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# Advanced Title IX Training

## Complex Issues in Live Hearings

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LSCPA



## Purpose of Live Hearings (per the DOE)



*The Department agrees that a live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes of Title IX adjudications.*



Preamble to the 2020 Regulations



# Agenda

- Refusal of parties to participate
- How to ask questions in a Live Hearing
- Questions that go to credibility
- Making fair and impartial relevancy determinations
- Impact of trauma during Live Hearing
- How to handle hostile witnesses or advisors





# Refusal to participate

- A party or witness has the right to refuse to participate.
- Parties should continue to receive all notices.
- Retaliation includes discrimination against an individual based on their decision to refuse to participate in an investigation or hearing. Policy 3.14.





## Refusal to participate – continued

- Party and witness's prior statement can be considered in live hearing, even if they refuse to participate or answer cross examination questions.
- A party's refusal to participate or answer cross questions can be a basis for assessing credibility if Decision Maker unable to ask relevant questions.
- Some institutions will have university-appointed advisor appear on behalf of non-participating party to ask cross questions of the other party, but this can be risky.





## Refusal to participate – tips

- Complainant's refusal to participate may result in permissive dismissal due to inability to collect evidence. Policy 5.5.
- Keep engaging with party throughout the process, even if they decline to participate.
- During the Live Hearing, Decision Maker should acknowledge party has chosen not to participate and ask investigator or Title IX Coordinator to summarize attempts to contact and notice of hearing.
- During each step of Live Hearing, recognize that non-participating party would have opportunity to present evidence if present.
- If Decision Maker feels there are unanswered questions that could go to the non-participating party's credibility, Decision Maker can state on the record.



# How to Ask Questions in Live Hearings

- By the Live Hearing, evidence has been presented in report and questions should focus on disputed key facts and relevant issues to be decided, not a full restatement of undisputed facts.
  - E.g., in a sexual assault case, questions may focus solely on consent.
- Decision maker should ask impartial questions that go directly to key issues of responsibility and/or credibility.
- Party's own advisors should provide party opportunity to explain key facts and events and potential gaps or conflicts in the evidentiary record.
- Opposite advisor should *respectfully* ask targeted questions to highlight conflicting evidence, inconsistencies, and/or credibility issues.
- Questions should be in chronological order. Don't start with consent and then go back to how much alcohol was consumed beforehand.



## Tips for Questions – Predicate Question, Follow-up, and Close the Loop

- Ask simple, direct questions, one question at a time, not complex, compound questions.
- First, ask the predicate question to establish a fact. Then ask the follow-up and close the loop.
  - Good question: Did Complainant express consent to sex, either by words or actions, at any time during the night in question?
    - How did Complainant express consent?
    - Did Complaint do anything else to express consent that night?
  - Bad question: So you stated in your interview that Complainant consented but you didn't say how. Can you tell us how Complainant consented? It could have been either by her words or actions. In summary, did the Complainant say anything or do anything that made you think she was consenting to sex?





## Tips for Questions – Short Questions in Chronological Order

- Ask short, simple questions in chronological order to describe an event.
- Take separate incidents one-by-one, if possible.
  - Good question: When was the first time that Respondent touched you during your Voice Studio lessons?
    - Can you describe what happened that first time?
    - How did you respond?
    - Did Respondent offer any explanation for his conduct?
    - Is there anything else we should know about this incident?
  - Bad question: So you allege that Respondent touched you during Voice Studio. Please tell us everything that happened, including where he touched you, how many times, and whether you objected each time.



# Tips for Questions – Cross Examination

- Ask short, simple questions. Leading questions okay. Treat parties respectfully.
  - Good questions:
    - Isn't it true that you didn't file your complaint until three months after the alleged assault, after Respondent broke up with you?
    - You initially told investigators you didn't attend the party where Complainant was drinking and only admitted to being shown pictures of you being there, right?
  - Bad questions:
    - Since you didn't file your complaint until Respondent broke up with, it seems like you're just mad at him. Isn't that what's happening here?
    - Why should anyone believe you when you lied to the investigator about being at the party?



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Questions  
that go to  
credibility



# CREDIBILITY

Every detail counts.



# Credibility Assessments

- Ask questions that go to the facts that courts consider when assessing credibility.
  - Witness's Manner and Demeanor
  - Personal vs. Second-Hand Knowledge
  - Witness's Bias or Interest
  - Corroborating Testimony or Evidence
  - Inconsistencies and Prior Statements



## Credibility Questions – Examples

- The other witnesses from the party reported Complainant was very drunk, except for you. Do you have an explanation for these different accounts?
- You initially reported to Title IX that Respondent only kissed you without your consent. During the investigation, you also alleged he groped your breasts. Can you explain why you didn't report the groping originally?
- How long have you known Respondent? Are you close friends?
- You stated that Complainant was sober that night, but you left the party early, correct? You don't have first-hand knowledge of her state when she left with Respondent, do you?
- You reported that you never heard your supervisor and mentor make sexual comments to his secretary. Do you sit near them? Are you able to hear their conversations? Do they ever meet without you present? Thus, you don't necessarily have first-hand knowledge of all of their communications, do you?



# Making Fair and Impartial Relevancy Determinations

## What is relevant?

According to Federal Rule of Evidence 401, evidence is relevant if:

- it has any tendency to make a fact more or less probable than it would be without the evidence; and
- the fact is of consequence in determining the action.

**RELEVANCE = PROBATIVE + MATERIAL**





# Making Fair and Impartial Relevancy Determinations

## What is not relevant?

- Information protected by a legal recognized privilege;
- Evidence about Complainant's sexual predisposition or prior sexual behavior
  - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent.
- Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).

Sexual Misconduct Poly 3.15.3, 7.15, 7.7.5



## Evidence of Prior Bad Acts

- “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.”
  - Where a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, Decision Makers cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility.





# Determining Relevancy of Questions

Relevancy determinations occur in real time during Live Hearings.

- The question is asked;
- Decision Makers state whether the question is relevant;
  - Not relevant questions are excluded, and Decision Makers explain exclusion rationale.
  - Only relevant questions answered by Party or Witness.



*Sexual Misconduct Policy, Sections 7.15-7.16*



# Handling Objections and Inquiries from Advisors

- A Decision Maker's Live Hearing determinations are final.
  - A Decision Maker's relevancy and evidentiary exclusions can only be challenged as a procedural defect during appeal.

But

- Advisors can ask clarifying questions.
- Objections not pertaining to a question's relevance cannot be made by the Advisor.
  - An Advisor is a potted plant unless conducting cross-examination.



## Tips for Making Fair and Impartial Relevancy Determinations

- Take your time to consider the applicable rules.
- Ask clarifying questions of the parties / advisors to determine relevance.
- If complex issues arise around documents, consider redactions of irrelevant or prohibited material.
- State on the record the relevancy ruling and why.
  - For example, “I am not allowing the question, as it goes to the Complainant’s prior sexual history and is not offered for one of the two exceptions.”



## Tips for Making Fair and Impartial Relevancy Determinations – continued

- Make sure to apply the same rule to both sides. If one side can't ask questions about a particular issue, the same rule applies to the other.
- Focus on the probative and materiality prongs of relevancy to avoid irrelevant and harassing questions, such as:
  - Do you think your parents would be proud of your behavior? [Not probative or material.]
  - Isn't it true that you failed out of your first university? [Not material.]
- Enforce presumption of non-responsibility during Live Hearing. Address responsibility only in written decision.



## Role of Trauma in Live Hearing

- “While the final regulations do not use the term ‘trauma-informed,’ nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.”
  - Preamble p. 591
- “While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties.”
  - Candice Jackson, Fmr. Deputy Ass’t. Sec., DOE, *NACUA Briefing* (Sept. 28, 2017)



# Role of Trauma in Live Hearing

- Begin hearing with a respectful tone and recognize formal, professional environment.
- Create physical space for parties, allow participation from separate rooms, avoid parties having to directly face each other.
- Make it clear parties can take a break at any time. If a party appears to be getting emotional, offer to take a break.
- Ask questions in a calm, respectful manner. No raised voices.
- Enforce Rules of Decorum to avoid harassing and traumatizing questioning of parties and witnesses, while also allowing for robust cross examination.
- Avoid / prohibit questions with overly accusatory tone:
  - Isn't it true your lying about what happened to you?
  - Why don't you just admit you're a rapist?



# Role of Trauma in Live Hearing

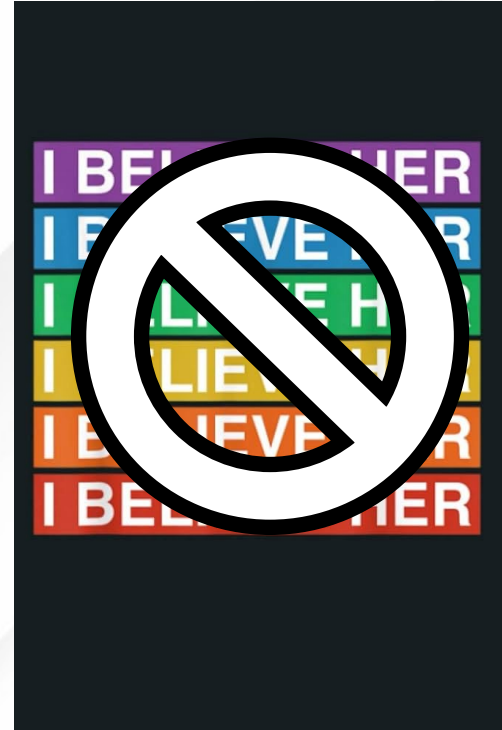
- Recognize that party's "odd" or "unusual" behavior may be explained by trauma.
- Party may continue to be affected by trauma when recalling a traumatic event.
  - Various "normal" responses include
    - Emotional, crying
    - Flat affect – seeming numb
    - Laughing, light-heartedness, inappropriate
    - Cycling of emotions





## Considering Trauma as Decision Maker

- DO allow for trauma as possible explanation of Complainant's behavior.
- DO NOT accept everything Complainant recalls as absolutely "true."
- DO examine inconsistencies from both parties.
- Avoid assigning truthfulness or responsibility based on conventions of "victim" and "perpetrator."







## Difficult Parties and Advisors

- “If a party’s advisor of choice refuses to comply with a recipient’s rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the Party to use a different advisor.
- Similarly, if an advisor that the recipient provides refuses to comply with a recipient’s rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.”

Preamble to 2020 Title IX Regulations.





# Tips for Handling Difficult Parties or Advisors

- Set the tone of professionalism and decorum at the outset.
- If needed, remind the parties that behavior in violation of University rules can result in disciplinary action.
- If parties refuse to cooperate, take a break and inform them that further violations will result in waive of their participation in the hearing.
- If advisors refuse to cooperate, take a break and inform them that further violations will result in them being excluded from the hearing and the University will appoint an alternative advisor to the party.



# Questions

