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Being an Effective Title IX Advisor: From Investigation to Hearing

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He/Him/His

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Meet Your Facilitator

Kevin Lineberger is a Solutions Specialist at Grand River Solutions. Kevin has wide-ranging experience in law and policy research, social justice advocacy, and Title IX. Kevin also has considerable experience serving as an Advisor for both Complainants and Respondents.

Agenda

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Overview of Title IX and its Hearing Requirements

01

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Title IX of the Education Amendments Act of 1972

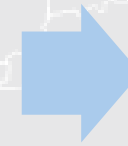
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1972).

On May 19, 2020 . . .

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



These regulations included a new definition of sexual harassment and a more narrow set of 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.

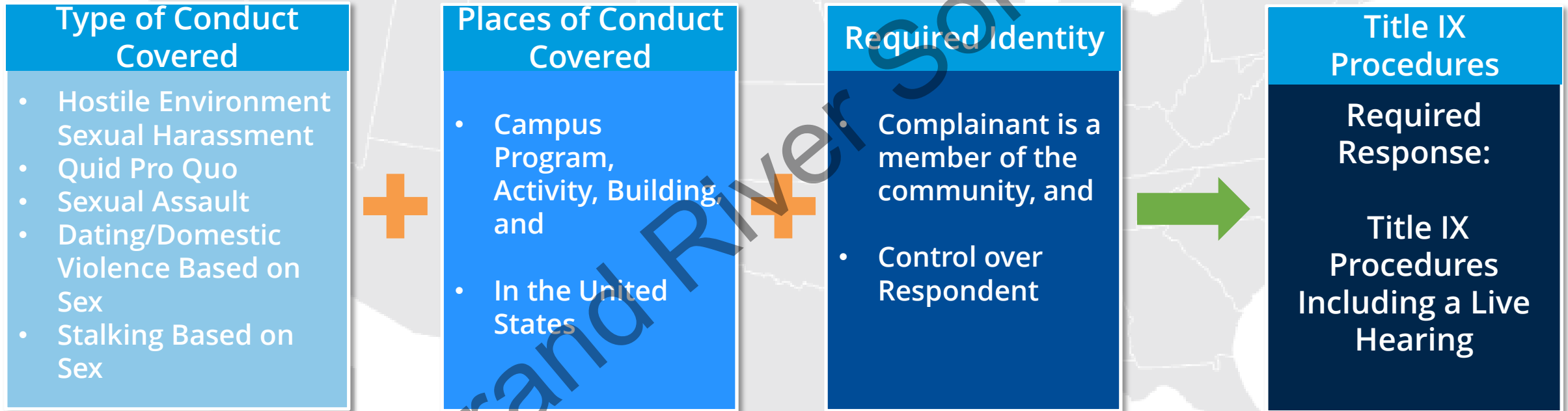
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Section 106.30: Sexual Harassment

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).

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

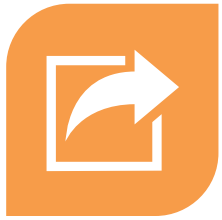


Conduct Falling Outside the Scope of Title IX

- 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



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

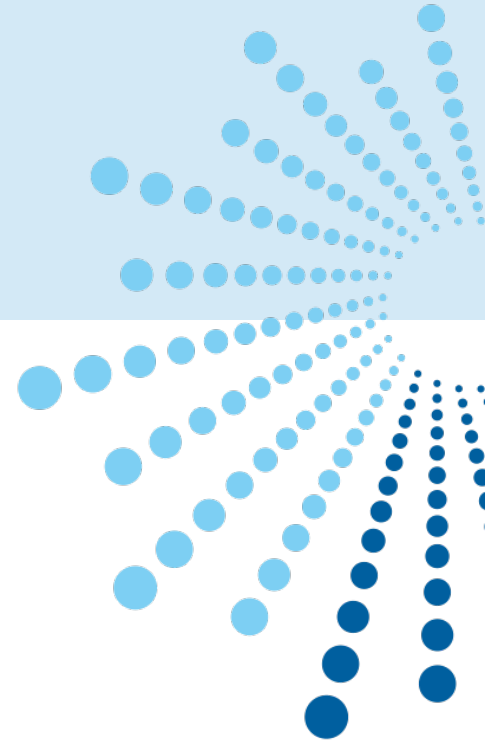
Written decision must be issued that includes finding and sanction



Live Hearing Format and Logistics

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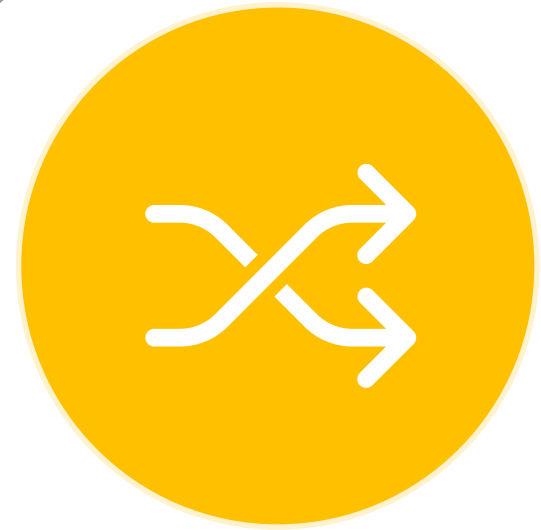
Live Hearings Required



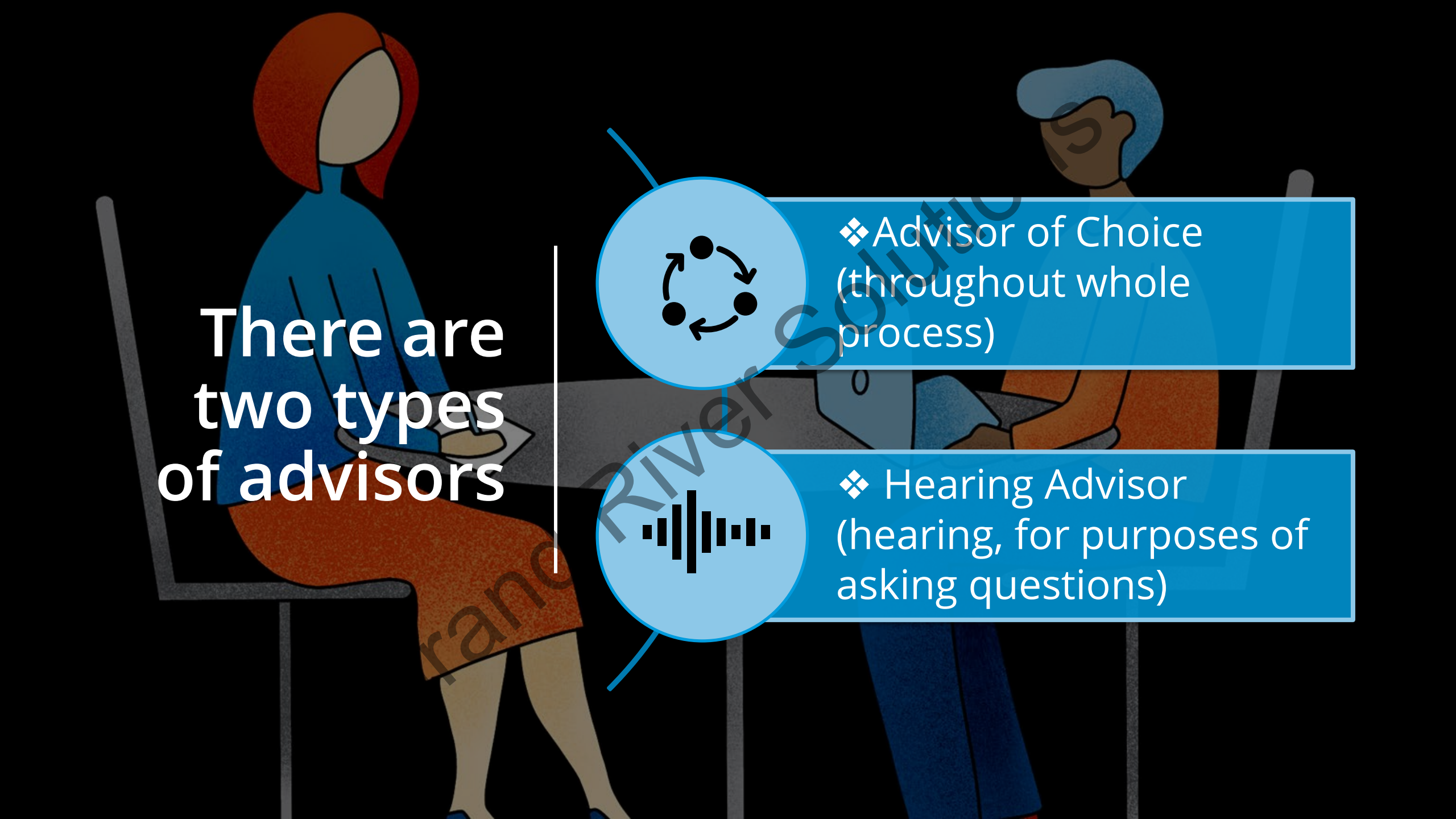
In person



Remote



Hybrid



There are
two types
of advisors



❖ Advisor of Choice
(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.



Hearing Advisor

An advisor of choice may serve as a hearing advisor.

The hearing advisor's role is limited to asking questions for the purpose of cross examination.

If a party does not have their own advisor, the institution must provide one for the live hearing.

Some institutions may permit the hearing advisor to have a role in helping the party to prepare for the hearing.



Hearing Participants

Who will be in attendance and their roles

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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

may summarize the investigation, answer fact-based questions

Witnesses

present in the room only when answering questions

Hearing Administrators

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

Disciplinary Hearing Officer

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

Hearing Panel

reviews evidence, poses questions to party and witnesses



Role of the Advisor

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During the Investigation: Advisor of Choice

- Assist the advisee in understanding the Policy
- Assist in the identification of witnesses
- Assist in the identification of evidence
- Assist advisee 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



Your Role as a Hearing Advisor

The limited role of
conducting cross
examination on
behalf of your
party*

Supporting your
party

If you are
acting in the
role of a
Hearing
Advisor...



Review the policy



Review the materials provided, if any



Reach out to your advisee



Schedule a meeting



Do Your Homework



Do Your 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

Meeting with your advisee

Build

Build Rapport

Explain

Explain your role

Advise

Advise them that their conversations with you are not privileged

Go over

Go over the policy and process with them

Discuss

Discuss the evidence

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?

Sexual Harassment (Quid Pro Quo). Any unwanted conduct that is based on an individuals' sex, sexual orientation, gender identity, or gender expression and that conditions an educational or employment benefit on participation in unwelcome sexual conduct.

1. Was the conduct unwelcome?
2. What was the conduct based on?
3. Was there a benefit offered for the unwelcome sexual conduct?
 - What was the conditioned benefit?

Sexual Harassment (Hostile Environment). Any unwanted conduct that is based on an individuals' sex, sexual orientation, gender identity, or gender expression and a reasonable person would determine is so severe, pervasive, and/or objectively offensive that it effectively denies a person equal access to educational or employment program or activity.

1. Was the conduct unwelcome?
2. What was the conduct based on?
3. Was the conduct severe?
4. Was the conduct pervasive?
5. Was the conduct objectively offensive?
6. What was the impact of the conduct?
 - Was the complainant effectively denied access?

Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person's safety or the safety of others; or
Suffer substantial emotional distress.

1. Did Respondent "engage in a course of conduct?"
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either:
 - Fear for their safety or the safety of others, or
 - Suffer substantial emotional distress

Rape. Is defined as sexual assault involving an act of penetration (and includes such assaults when the individuals know one another).

1. What is the definition of sexual assault?
 - Any physical sexual contact that involves the use or threat of force or violence or any other form of coercion or intimidation.
 - Any physical sexual contact with a person who is unable to consent due to incapacity or mental or physical impairment.
2. Was there an act of penetration?
 - What was the penetration?

Consent. Is an affirmative decision to engage in mutually agreed upon sexual activity and is given by clear words or actions. Consent may not be inferred from silence, passivity or lack of resistance alone.

1. What is the sexual activity?
2. Was the sexual activity mutually agreed upon?
 - Through clear words or actions?
3. What was the agreement for sexual activity inferred from?
 - Silence?
 - Passivity?
 - Or lack of resistance alone?

Relationship Violence (dating violence). An act or pattern of abuse committed by a person involved in a social, sexual or romantic relationship, past or present, with the victim.

1. Is it one singular act or a pattern of actions?
2. What Type of behavior/abuse?
 - Physical violence
 - Sexual violence
 - Emotional violence
 - Economic violence
3. How are the Complainant and Respondent connected?
 - Social, sexual, or romantic relationship?

Domestic Violence. Abuse committed against an adult who is a spouse, former spouse, cohabitant, someone with whom the person has a child, someone with whom the person has an existing dating or engagement relationship, or someone with whom the person had a dating or engagement relationship.

1. Is it one singular act or a pattern of actions?
2. What Type of behavior/abuse?
 - Physical violence
 - Sexual violence
 - Emotional violence
 - Economic violence
3. How are the Complainant and Respondent connected?

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 summary?

Did the summary reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your summary before coming to this hearing?

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

At the Hearing

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Prepare Your Advisee for the Hearing



How to answer questions



Questions they can expect



How to prep for the hearing day itself and self-care



Communicating During the Hearing



Selective Participation and Potential Impacts

Opening Statements



Assist advisee in developing their opening statement



Must adhere to the institution's rules or guidelines



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

Testimony of the Parties & Witnesses

Possible 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.”*



*September 4, 2020 Questions and Answers Regarding the Departments Final Title IX Rule

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.”

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
is otherwise
irrelevant

Complainant's
prior sexual
history, with
limited
exceptions.

Irrelevant and
Impermissible
Questions

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

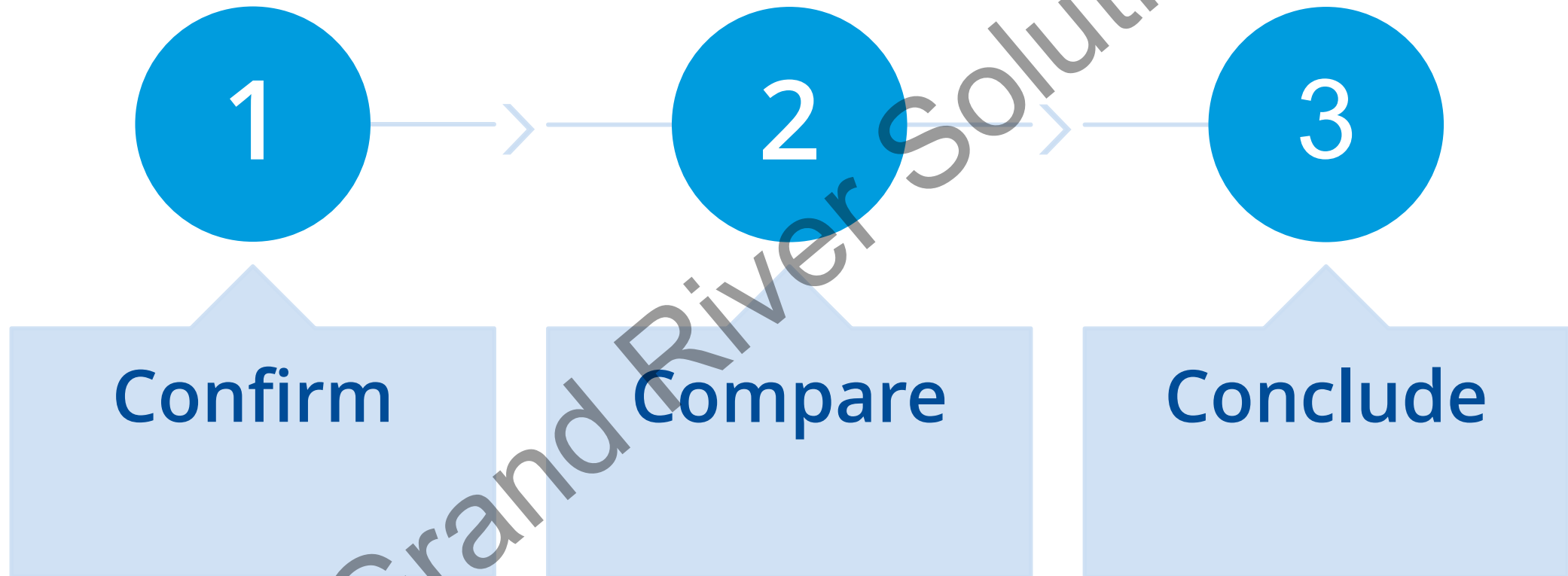
Cross Examination

Common Approaches

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

Questioning

How to Discount



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.

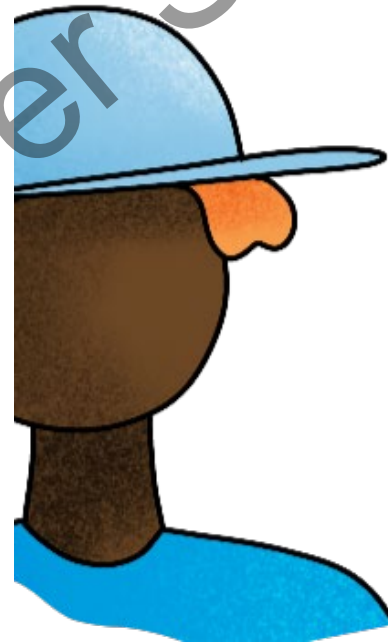
Confirm

- 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?

Cross Examination:

Do be efficient in your questioning – go event by event

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

Don't forget to be prepared to pivot as testimony is given

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

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

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

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

Closing Statements: Advisor's Role

Assist advisee
in developing
their closing
statement

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

Bullet points

May not
provide a
closing on
behalf of an
absent party

After the Hearing



DEBRIEF?



THE APPEAL

Lessons Learned



Advisors arguing relevancy?



Asking an ill-advised question?



Case by case



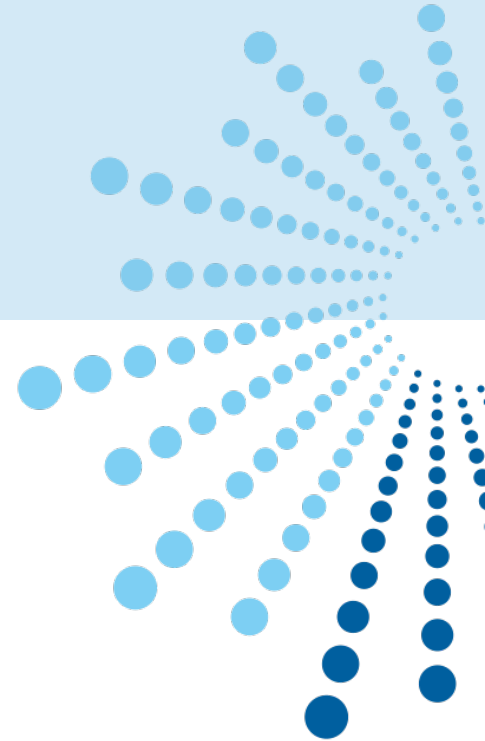
Observe and Listen



05

Practical Application

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Complainant's Statement

Complainant alleges that Respondent violated the provision against stalking by engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress. Specifically, Complainant alleges that after she told Respondent to stop talking to her, Respondent: followed her to and from her dorm; repeatedly asked her friends of her location; and approached her while she was with a group of friends. Complainant reported that after she ended her romantic relationship with Respondent, she would see Respondent every day on her way to class. Complainant also reported that Respondent on more than one occasion asked Witness A where she was. Lastly, Complainant reported that Respondent approached her while she was with Witness A and others and began yelling at her regarding why she was no longer talking to him. Complainant reported that these interactions together made her uncomfortable and fearful for what Respondent would do next.

Witness A

Witness A was interviewed by the investigator and reported that she and Complainant have been best friends since they were younger. Witness A stated she was happy to hear when Complainant and Respondent broke up because she did not like Respondent. Witness A stated that Complainant had called her a couple of times after she broke up with Respondent as Complainant believed Respondent was following her to class. Witness A recalled Complainant's voice "shaking" and she was not able to "keep a consistent train of thought" during these conversations. Witness A stated Respondent asked her once where Complainant was. Witness A also recalled seeing Respondent approach Complainant with a "raised" voice but the two seemed to be smiling when they were talking to one another. Witness A was not sure what the two were talking about as they walked away from where she was standing.

Witness B

Witness B was interviewed by the investigator and reported she has known Respondent for about a year. Witness B stated she has never met Complainant nor seen Complainant and Respondent interact. Witness B stated that Respondent told her when Respondent and Complainant broke up. Witness B stated Respondent seemed sad but said he was mostly confused and “wanted answers.” Witness B recalled Respondent asking her a few times if she had seen Complainant. She told Respondent she had not, despite seeing Complainant in the dining hall. Witness B stated that the last time Respondent talked to her about Complainant was when he called her and said he approached Complainant for “closure.” Witness B stated Respondent approached Complainant “in a loud, joking manner” and asked Complainant to come talk to him. Witness B stated Respondent said that the conversation was “productive,” “good natured,” and “civil.” Witness B recalled that Respondent’s mood was very high after this conversation and they have not spoken about Complainant since.

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