



# Title IX – Advisor Training

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# Internal Complaint Resolution Process

- ▶ Complainants and respondents who are parties to a complaint of sexual misconduct in violation of University policy are entitled to an advisor.\*
- ▶ Advisors should be aware of, and understand, applicable policies, e.g. Sexual Misconduct Policy, Equal Opportunity and Affirmative Action Policy, Code of Student Conduct
- ▶ Advisors may attend meetings and provide information and support, but do not speak for the party they are advising

## Who are the Advisors and what do they do?

An advisor . . .

- ▶ Provides emotional, logistical, and general support or advice to a complainant or respondent
- ▶ Should assist a party in understanding and navigating the process
- ▶ May accompany a party to any meeting or conversation related to the investigation or adjudication process



## More specifically . . .

- ▶ May attend meetings and interviews with advisee, including interviews by the investigators and hearing panel
- ▶ Should help advisee prepare for each meeting
- ▶ May ask procedural or process questions at the appropriate time
- ▶ May be present for interview of the party they represent (complainant or respondent)
- ▶ May receive draft investigative report for review and comment with complainant or respondent
- ▶ Should assist advisee in reviewing, understanding, and responding to the investigative report
- ▶ Should help advisee prepare for the hearing
- ▶ May ask questions of other party and witnesses at hearing, subject to rulings on relevance or other appropriate factors
- ▶ Should assist in review of decision of hearing panel and, if applicable, aid with preparing an appeal

# Advisors – Prepare to Assist

- ▶ Best practice is to provide support early in the process
- ▶ Understand allegations in complaint
- ▶ Understand scope of investigation
- ▶ Understand options available for counseling, support, or to change academic, living, or work arrangements

# Prohibited Conduct

The following behavior is prohibited under the University's Sexual Misconduct Policy:

Sexual Harassment

Sexual Violence

Relationship Violence

Domestic Violence

Stalking

Retaliation

[https://almanac.upenn.edu/uploads/media/No.\\_6\\_OF\\_RECORD\\_Sexual\\_Misconduct\\_Policy\\_.pdf](https://almanac.upenn.edu/uploads/media/No._6_OF_RECORD_Sexual_Misconduct_Policy_.pdf)

# Issues

- ▶ Consent
  - ▶ Incapacity or Impairment
- ▶ Relevance
- ▶ Privilege
- ▶ Prior Sexual History
- ▶ Prior or Subsequent Misconduct
- ▶ Fairness and Impartiality
- ▶ Bias
- ▶ Stereotyping



# Consent

- ▶ Title IX gives each institution the discretion to define “consent” as it wishes.
- ▶ Pennsylvania law: **Consent** is present if the complainant, at the time of the alleged incident, is willing to engage in these activities and makes their willingness known to the respondent by words or behavior.



# Consent - Penn

**Definition:** 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.
- ▶ Consent to one form of sexual activity does not imply consent to other forms of sexual activity
- ▶ Marital or sexual relationship is not sufficient to constitute consent to additional sexual activity.
- ▶ **Assent** is not **consent** if offered by a person who is unable to lawfully provide consent
- ▶ Determination of whether consent was given is fact-specific.

# Consent -- Incapacitation

Evidence relevant to determination of incapacitation:

- ▶ Age – if the complainant is **younger than 16**, and the respondent is **at least four years older**
- ▶ Intoxication by drugs or alcohol
- ▶ Other diminishment or loss of function or ability
- ▶ Did age, intoxication, or other form of impairment impede a complainant's ability to appraise or control their conduct?

# Relevance

- ▶ A piece of evidence or question is relevant if it tends to make an allegation of sexual harassment or misconduct more or less likely to be true.
- ▶ Relevant evidence includes both inculpatory and exculpatory evidence.
- ▶ Relevant evidence does NOT include:
  - ▶ Privileged information and records
  - ▶ Prior sexual history

# Privileged Information

- ▶ Information protected under a legally recognized privilege cannot be sought, obtained, submitted, relied upon, or asked about unless:
- ▶ the person holding the privilege waives the privilege with voluntary, written consent
  - ▶ Examples:
    - ▶ Medical records or information
    - ▶ Mental health records or information
    - ▶ Attorney-client privileged communication and documents



# Prior Sexual History

- ▶ Evidence and questions about the Complainant's sexual predisposition or prior sexual behavior are not permitted unless:
- ▶ They are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
- ▶ They concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

# Prior or Subsequent Misconduct

- ▶ Evidence of a pattern of inappropriate behavior by a Respondent is permissible and must be judged for relevance like any other evidence
- ▶ Prior or subsequent conduct may be relevant to demonstrate:
  - ▶ Intent, knowledge, or state of mind
  - ▶ Motive
  - ▶ Opportunity
  - ▶ Lack of mistake
  - ▶ Pattern
  - ▶ Identity

# Impartiality

- ▶ No bias or conflict of interest
  - ▶ Against complainants or respondents generally
  - ▶ Against a particular complainant or respondent
  - ▶ Applies to Title IX coordinator, investigators, decision-makers, or any person designated to facilitate an informal resolution process (e.g. a mediator)

# Prohibition of Gender Bias and Sex Stereotyping

- ▶ Investigative team, hearing panel and appellate officer must be gender neutral and free from bias
  - ▶ Includes sex bias, sex stereotyping
- ▶ Avoid questions that have a tendency to perpetuate such stereotypes



# Hearing Procedure: Questioning a Witness

## Procedure:

- ▶ Step 1, Question: Advisor asks a question
- ▶ Step 2, Ruling: Panel determines whether the question is relevant
  - ▶ If not relevant, the panel must explain its reasoning for excluding the question
- ▶ Step 3, If relevant, question may be asked

# Scenario 1

- ▶ Clem and Randy were friends who lived in the same College House and had known each other since New Student Orientation. Clem and Randy made plans to celebrate the beginning of spring and started drinking early on Friday, March 19, 2021. Before going to Randy's room, Clem took her ADHD medication. Clem and Randy stopped at the dining hall before heading to a party at the apartment of one of the members of the student club to which they both belonged. They drank White Claws at the party and did some shots of lemon-flavored vodka. Before Clem started doing shots, she said to Randy, "I'm not sure it's a good idea for me to be doing shots- I don't think I'm supposed to drink on this medication I'm taking." Nevertheless, Clem had three shots at the party. Randy and Clem left the party together and headed back to their College House. Along the way, while they were talking, Clem tripped over a metal grate on the walkway. Randy helped her up. Randy asked Clem if she wanted to hang out in his room and Clem agreed.

# Scenario 1

- ▶ Once in Randy's room, they sat on the bed and talked about the party. Randy noticed that Clem was talking loudly and kept repeating herself. At one point, Clem put her head on Randy's shoulder. Randy proceeded to put his arm around Clem, kissed her and rubbed her back and legs. Randy took off his own clothes and helped Clem take off hers. Randy then digitally penetrated Clem's vagina. Randy asked Clem if she wanted to have sex and Clem said that she would if Randy used a condom.
- ▶ The next morning Clem woke up in Randy's room. She tried to remember how she got to Randy's room the night before but was having trouble putting things together. Clem opened her phone and saw she had a snapchat message from the host of the party. The message read, "I didn't know you liked lemons so much." Clem had a flash of asking Randy about a condom. Clem looked around the room but did not see any empty condom wrappers. Clem asked Randy if they had sex the night before and Randy said, "Yes." When Clem asked if he used a condom, Randy did not answer.

# Additional Information – Scenario 1

## **Additional Facts:**

- ▶ Allegations in the formal complaint: Non-consensual sexual intercourse due to Clem's inability to consent because of incapacitation.
  - ▶ Sub-issue is consent to sexual intercourse with a condom but not without a condom

## **Advisor Information:**

- ▶ Clem is worried about being able to navigate the Title IX process and prepare for finals.
- ▶ Randy is on a scholarship and hopes to study abroad next year.



# Scenario 2

- ▶ Charlie works in a department and is supervised by Remi, who oversees various important projects for the University. Charlie is outgoing and has many long-term, positive relationships with their colleagues. Their team worked remotely during the COVID pandemic, and they've been working in person again since September. Recently, Charlie and several of their colleagues were asked to make recommendations for one of these projects and present their ideas in a staff meeting. Remi informed the team that the person with the best ideas and presentation would be invited to join them at the annual conference in their field in Texas.
- ▶ Charlie was one of the most talented members of the team and was excited about the possibility of being selected to attend the conference. Remi sat next to Charlie in the conference room where the presentations were being held. When Remi sat down, they commented that Charlie smelled nice. A colleague presented first, then it was Charlie's turn. Charlie walked up to the front of the conference room and Remi commented, "That's a flattering outfit- it would work well in Texas." Charlie could feel their cheeks getting red as they started their presentation. They thought it was going well, then they got distracted thinking of the comments Remi made and started fidgeting with their clothes and lost their train of thought. When Charlie finished, Remi announced, "Brains AND beauty!"

## Scenario 2

- ▶ Charlie was surprised when Remi told them during their one-on-one meeting later in the week that they had been selected to join Remi at the conference. At the end of their meeting, Remi stood up and moved toward Charlie while reiterating their confidence in their abilities. Before Charlie could leave their office, Remi leaned in toward Charlie and gave them a hug, saying they were excited about attending the conference together.
- ▶ Charlie returned to their own office with an upset stomach and had difficulty focusing on work. Charlie had difficulty sleeping over the next week and shared with some of their trusted colleagues that they were concerned about Remi's intentions in selecting them to attend the conference. At the end of the next week, Charlie told Remi that they would not be able to attend the conference because of a personal matter that they were experiencing at home. Charlie had talked with someone at the Office of the Ombuds and knew that they had a right to report Remi's behavior toward them. The Ombuds connected Charlie with the AVP-Title IX Office and after speaking with the AVP-Title IX Officer, Charlie decided to file a complaint. Charlie was anxious about the impact this complaint would have on their career.

# Additional Information -- Scenario 2

## **Added facts:**

- ▶ When Remi met with the AVP-Title IX Office, they shared that they had observed other members of the team interacting with Charlie in a similar manner and believed that this type of behavior was welcome by Charlie. Remi has seen Charlie smiling while hugging other members of the team since they returned to the office in the fall. Remi was upset that Charlie did not raise this concern directly with them.

## **Advisor Information:**

- ▶ Charlie has been late for work almost every day since their presentation.
- ▶ Remi has worked at Penn for 3 years on a work visa.

# Tips for Questioning

- ▶ Prepare a witness outline
- ▶ Line of questions should be easy for factfinder to follow
- ▶ Avoid compound questions
- ▶ Avoid characterizations and conclusions
- ▶ Always consider the relevance of the evidence
- ▶ Ask questions respectfully
- ▶ Be patient with the witness



# Tips for Questioning

- ▶ Be familiar with the investigative report
- ▶ Traditionally, the types of questions posed to the other party or witnesses try to elicit “yes” or “no” answers, not explanations.
- ▶ Seek to elicit information witness is likely to concede
- ▶ Try to avoid questions you don't know the answer to

# Scope of Advisors' Duties

MUST:	CAN:	CANNOT:	SHOULD:
<ul style="list-style-type: none"><li>• Keep the information obtained throughout the investigation and adjudication process confidential</li></ul>	<ul style="list-style-type: none"><li>• Provide emotional, logistical, and general support or advice to a complainant or respondent</li><li>• Accompany a party to any meeting or conversation related to the investigation or adjudication process</li><li>• Assist a party in understanding and navigating the process</li><li>• Ask procedural or process questions at the appropriate time</li><li>• Direct questions to the other party during the hearing subject to considerations of relevance and appropriateness</li><li>• Assist during appeals process</li></ul>	<ul style="list-style-type: none"><li>• Provide active representation ( i.e., speak on behalf of a student during meetings, interviews or hearing or stand in for a party in their absence)</li><li>• Impede the investigation process or hearing in an obstructive manner</li><li>• Communicate with the other party outside of the limited permissible questioning during hearings</li></ul>	<ul style="list-style-type: none"><li>• Understand the University's investigation process and their role within that process in order to provide accurate information and appropriate assistance and support the party</li><li>• Be aware of supportive measures offered by the University</li></ul>

# Resources

- ▶ University's policies and materials are available here:  
<https://titleixoffice.upenn.edu/>
- ▶ If you have questions or need clarification, consult AVP and Title IX Officer



**QUESTIONS?**