all that you recall, it seems that you have a really good recollection of that night, no impaired memory, were easily able to play darts, and never fell down, so for you to act as if you were too drunk to give him a blow job and that you're the real victim here is nothing less than highly offensive, isn't that right?
18. If someone were sexually assaulted and the other person said it was the victim's fault, that is victim blaming, isn't it?
19. Are you alleging you were sexually assaulted?
20. Why would you make that up?
21. If you are saying that you were sexually assaulted, why didn't you file a complaint? Is that because you know you'll lose and be expelled for a false complaint and retaliation if you do that?
22. Are you making an allegation in order to retaliate against complainant?
23. Did you ever drink from Angel's water bottle?
24. Did you ever smell alcohol on Angel's breath while at the TKE party?
25. Have you seen the video of you giving Angel a blow job?
26. Did you initiate sex with Angel in order to get back at your boyfriend?
27. He wasn't restraining you, why didn't you just pull away?
28. Do you often give blowjobs to boys at parties?

### Questions submitted by Respondent for Complainant

1. You said you do not remember anyone drinking from your water bottle. How can you remember that?
  2. Did you file a report with the police?
  3. Why not?
  4. Did you get a medical exam?
  5. Why not?
  6. Is it true that you are hoping to go to medical school?
  7. Isn't it true that you are really worried about your grades this semester?
  8. Isn't it true you were struggling with inorganic chemistry class?
  9. And isn't it true that you wanted to drop the class, but you would have had a "W" on your transcript?
  10. Did you end up withdrawing from that class?
  11. And isn't it true that there is no notation on the transcript because you were given the gift of being pulled from the class without any transcript notation?
  12. And is that why you filed this claim, so you could get out of taking the class without anything showing up on your transcript?
  13. You said to the investigator that you "could not believe anyone would film" the sex act that occurred at the TKE party, isn't that correct?
  14. Have you ever watched any porn videos?
  15. Didn't you take a video last year of some of your friends, including Bob and Dylan, playing a game that involved simulating sex acts?
  16. During your interview with the investigator, isn't it true that you had to be reminded by your own advisor that your "story" is that you were too drunk to remember anything, right?
  17. How many times did you and your advisor rehearse your interview?
  18. You said you had no information or memories about what happened at the party, but also claim to remember how her hands were moving, when the two of you were sitting on the couch in the basement. Which one of those statements is the lie?
-

### Questions for Bob

By Complainant

1. When you were describing the vodka you poured into your water bottle, what exactly do you consider to be 2 or 3 shots?
2. Did you use shot glasses, red solo cups, or did you eyeball it?
3. What do you remember about Barb's Tinder profile?
4. Did it suggest what type of relationship she was looking for?
5. Did you match?
6. Why were you looking at Tinder?
7. How often do you troll on Tinder?
8. You said Barb took a huge gulp out of your water bottle toward the end of the evening. What did you mean by "huge gulp?"
9. How much of the vodka/orange juice in your bottle did you drink that night?
10. How much was left in the morning?

By Respondent

1. Doesn't your frat have a reputation on campus of getting girls drunk at parties?
  2. Isn't true when you say you take care of people at parties, that you actually just get them more drunk so they will have sex with one of your friends or brothers? That is what you were doing to the respondent, correct?
  3. Didn't you have to retake Measuring Science 101 where they teach you how to measure liquids?
  4. How many times did you watch that video before deleting it?
  5. Do you still have the video?
  6. Will you get in trouble with your fraternity for bringing in illicit alcohol to the party?
  7. Isn't it a violation of fraternity rules for you to drink, particularly when you were supposed to stay sober and prevent people from getting too drunk or harming themselves or others?
  8. Do you feel bad that, by drinking so much, you were unable to do your job well that night?
  9. Do you feel bad that, by drinking so much, you basically allowed the sex assault in the basement to occur, because you weren't keeping a watchful eye?
- 

### Questions for Dylan

By Complainant

1. You told the investigator you saw Angel spill beer on Barb, isn't that correct?
2. And didn't you tell the investigator that you also saw Angel stumbling and falling?
3. So basically, he was acting like he was so drunk that he could barely function, right?

By Respondent

1. You made a water bottle of vodka and orange juice correct?
  2. How much did you drink?
  3. Do you remember how much of it you had left at the end of the night?
  4. How strong was your orange juice and vodka?
  5. You bought beer. How old are you?
  6. Why do you have a fake ID?
  7. You said you saw Angel at the party, and that he was so drunk he could barely stand up; did you take any action to protect your drunk friend from drinking more?
  8. Is that because your friend was not really that drunk, or because you don't really care about someone being so drunk they can barely stand?
  9. Your friend passed out at the end of the night; which emergency number did you call for help?
  10. You said you put a trash can by him when you saw him passed out, but you didn't roll him on to his side? Is that because he was sleeping, and not really because he was drunk?
  11. Have you ever tried to hit on Barb?
  12. Didn't she reject your advances?
  13. Is that why you're exaggerating your supposed observations that Angel was so drunk?
  14. Respondent does better than you in all your classes, correct?
  15. And you said you once caught her cheating off of you, but isn't it actually true that you were the one referred to student conduct for a plagiarism charge?
  16. If you have a fake ID, what else is fake? Your testimony, for example?
-



### Questions for Stevie

By Complainant

1. How much did you have to drink?
2. How drunk did you feel that night?
3. Do you think you were close to blacking out?
4. Given how drunk you were, isn't it likely that you don't really have a good memory of that night?
5. You said Angel stumbles even when he is not drinking, yet you know he is an athlete, so how is it that an athlete stumbles and is as uncoordinated even when sober, as you described to the investigator?
6. Do you have a crush on Barb?
7. How long have you wanted to have sex with her?
8. Are you minimizing how very drunk Angel was in order for her to like you more?

By Respondent

1. Did you see Barb and Angel playing darts?
  2. Was Angel able to play darts?
  3. Was he hanging on to Barb for dear life or standing up and throwing darts?
- 

### Questions for Nick

By Complainant

1. Isn't true you have no real friends?
2. You don't get good grades, correct?
3. That is because you are always smoking weed, correct?
4. How much weed did you smoke that night?
5. Does smoking weed impact your ability to remember things?
6. Isn't it true that the reason you started smoking weed was because you got a card for medical marijuana, for your anxiety and ADHD?
7. Did you imagine the conversation about Angel wanting to hook up with a girl?
8. Does your anxiety or ADHD make you imagine things that did not happen?
9. Why did you presume Angel was "cheating" when he was actually the victim of a sexual assault?
10. Did you watch the video?
11. Isn't it obvious to you that Angel is swaying and can barely stand up while she gives him a blow job?
12. Do you still have the video of that night on your phone?
13. If I were to call the police on you and tell them that that you have evidence of a crime on your phone, aren't you scared they will find it?

By Respondent

1. So, the complainant seemed desperate to hook-up with a girl that night?
  2. Are you certain you remember that conversation?
  3. What else do you recall from that night?
  4. Can you remember what you ate for breakfast that day?
  5. And isn't it true that you are a really honest person who would never lie?
- 

### Questions for Kayla

By Complainant

1. Did you notice the complainant stumbling or falling over, once he was in the basement?
2. Did you feel drunk that night?
3. Was the amount you had to drink that night a lot for you?
4. Given how much you had to drink, do you think you can even trust your memories from that night?
5. Barb is a good friend of yours, isn't she?
6. You would say anything to support her, wouldn't you?
7. Did you tell the investigator that Barb was mad at herself?
8. Is it possible she was mad at herself for violating Angel?
9. You said Barb and Angel were "drunk sloppy kissing." Did you get that phrase from Barb, or did she get it from you?
10. Did she tell you what to say here today?
11. Do you know that, if you are caught lying for her, you will be disciplined and might be suspended or expelled?

By Respondent

1. Would you categorize Angel as the initiator of all the contact between him and Barb?
  2. So you would call him the aggressor, is that right?
  3. How many times did you see Angel fill Barb's beer that night?
  4. And you saw him keep topping it off, is that right?
  5. Did that feel predatory to you?
  6. Have you seen Angel or any of his friends like Bob, Dylan, Stevie, or Nick try to get a girl really drunk at a party, on any other occasion?
-

### Questions for Caitlyn

By Complainant

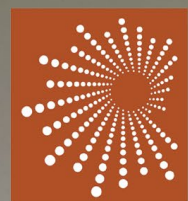
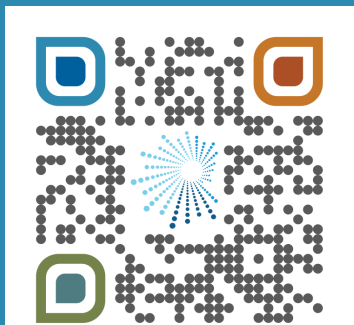
1. You would consider complainant a good guy, right?
2. Barb wanted to "have a good time" right?
3. Did she tell you she planned to have sex with Angel that night?
4. You saw her intentionally move down to give a blow job?
5. How often has she done this at other parties? Is giving blow jobs something she casually does at parties?
6. And she is a good friend, right?
7. So this is particularly painful for you, your telling the truth about her sexually assaulting him, right?
8. And would you agree that it does not matter if the victim is a man or a woman, but rape is rape, right?
9. You said Barb had her arm around Angel's waist when people were in the basement that night. Is that so that she could control him?

By Respondent

1. You told the investigator you had 4-5 beers and 2-3 swigs of from Bob's vodka, correct?
  2. Is that a lot for you?
  3. Were you feeling drunk that night?
  4. How drunk?
  5. Was the drink in Bob's water bottle strong?
  6. Given how drunk you were, why should we trust your recollections of that night?
  7. You said you were cheering on the sex act in the video; were you surprised to see yourself doing that?
  8. Do you remember cheering?
-



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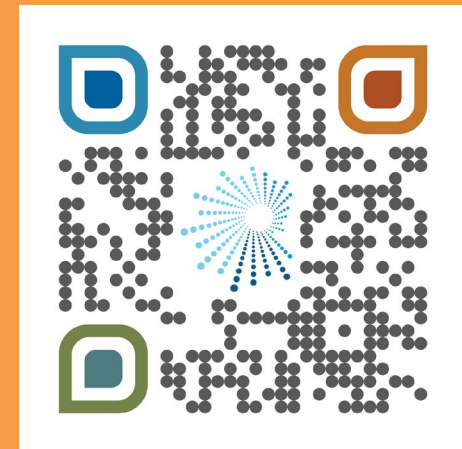
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# Thank You!

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